

Multinational Corporations, Investment and Natural Resource Management in Kenya

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Abstract

Over the years, the Multinational Corporations (MNCs) have expanded their reach to most developing world countries, controlling the main activities in exploration and exploitation of natural resources. This is mainly based on their huge financial muscle and technical expertise as far as these activities are concerned. These countries hope to reap benefits from engaging these corporations, and often they do. There is however the downside to this relationship in that their activities negatively affect many other areas such as the social and political stability of the people. This paper casts a critical look at multinational corporations and their impact on natural resource management particularly in developing countries such as Kenya. While the discussion acknowledges the fact that the place of the MNCs in the global economy cannot be wished away, the paper offers some thoughts on how the engagement between the developing world and the MNCs can be made more fruitful and mutually beneficial.

Multinational Corporations, Investment and Natural Resource Management in Kenya

By Kariuki Muigua*

1. Introduction

This paper casts a critical look at multinational corporations and their impact on natural resource management particularly in developing countries such as Kenya. International trade and investments law has facilitated Multinational Corporations (MNCs) to access new markets and new resources in the developing world. Foreign companies are able to move to regions where there are abundant resources, including cheap labour with few restrictions.¹ While it is acknowledged that there are benefits that may accrue to host states as a result of the presence of MNCs in their territories, criticisms have arisen that the relations between multinational corporations and host countries mostly favour the MNCs. It is said that host countries receive few benefits, and that foreign investments distort local economies and politics.² This paper contributes to this debate in the context of the involvement of multinationals in natural resource exploration and exploitation. It also analyses the nature of the laws governing these investments and the extent of their conformity with the countries' constitutions and the political, economic, social, scientific and technological factors that play an important role in natural resources management.³

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¹ Jensen, N.M., 'Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment,' *International Organization* Vol. 57, 2003, pp 587-616.

² Moran, T.H., 'Multinational corporations and dependency: a dialogue for dependentist as and non-dependentist as,' *International Organization*, Vol. 32, 1978, pp 79-100; See also Wyrzykowska, M., "Role of transnational corporations in the international trade," available at <http://www.etsg.org/ETSG2010/papers/Wyrzykowska.pdf> [Accessed on 16/11/2018].

³ Jensen, N.M., 'Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment,' *op cit*.

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2. Background

MNCs or TNCs are for-profit enterprises marked by two basic characteristics: They engage in business activities including sales, distribution, extraction, manufacturing, and research and development outside their country of origin so that it is dependent financially on operations in two or more countries; and its management decisions are made based on regional or global alternatives.⁴ MNCs control over 50% of all oil extraction and refining, and a similar proportion of the extraction, refining, and marketing of gas and coal. Additionally, they have virtually exclusive control of the production and use of ozone-destroying chlorofluorocarbons (CFCs) and related compounds. Their activities are believed to generate more than half of the greenhouse gases emitted by the industrial sectors with the greatest impact on global warming.⁵

3. MNCs and Natural Resources

Natural resources have been exploited in many countries around the world and used to boost economic development in these countries through the revenue derived from these endeavours. However, the exploitation of Africa's natural resources is normally carried out by foreign Multi-national Corporations (MNCs) which have shown almost no regard for the impact of their actions on people in Africa.⁶ Although there are advantages associated with MNCs, they have also been vilified because in some cases they take a country's natural resources, paying but a pittance while leaving behind environmental and social disasters.⁷

Their activities have had the result of destruction of the environment and livelihoods of local populations and caused widespread pollution and even war, with the

⁴ Greer, J. & Singh, K., 'A Brief History of Transnational Corporations,' (Global Policy Forum, 2000), available at <https://www.globalpolicy.org/empire/47068-a-brief-history-of-transnational-corporations.html> [Accessed on 16/11/2018].

⁵ *Ibid.*

⁶ Africa Europe Faith & Justice Network (AEFJN), The Plundering of Africa's Natural Resources, available at http://www.aefjn.org/tl_files/aefjn-files/publications/Fact%20Sheets%20EN/120521-NatResources-Factsheet-eng.pdf [Accessed on 16/11/2018].

⁷ Patrick, S.M., "Why Natural Resources Are a Curse on Developing Countries and How to Fix It." Available at *The Atlantic*. < <http://www.theatlantic.com/international/archive/2012/04/why-natural-resources-are-a-curse-on-developing-countries-and-how-to-fix-it/256508/>>, [Accessed on 16/11/2018]; See also Stiglitz, J., "Resource Rich, Cash Poor." *Slate*, August 12 (2012). Available at <https://slate.com/business/2012/08/why-resource-rich-countries-usually-end-up-poor.html> [Accessed on 16/11/2018].

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desire to control economically profitable natural resources being the reason behind several conflicts in Africa, especially in Congo DRC.⁸ MNCs have contributed greatly towards conflicts and taken advantage of the occurrence of conflicts to continue exploiting these resources.⁹ This scenario is not unique to DRC Congo only but is a reflection of what is happening across Africa.¹⁰

MNCs usually enter into negotiations with governments for the exploitation of mineral resources and thereafter are usually awarded contracts to exploit these resources. When entering into these negotiations, these corporations usually aim at ensuring maximum profits from the undertakings which in most cases is done at the expense of the host State. The concession contracts are usually drawn in a manner that ensures that the companies have unlimited rights to the natural resources leaving no room for future amendments by the host state. This makes the host states to lose out on revenue, where there are changes in the fiscal regime in the future.¹¹

Some of the contracts and deals are concluded in questionable manner mostly influenced by high level corruption as recently evidenced in the Kenyan case of *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*¹². The contract involved investments in the Kenyan mining sector, including a 21-year mining license for the extraction of rare earths at the Mrima Hill project, southern part of the country. However, there arose a dispute and claims arising out of the Government's allegedly unlawful revocation of claimant's mining license, following the discovery of new rare earths deposits by the claimant. The investor filed a case against Kenya before the International Centre for Settlement of Investment Disputes (ICSID) claiming USD 2,000 Million. However, Kenya argued that the contracts were awarded irregularly and were marred with corruption and the process did not follow the

⁸ See generally, Batware, B., 'Resource Conflicts: The Role of Multinational Corporations in the Democratic Republic of Congo,' (MA Peace and Conflict Studies, EPU, 2011), available at <http://acuns.org/wp-content/uploads/2012/06/RoleofMultinationalCorporations.pdf> [Accessed on 16/11/2018].

⁹ Ezekiel, A., "The application of international criminal law to resource exploitation: Ituri, democratic republic of the Congo," *Natural Resources Journal* (2007): 225-245.

¹⁰ See generally United Nations Expert Group Meeting on 'Natural Resources and Conflict in Africa: Transforming a Peace Liability into a Peace Asset,' *Conference Report*, 17-19 June 2006, Cairo, Egypt. Organized by the Office of the Special Adviser on Africa (OSAA) in cooperation with the Government of Egypt.

¹¹ *Ibid*, p. 224. It has been suggested that one of the tools that can be used to counter this scenario is the use of additional profits tax (APT).

¹² ICSID Case No. ARB/15/29.

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laid out legal requirements. Although the corruption allegations did not stand¹³, the Tribunal concluded that the Claimants' failure to comply with the legislature's regulatory regime governing the Mrima Hill forest and nature reserve, and the Claimants' failure to obtain an EIA licence (or approval in any valid form) from National Environment Authority (NEMA) concerning the environmental issues involved in the proposed removal of 130 million tonnes of material from Mrima Hill, constituted violations of Kenyan law that, in terms of international law, warrant the proportionate response of a denial of treaty protection under the BIT and the ICSID Convention.¹⁴ The case was thus dismissed with costs.

This is just one of the many examples of irregular contracts that are signed between developing countries, in Africa and elsewhere, and MNCs without regard to the existing laws or the accruing benefits to the host states and their people. Thus, the MNCs' political influences upon the governments of less developed countries in natural resources exploitation and investments cannot be underestimated.¹⁵

¹³ Ibid, para. 185.

¹⁴ Ibid, para. 365.

¹⁵ Helleiner, G.K., "The role of multinational corporations in the less developed countries' trade in technology," *World Development* 3, no. 4 (1975): 161-189.

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Fig. 3: Multinationals and Natural Resources

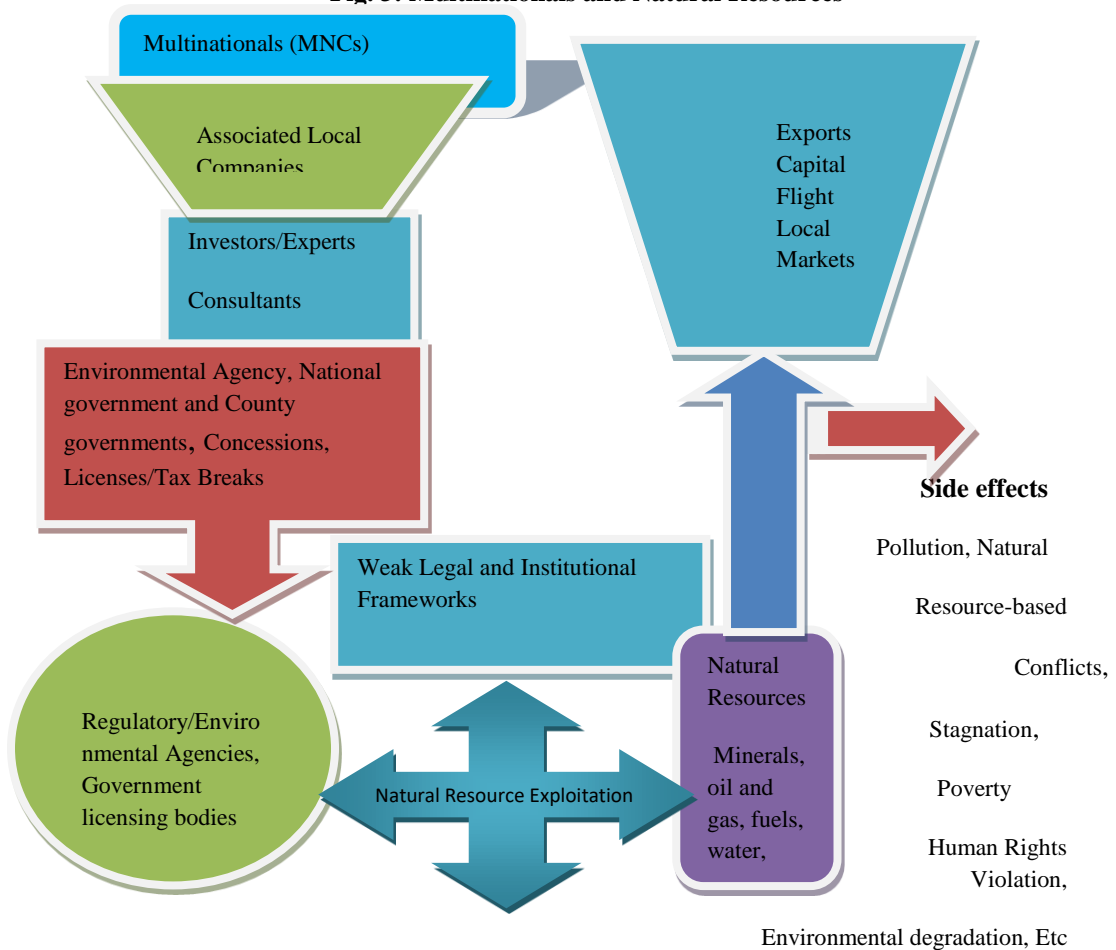


Fig. 4.0 Source: Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, Glenwood Publishers, Nairobi – 2015

4. FDI and Natural Resources

Foreign Direct Investment (FDI) is a form of international inter-firm co-operation that involves significant equity stake and effective management decision power in, or ownership or control of foreign enterprises.¹⁶ It also encompasses other broader,

¹⁶ Mello, R., ‘Foreign direct investment-led growth: evidence from time series and panel data,’ *Oxford Economic Papers*, No. 51, pp.133-151, p. 135, (Oxford University Press, 1999).

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heterogeneous non-equity forms of co-operation that involve the supply of tangible and intangible assets by a foreign enterprise to a domestic firm.¹⁷

FDI reflects a lasting interest by a resident entity of one economy in an enterprise that is resident in another economy.¹⁸ The ideological underpinning of this concept is the transmission to the host country of a package of capital, managerial skill and technical knowledge, as a potent agent of economic transformation and development.¹⁹ The role of natural resources in economic development touches on many issues, from FDI to the environment to the level and management of exchange rates. MNCs are the main players engaging in value adding activities based on cross-border transactions. They base most of their industrial activities on natural resources. They derive the raw materials from the host countries and export the same either in their raw form or semi-processed one for value addition, which later comes back as a finished product ready for the local market as well as the international markets. For instance, with regard to oil, the exploration and production of oil results in foreign direct investment (FDI) inflows only when the activities are financed by foreign MNCs.²⁰ The dominance of MNCs in Africa's extractive industries is because mineral extraction is capital-intensive, requires sophisticated technology, has long gestation periods and is also risky. There is no guarantee that oil may be discovered after spending an extensive amount of resources on exploration. As a consequence, the increased exploration and production in the region has led to a substantial increase in extractive industry FDI.²¹ Further, countries that are rich in natural resources, in particular oil, tend to have weak institutions,²² suggesting the direct link between FDI and natural resources exploitation. In such arrangements, the host countries often derive little benefits while the lion's share goes to the MNCs and their home countries. Indeed, it has been argued that MNCs investment distorts industrial growth in poor areas, and confirms their dependence and underdevelopment, rather than promoting the widespread effects of genuine development.²³

¹⁷ *Ibid.*

¹⁸ Duce, M. & Espana, B., 'Definitions of Foreign Direct Investment (FDI): a methodological note,' available at <http://bis.hasbeenforeclosed.com/publ/cgfs22bde3.pdf> [Accessed 16/11/2018].

¹⁹ Kojima, K., 'A Macroeconomic Approach to Direct Foreign Investment,' *Hitotsubashi Journal of Economics*, June 1973, p. 3.

²⁰ Asiedu, E., 'Foreign direct investment, natural resources and institutions,' *Working Paper*, March 2013, p. 2.

²¹ *Ibid.*, p. 2.

²² *Ibid.*

²³ Langdon, S., "Multinational corporations, taste transfer and underdevelopment: A case study from Kenya," *Review of African Political Economy* 2, no. 2 (1975): 12-35 at 12.

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The unsustainable development of natural resource endowments has several basic limitations as a means of promoting broad-based economic development.²⁴ Primary product exports have low value added compared to processed and manufactured goods, and the lion's share of value addition occurs in developed countries, where raw materials are converted into manufactured goods.²⁵ In this cycle, MNCs play a central role.

5. State Sovereignty over Natural Resources vis-à-vis Multinational Corporations

International law has put in place a framework law to guide natural resources allocation and exploitation.²⁶ It establishes basic rules under which nations can assert property rights in resources. This influences how nations deal with resource allocation. However, apart from international law, other factors ranging from political, economic, social, scientific and technological factors also contribute to allocation of resources. Under international law, property rights are defined in terms of national sovereignty or territorial or jurisdictional rights.²⁷ The dissolution of colonial bonds in a rising tide of nationalism has led to assertions of sovereignty over natural resources by States.²⁸

However, in the face of globalization and need for economic development, States have had to enter into agreements with Multinational Corporations (MNCs) for exploitation of natural resources, mainly due to their infrastructural (in)capacities (technological, financial, human resource).²⁹ They also do so with the objective of boosting foreign direct investments (FDIs) which are believed to be key for development. Developed countries invest in developing countries, with the object of

²⁴ Cf. Pérez, R.T., "Structural Problems and Changes in Cuba's Economic Model," In *No More Free Lunch*, pp. 5-22. Springer, Cham, 2014.

²⁵ Cronin, R., *et al*, (eds), 'Exploiting Natural Resources: Growth, Instability, and Conflict in the Middle East and Asia,' *Natural Resources and the Development-Environment Dilemma*, 2009, p. 72.

²⁶ Bilder, R.B., 'International Law and Natural Resources Policies,' *Natural Resources Journal*, Vol. 20, 1980, pp. 451-486 at p. 451.

²⁷ *Ibid*.

²⁸ Brown, R., 'The Relationship between the State and the Multinational Corporation in the Exploitation of Resources,' *op. cit*, p. 218.

²⁹ Giuliani, E., *Multinational corporations, technology spillovers and human rights' impacts on developing countries*, No. 2010/06. LEM Working Paper Series, 2010. Available at <http://www.lem.sssup.it/WPLem/files/2010-06.pdf> [Accessed on 16/11/2018]; cf. Osuagwu, G.O. and Obumneke, E., "Multinational corporations and the Nigerian economy." *International Journal of Academic Research in Business and Social Sciences* 3, no. 4 (2013): 359.

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securing increased imports of primary products, which are vitally important for their economy, although the benefits of such development assistance have been criticized as being limited; the employment and training effects are small in so far as the goods are exported in the form of raw materials.³⁰

MNCs have also been criticized as being exploitative of the weak legal regimes in most developing countries. Most of these corporations use this to evade liability where they are in violation of the laws.³¹ Further, these corporations have used their financial muscles to frustrate legal proceedings brought against them and further collaborate with corrupt government officials to ensure that they are not held liable for violations attributable to them.³² They have also taken advantage of their financial muscle to enter into contracts with governments and the imbalance of power usually occasions the entering into bad deals by governments.³³ These actions by the MNCs have rightly been viewed as an affront or encroachment on sovereignty and an attempt by contract to limit the legislative competence of the host country.³⁴ Arguably, the cumulative effect of it is weakened effect of state sovereignty especially in the case of developing countries.

6. Multinational Corporations and Human Rights Violations

Most MNCs have been identified as gross human rights violators in their areas of operation.³⁵ In this regard, the relationships between the MNCs and the host

³⁰ Brown, R., 'The Relationship between the State and the Multinational Corporation in the Exploitation of Resources,' *op. cit.*, p. 4.

³¹ Osuagwu, G.O. and Obumneke, E., "Multinational corporations and the Nigerian economy." *International Journal of Academic Research in Business and Social Sciences* 3, no. 4 (2013): 359.

³² Ibid; See also Giuliani, E. and Macchi, C., "Multinational corporations' economic and human rights impacts on developing countries: a review and research agenda," *Cambridge journal of economics* 38, no. 2 (2013): 479-517.

³³ See generally, Fieldhouse, D., "'A New Imperial System'?: The Role of the Multinational Corporations Reconsidered," In *International Political Economy*, pp. 177-189. Routledge, 2002.

³⁴ Brown, R., *The Relationship between the State and the Multinational Corporation in the Exploitation of Resources*, *op. cit.*, p. 223; See also Fieldhouse, D., "'A New Imperial System'?: The Role of the Multinational Corporations Reconsidered," In *International Political Economy*, pp. 177-189.

³⁵ Rahman, K., "MNCs and TNCs: Their Role and Socioeconomic Impact on Host Societies." *Policy Perspectives* (2007): 115-126.

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communities have often been characterized by conflict, ranging from ideological opposition and dispute, to armed conflict and the extensive loss of lives, livelihoods, and environments.³⁶ This arises from the fact that these corporations are in most cases viewed as ‘outsiders’ who come to interfere with the relative peace enjoyed by communities. MNCs operating in most developing countries have in many cases suppressed the rights of workers in their facilities leading to gross human rights violations, such as killings.³⁷ The activities by the MNCs especially in the mining sector have also resulted both directly and indirectly to the deaths of members of communities and livestock owned by these communities.³⁸

In this regard, the civil society in most of the countries where the MNCs are in operation, have been on the forefront in seeking to hold these entities accountable for their actions, with the aim of protecting and promoting fundamental human rights and labour rights of the employees of these corporations.³⁹ This is largely attributable to the fact that a majority of the populace amongst whom these corporations operate, are not usually aware of their rights and the mechanisms for enforcement of those rights.

Efforts by civil society organisations have, however, proved to be futile in certain instances due to the laxity in legal processes to remedy the situation, with certain players in the legal sectors being aiders and abettors of the violations. This is as a result of lack of political will in the host countries to prosecute the violators.⁴⁰ In *SERAC v Nigeria*,⁴¹ the communication alleged that the exploitation of oil resources in Ogoniland resulted to

³⁶ Ballard, C., & Bank, G., ‘Resource Wars: The Anthropology of Mining,’ *Annual Review of Anthropology*, Vol. 32, 2003, pp. 287-313, p. 289.

³⁷ Makwana, R., ‘Multinational Corporations (MNCs): Beyond the Profit Motive,’ *Share the World Resources*, 3rd October 2006, <http://www.stwr.org/multinational-corporations/multinational-corporations-mncs-beyond-the-profit-motive.html#legalrights> [Accessed on 16/11/2018].

³⁸ Luvhengo, V., "Multinational Corporations and Human Rights Violations in African Conflict Zones: The Case Study of Angola 1992-2005," PhD diss., 2007. Available at <https://core.ac.uk/download/pdf/39664716.pdf> [Accessed on 16/11/2018]; See Awuah-Nyamekye, S. and Sarfo-Mensah, P., "Mining or Our Heritage? Indigenous Local People's Views on Industrial Waste of Mines in Ghana." In *Industrial Waste*. InTech, 2012. Available at http://cdn.intechopen.com/pdfs/30862/InTech-Mining_or_our_heritage_indigenous_local_people_s_views_on_industrial_waste_of_mines_in_ghana.pdf [Accessed on 16/11/2018].

³⁹ Social Watch Report 2009 - *Making finances work: People first*, ‘Holding transnational corporations accountable for human rights obligations: the role of civil society,’ available at <http://socialwatch.org/node/812> [Accessed on 16/11/2018].

⁴⁰ *Ibid.*

⁴¹ [2001] AHRLR 60 (ACHPR 2001).

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the violation of the right to health and the environment of the community, and that the government of Nigeria had condoned and facilitated the violations by the Nigerian National Petroleum Company (NNPC) whose majority shareholder was the Shell Petroleum Development Corporation (SPDC). The African Commission on Human and People's Rights held that the State of Nigeria was in violation of the African Charter on Human and People's Rights. States are supposed to take measures to ensure that the actions of MNCs operating within their respective countries, are not in violation of national and international law, and to also ensure that these actions are not in violation of human rights.

In order to ensure that their activities are sustainable and 'acceptable' in the different countries where they operate, it is imperative that the MNCs respect the rights of the communities amongst whom they operate. Host States must ensure that these corporations are held accountable in case of any violations. Particularly, these corporations must ensure that they respect the fundamental rights of individuals and respect the environmental rights in the societies amongst whom they operate. Most importantly, they respect the rights of pastoralist communities who mostly hold land in groups or communities. Respect of these rights will ensure that these corporations gain 'legitimacy,' among these communities thus granting them 'social licence' to operate in these areas.⁴²

7. International Policy, Legal and Institutional Frameworks

The *Agreement on Trade-Related Investment Measures* (TRIMs),⁴³ seeks to promote the expansion and progressive liberalization of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country Members.⁴⁴ The agreement, thus, takes note of the vulnerable position which most developing countries usually are at and seeks to alleviate the situation in these countries. The agreement further provides for the importance of ensuring that transactions between corporations and states are done in a manner that is transparent.

⁴² See Rodhouse, T. and Vanclay, F., "Is free, prior and informed consent a form of corporate social responsibility?." *Journal of Cleaner Production* 131 (2016): 785-794.

⁴³ Marrakesh Declaration of 15 April 1994, ANNEX 1A: Multilateral Agreements on Trade in Goods, (GATT secretariat publication, Sales No. GATT/1994-7).

⁴⁴ Preamble.

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The *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPs),⁴⁵ seeks to reduce distortions and impediments to international trade, and takes into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.⁴⁶ TRIPs plays a useful role in the protection of intellectual property rights. However, it has been a subject of criticism in many African countries as it largely embodies western standards in I.P. Therefore, the agreement does not offer much protection especially to traditional knowledge, which is an important form of intellectual property in Africa.

The *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*,⁴⁷ seeks to ensure that States establish mechanisms to ensure that parties to international business transactions who engage in corrupt practices are held liable for these actions. Each contracting party must thus take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.⁴⁸ This Convention has recognized that corruption plays a big role in illegal transactions and corrupt practices which are usually done at the expense of the governed and has sought to ensure that these entities are held accountable. This Convention could be very useful in ensuring that cases of corruption by MNCs often reported in developing countries are effectively dealt with, so as to ensure that the proceeds of natural resource exploitation benefit the locals. In this regard, institutions have to be established which will ensure that the MNCs are held to account for their actions.

The Convention has realized the importance of good governance in the running of MNCs and the need to ensure accountability. Accountability and transparency are said to be related principles which ensure good governance. In this regard, accountability mechanisms ensure that oversight is exercised over the actions of various entities. The broad aim of oversight is to ensure that initiatives by the government meet their planned

⁴⁵ The TRIPs Agreement, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

⁴⁶ Preamble.

⁴⁷ Dec. 18, 1997, 37 I.L.M. 1 (1998), *Convention On Combating Bribery of Foreign Public Officials in International Business Transactions*, adopted At Paris On November 21, 1997, by a Conference Held Under The Auspices Of The Organization For Economic Cooperation And Development (OECD). Convention Signed In Paris on December 17, 1997, By the United States and 32 other Nations, adopted by the Negotiating Conference on 21 November, 1997.

⁴⁸ Art. 2.

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objectives, respond to the needs of the citizenry and contribute to better governance and the reduction of poverty.⁴⁹

The *OECD Guidelines for Multinational Enterprises* (the *Guidelines*) are recommendations addressed by governments to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws. The Guidelines aim to ensure that the operations of these enterprises are in harmony with government policies and ensure that confidence is built among the societies amongst whom these enterprises operate. The Guidelines are part of the *OECD Declaration on International Investment and Multinational Enterprises*, the other elements of which, relate to national treatment, conflicting requirements on enterprises, and international investment incentives and disincentives.⁵⁰ They apply to multinational enterprises (MNEs) in all sectors, wherever they operate.

Enterprises should contribute to sustainable development, respect human rights, abstain from improper involvement in local political activities and refrain from retaliating against workers who report practices that contravene the law, the *Guidelines* or the enterprise's policies.⁵¹ Further, they should conduct due diligence to avoid being involved in adverse impacts on matters covered by the *Guidelines*. These entities are also to endeavor to ensure that they take into consideration the views of members of the public in the governance process. All these initiatives relate to inclusion of democratic principles in the governance of MNCs. Democratic governance of MNCs is important in ensuring that there are increased levels of economic growth. The common aim of the governments adhering to the *Guidelines* is to encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress and to minimize the difficulties to which their various operations may give rise.⁵²

The *OECD Principles of Corporate Governance*⁵³ are intended to assist OECD and non-OECD governments in their efforts to evaluate and improve the legal, institutional and regulatory framework for corporate governance in their countries. It seeks to provide guidance and suggestions for stock exchanges, investors, corporations,

⁴⁹ Ako, R. & Uddin, N., 'Good governance and resources management in Africa,' in Botchway, F. (ed), *Natural Resource Investment and Africa's Development*, (Edward Elgar Publishing, Inc., 2011), p. 25.

⁵⁰ Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises*, 27, June, 2000.

⁵¹ The Trade Union Advisory Committee to the OECD (TUAC) 2012, *The OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context*, Trade Union Guide. *op cit*, p. 2.

⁵² OECD Guidelines for Multinational Enterprises, 2008.

⁵³ OECD, 2004.

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and other parties that have a role in the process of developing good corporate governance. The Principles are of importance to both traded and non-traded companies and they represent a common basis that OECD member countries consider essential for the development of good governance practices.

The United Nations Environmental Programme (UNEP) helps States cooperate to achieve agreed environmental priorities, and supports efforts to develop, implement and enforce new international environmental laws and standards.⁵⁴ UNEP observes that to achieve their environmental commitments and goals, States need strong legislative, political and judicial systems. To promote this, UNEP seeks to use its expertise in environmental policy and law to help States further develop these institutions, and enhance their ability to effectively participate in international negotiations.⁵⁵ In this regard, therefore, Multilateral Environmental Agreements (MEAs) have been formulated and they are driven at formulating guidelines to states on how to deal with transboundary hazards. Despite the fact that these guidelines are in existence, practice has shown widespread occurrence of non-compliance by states and non-enforcement with respect to many MEAs.⁵⁶

The United Nations Global Compact is a call to companies everywhere to voluntarily align their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption, and to take action in support of UN goals and issues.⁵⁷ The principles seek to guide the manner in which businesses are to operate and it seeks to ensure that these entities respect human rights in their operations. The UN Global Compact has largely adopted a voluntary approach to

⁵⁴ United Nations Environment Programme, Environmental Governance, *op cit*, p2. It is noteworthy that the UN Environmental Assembly of the UN Environment Programme (UNEP), has since replaced the UNEP Governing Council. During a plenary meeting on 13 March 2013, the UN General Assembly (UNGA) adopted a draft resolution that changes the UN Environment Programme (UNEP) Governing Council to the "United Nations Environment Assembly of UNEP." The resolution, contained in an Annex to the note, states that the UNGA decides to change the designation of the GC of UNEP to the United Nations Environment Assembly of UNEP. This was meant to reflect its universal character.

⁵⁵ *Ibid.*

⁵⁶ Neumayer, E., Multilateral Environmental Agreements, Trade and Development: Issues and Policy Options Concerning Compliance and Enforcement, *A report for the Consumer Unity & Trust Society Jaipur, India*, p. 4, available at <http://www.lse.ac.uk/geographyandenvironment/whoswho/profiles/neumayer/pdf/cuts.pdf> [Accessed on 16/11/2018].

⁵⁷ Available at <https://www.unglobalcompact.org/> [Accessed 16/11/2018].

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sustainability and currently has over 12,000 signatories from business and key stakeholder groups based in 145 countries.⁵⁸

The *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, provides guidance on the application of the "arm's length principle,"⁵⁹ which is the international consensus on transfer pricing, i.e. on the valuation, for tax purposes, of cross-border transactions between associated enterprises.⁶⁰ In a global economy, where multinational enterprises (MNEs) play a prominent role, transfer pricing is high on the agenda of tax administrators and taxpayers alike, and governments need to ensure that the taxable profits of MNEs are not artificially shifted out of their jurisdictions and that the tax base reported by MNEs in their respective countries reflect the economic activity undertaken therein.⁶¹

The existing international framework governing multinational corporations is, however, seen to be inadequate as the international framework largely relies on implementation by States. The problem is particularly seen where there are violations within developing countries. These countries are usually not in a position to regulate the MNCs which operate within their countries since states have trans-border limitations and thus not in a position to effectively regulate the operations of the MNCs.⁶² States have also been complacent in ensuring that the MNCs are held to account for their actions. States are, thus, supposed to ensure that international norms that have been

⁵⁸ The United Nations Global Compact, Background: UN Global Compact and Leaders Summit 2013, About The UN Global Compact, available at http://www.unglobalcompact.org/docs/about_the_gc/UNGC_Leaders_Summit2013_Fact%20Sheet.pdf [Accessed on 16/11/2018].

⁵⁹ Notably, OECD member countries have agreed that to achieve a fair division of taxing profits and to address international double taxation, transactions between connected parties should be treated for tax purposes by reference to the amount of profit that would have arisen if the same transactions had been executed by unconnected parties. This is the arm's length principle. See H.M Revenue & Customs, INTM412040-Transfer pricing: legislation: rules: the arm's length principle, available at <http://www.hmrc.gov.uk/manuals/intmanual/intm412040.htm> [Accessed on 16/11/2018]. The arm's length principle is endorsed by the OECD and enshrined in Art. 9 (the Associated Enterprises Article) of the OECD Model Tax Convention on Income and on Capital (usually referred to as the OECD Model Treaty or Model Convention).

⁶⁰ OECD (2010), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010*, OECD Publishing, available at http://www.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2010_tpg-2010-en [Accessed on 16/11/2018].

⁶¹ *Ibid.*

⁶² Deva, S., "Human Rights Violations by Multinational Corporations and International Law: Where from Here?" *Connecticut Journal of International Law*, Vol. 19, 2003, pp. 1-57.

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established are domesticated and ensure that any violations arising from the operations of these corporations are redressed.

8. Natural Resource Management and Multinational Corporations in Kenya

Kenya is well endowed with diverse natural resources including non-metallic minerals such as geothermal energy, soda ash, fluorspar, with the latest boosting coming from the petroleum oil discovered in Turkana. Its entrance into the extractive industries is expected to generate fiscal revenues, foreign exchange earnings and surpluses to finance much needed socio-economic development in the country.⁶³

Most of the players involved in the extractive industries are multinational companies. It is expected that these corporations are to operate in accordance with the principles of governance outlined in Article 10 of the Constitution and this includes the principle of sustainable development. Further, these entities are also to take into consideration the principle of social justice. In this regard, these entities are to ensure that the benefits accruing from the exploration of these resources are equitably shared with the members of the communities amongst whom they operate.

The benefits to be shared are usually either in monetary or non-monetary form. Kenya is also in the process of formulating the Natural Resources (Benefit Sharing) Act which seeks to establish a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities and; to establish the Natural Resources Benefits Sharing Authority. Benefit sharing agreements are to be entered into between the corporations seeking to conduct exploration activities with the respective counties.

The corporations involved in the extraction activities are not only supposed to focus on maximising profits, but also impact positively on the lives of the communities amongst whom they operate. Corporate Social Responsibility is, thus, an important tool that can be used by MNCs as a business tool to promote a positive image to business stakeholders, and as a way to improve the quality of life among citizens of the host

⁶³ See Johannes, E.M., Zulu, L.C. and Kalipeni, E., "Oil discovery in Turkana County, Kenya: a source of conflict or development?" *African Geographical Review* 34, no. 2 (2015): 142-164; Mkutu Agade, K., "'Ungoverned Space' and the Oil Find in Turkana, Kenya." *The Round Table* 103, no. 5 (2014): 497-515; Patey, L., "Kenya—An African oil upstart in transition." (2014). Available at https://ora.ox.ac.uk/catalog/uuid:5abd035d-5f6a-4d53-8f5b-5adef249c31b/download_file?file_format=pdf&safe_filename=WPM-53.pdf&type_of_work=Working+paper [Accessed on 16/11/2018].

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countries.⁶⁴ However, the work of MNCs must go beyond CSR and be sustainable in the long run, as CSR in most cases is largely philanthropic and not anchored in law.⁶⁵

In carrying out their functions, the various MNCs are to ensure that they operate in a manner that is sustainable. They are to ensure that their activities are socially sustainable, environmentally sustainable and economically sustainable. These three pillars of sustainability were identified by the World Commission on Environment and Development (WCED), *Our Common Future*, to be inextricably linked and deserving attention by all stakeholders. The emergence and popularization of sustainable development, has led to concerted efforts by players in the private sector to integrate sustainability in their activities and operations.⁶⁶

Further, the principle has been the subject of judicial interpretation as was the in *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* where Judge Weeramantry, argued that the concept of sustainable development reaffirms that there must be both development and environmental protection, and that neither of these rights can be neglected at the expense of the other, thus making it part of modern international law.⁶⁷

Various initiatives driven at ensuring sustainability have thus been undertaken by players in the private sector. The banking industry has particularly played a key role in this and this was particularly seen in 2003 when private banks adopted the Equator Principles which enable banks to evaluate the social and environmental impacts of their actions and the risks potentially posed by projects which they finance. In addition to this, the UN Global Compact initiative was also established in 2000 with the aim of having ‘a more sustainable and inclusive global economy.’⁶⁸ All these initiatives have been adopted on order to curb the ill associated with the activities of MNCs.

It is, however, important that the sustainability models adopted by MNCs be able to meet the needs of the countries where they operate. MNCs must be mindful of how

⁶⁴ Pimpa, N., ‘Multinational Corporations: Corporate Social Responsibility and Poverty Alleviation in Thailand,’ School of Management, RMIT University.

⁶⁵ See generally, Porter, M.E. & Kramer, M.R., ‘Strategy and Society: The Link between Competitive Advantage and Corporate Social Responsibility,’ *Harvard Business Review*, December, 2006.

⁶⁶ Kariuki, F., ‘Sustainability in the Financial Sector in Kenya,’ Kenya Bankers Association, WPS/01/15.

⁶⁷ *Hungary v Slovakia*, 1997, WL 1168556 ICJ.

⁶⁸ United Nations Global Compact, ‘The Ten Principles,’ available at www.unglobalcompact.org/abouttheGc/TheTenprinciples/index.html, [Accessed 16/11/2018].

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they identify, define and prioritise their sustainability agenda.⁶⁹ In this regard, these entities are supposed to ensure that they take into consideration the various sustainability challenges in order to ensure that the initiatives are successful and that they do not lead to further marginalization of certain groups.

Due to the infrastructural and financial (in) capacity of the country, Kenya could only work with MNCs to achieve its dream of joining oil producing countries, and in this case Tullow oil, amongst others were contracted to carry out the work. It is hoped that Kenya and the local people will benefit from this discovery. However, the resource-curse phenomenon is very real and Kenya must not follow the steps of other countries around Africa and the world where natural resources, particularly hydrocarbons have resulted in environmental degradation and violent conflicts, ultimately leading to impoverishment and devastation of the lives of the locals. It has been rightly pointed out that governance issues such as weak environmental policy, resource utilization policy and fiscal policies has come to be viewed as key factors inhibiting the ability of countries to use revenues from their extractive industries for development.⁷⁰

8.1 Constitution of Kenya, 2010

The Constitution of Kenya 2010 has provisions that seek to guide the operations of various entities in the country, including MNCs. Firstly, the Constitution in Article 10(1) provides for national values and principles of governance which are to bind all State organs, State officers, public officers and all persons, including legal persons.

The principle of sustainable development is particularly of importance in Kenya. Related to this principle are the principles of intragenerational equity and that of intergenerational equity. The former has been defined in Section 2 of EMCA to mean that all people within the present generation have the right to benefit equally from exploitation of the environment, and that they have an equal entitlement to a clean and healthy environment. The principle of intergenerational equity, on the other hand,

⁶⁹ Richardson, B., 'Africa: from object to agent of socially responsible investment' in Francis Botchway, F. (ed), *Natural Resource Investment and Africa's Development* (Edward Elgar Publishing Limited, 2011).

⁷⁰ Obat, G.O. & Owuor, G., 'Extractive Industries, Natural Resources Management and Sustainable Development: a Review', August, 2010, p. 1, available at www.sap4africa.net/.../EI_NRM_and_Sustainable_Development_August [Accessed on 16/11/2018].

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asserts that all generations hold the natural environment of our planet in common with other species, people, and with past, present and future generations.⁷¹

In Kenya, the two principles have received constitutional recognition in Article 60(1) which provides for the principles of land holding, stating that land in the country is to be held in a manner that is *inter alia* equitable, efficient, productive and sustainable. The government has a mandate of ensuring that investments made on land benefit members of the community and Parliament is mandated to enact legislation ensuring that investment in property benefits local communities and their economies.⁷² In this regard, mechanisms are supposed to be put in place to ensure that there is benefit-sharing with the local communities.

The Constitution further seeks to ensure that entities or persons who are not citizens, including MNCs, are to hold land for a limited period of time (99 years) and that they are only to hold land under leasehold tenure.⁷³ This is meant to ensure sustainable land utilisation and that the leases are able to take future land needs into consideration. Article 42 further provides for the right to a clean and healthy environment which includes the right to have the environment protected for the benefit of present and future generations. The government is to undertake legislative measures to ensure the protection of the environment and ensure communities are able to benefit from the activities undertaken in their environments.

Further, the Constitution creates an obligation on all persons to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.⁷⁴ A 'person' has been defined in the Constitution to include a company, association or other body of persons whether incorporated or unincorporated.⁷⁵ In this regard, the MNCs are also under an obligation to ensure the protection and respect of the environment. These corporations can also be held liable for the violation of human rights as the provisions of the Bill of Rights binds State organs and persons.⁷⁶ The Constitution requires Parliament to enact legislation to: ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and recognize and protect the ownership of

⁷¹ Muigua, K. & Kariuki, F., 'Sustainable Development and Equity in the Kenyan Context' UNLJ, Vol. 7(1), 2012.

⁷² Art. 66(2).

⁷³ Art. 65 (1).

⁷⁴ Art.69 (2).

⁷⁵ Art.260.

⁷⁶ Art.20 (1).

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indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.⁷⁷

Noteworthy are the obligations of the State regarding the environment. The Constitution outlines them as including the obligation to, *inter alia*: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities and; encourage public participation in the management, protection and conservation of the environment..⁷⁸

The Constitution provides that a transaction is subject to ratification by Parliament if it involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya; and is entered into on or after the effective date.⁷⁹ The foregoing constitutional provisions lay a basis for other legislation to be enacted in the country to govern investments by MNCs in the country.

8.2 The Petroleum (Exploration and Production) Act

The *Petroleum (Exploration and Production) Act*⁸⁰ is an Act of Parliament to regulate the negotiation and conclusion by the Government of petroleum agreements relating to the exploration for, development, production and transportation of, petroleum and for connected purposes.⁸¹ “Petroleum” is a broad term that is used to mean mineral oil and includes crude oil, natural gas and hydrocarbons produced or capable of being produced from oil shales or tar sands.⁸² The Act vests all petroleum existing in its natural condition in strata lying within Kenya and the continental shelf is in the Government, subject to any rights in respect thereof which, by or under any other written law, have been or are granted or recognized as being vested, in any other

⁷⁷ Art. 11(3).

⁷⁸ Art. 69(1).

⁷⁹ Art. 71, Constitution of Kenya. Art. 260 thereof defines natural resources to mean the physical non-human factors and components, whether renewable or non-renewable, including—sunlight; surface and groundwater; forests, biodiversity and genetic resources; and rocks, minerals, fossil fuels and other sources of energy.

⁸⁰ Cap. 308, Laws of Kenya.

⁸¹ Preamble.

⁸² S. 2.

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person.⁸³ The Act empowers the Minister (now Cabinet Secretary) to, on behalf of the Government, negotiate, enter into and sign petroleum agreements with a contractor and petroleum agreements must, subject to the provisions of this Act, be in the prescribed form.⁸⁴

The Government is to enter into petroleum agreements only with contractors who have the financial ability, technical competence and professional skills necessary to fulfill the obligations under the petroleum agreement.⁸⁵ The Act also provides for the general terms and conditions of petroleum agreements, which notwithstanding any other written law and subject to this Act, shall be implied in every petroleum agreement an obligation on the contractor.⁸⁶ Any petroleum agreement must be negotiated on the basis of the model production sharing contract substantially in the form set out in the Schedule.⁸⁷ Missing from the general terms and conditions of petroleum agreements provided under the Act, is the implied requirement to preserve and clean the environment. Public participation as required by the Constitution of Kenya 2010 is also missing from the Act as a whole. There is also no express requirement for benefit sharing under the Act.

The proposed law, *Petroleum (Exploration, Development and Production) Bill, 2017*, was developed to provide a framework for the contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations; to give effect to relevant articles of the Constitution in so far as they apply to upstream petroleum operations; and for connected purposes. If approved, the Bill seeks to repeal *Petroleum (Exploration and Production) Act*.⁸⁸ Notably, the Bill introduces the concept of "local content" which means the added value brought to the Kenyan economy from petroleum related activities through systematic development of national capacity and capabilities and investment in developing and procuring locally available work force, services and supplies, for the sharing of accruing benefits.⁸⁹ For the purpose of subsection (1) the contractor must, before engaging in upstream petroleum operations, prepare and submit a long term and annual local content plan which corresponds with

⁸³ S. 3.

⁸⁴ S. 5.

⁸⁵ S. 8.

⁸⁶ S. 9.

⁸⁷ *Petroleum (Exploration and Production) Regulations*, 1984 [L.N. 193/1984.], Regulations under S.6.

⁸⁸ Chapter 308, Laws of Kenya.

⁸⁹ Clause 77(1), *Petroleum (Exploration, Development and Production) Bill, 2015*.

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the work program to the Authority for approval.⁹⁰ The local content plan should address-employment and training; research and development; technology transfer; industrial attachment and apprenticeship; legal services; financial services; insurance services; and succession plans for positions not held by Kenyans.⁹¹

The proposed law requires that a contractor and a sub-contractor of the contractor conducting upstream petroleum operations must comply with local content requirements in all of the contractor's or sub-contractor's operations; give priority to services provided and goods manufactured in Kenya where the goods meet the specifications of the petroleum industry as prescribed by the Kenya Bureau of Standards or in absence of a Kenyan standard any other internationally acceptable standard that the (Upstream Petroleum Regulatory) Authority shall approve; and ensure that priority is given for the employment or engagement of qualified and skilled Kenyans at all levels of the value chain: Provided that the cost of local content should not be higher than at any other place.⁹²

8.3 Land Act, 2012

The *Land Act, 2012*,⁹³ is an Act of Parliament to give effect to Article 68 of the Constitution, to revise, consolidate and rationalize land laws; to provide for the sustainable administration and management of land and land based resources, and for connected purposes.⁹⁴ The Act also provides for allocation of public land by the National Land Commission and states that subject to the Constitution and any other law, the Commission may, in consultation with the national and county governments, allocate land to foreign governments on a reciprocal basis in accordance with the *Vienna Convention on Diplomatic Relations*.⁹⁵ The Act goes further to state that at the expiry, termination or extinction of a lease granted to a non-citizen, reversion of interests or rights in and over the land shall vest in the national or county government as the case may be.⁹⁶

⁹⁰ Ibid, Clause 77(2).

⁹¹ Clause 77(3).

⁹² Clause 77(1), *Petroleum (Exploration, Development and Production) Bill, 2015*.

⁹³ No. 6 of 2012, Laws of Kenya.

⁹⁴ Preamble.

⁹⁵ S. 12(5).

⁹⁶ S. 12(6).

8.4 The Wildlife Conservation and Management Act, 2013⁹⁷

This Act provides for the protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes.⁹⁸ Under the Act, the Kenya Wildlife Service is established with functions which include, *inter alia*, promoting or undertaking commercial and other activities for the purpose of achieving sustainable wildlife conservation.⁹⁹ The Act has made attempts to provide for the regulation of wildlife dealings connected to bio-piracy¹⁰⁰ and bio-prospecting.¹⁰¹ For one to undertake such activities, the Act provides that such persons must obtain a permit from the Cabinet Secretary.

Certain considerations are to be taken into account before granting the permit and these include; ensuring that the interest of all stakeholders, both public and private is taken into account and that the interests of communities amongst whom these resources are found is protected. There are certain prerequisites before a person is granted a licence. An applicant for the licence has to disclose all material information relating to the relevant bio-prospecting and on the basis of that disclosure has obtained the prior consent of the stakeholders for the provision of or access to such resources. The applicant must also disclose any benefit-sharing arrangements that have been proposed by the stakeholders.¹⁰²

The Act states that the Service shall, in all bio-prospecting involving any wildlife resources, be a joint partner on behalf of the people of Kenya.¹⁰³ In what may be seen as a move to strengthen the Service's work, the Act states gives the Cabinet Secretary the mandate, on the recommendation of the Service, to require that a particular per centum of the proceeds from the bio-prospecting be contributed to the Wildlife Endowment

⁹⁷ No. 47 of 2013, Laws of Kenya.

⁹⁸ Preamble.

⁹⁹ S. 7.

¹⁰⁰ S. 3 of the Act defines bio-piracy to mean the exploration of biological resources without the knowledge and non-coercive prior consent of the owners of the resources and without fair compensation and benefit sharing.

¹⁰¹ S. 3 of the Act defines bio-prospecting to mean the exploration of biodiversity for commercially valuable genetic and biochemical resources. This definition echoes that offered by the Convention on Biological Diversity (CBD) Secretariat which defines bioprospecting as 'the exploration of biodiversity for commercially valuable genetic and biochemical resources,' [UNEP/CBD/COP/5/INF/7].

¹⁰² S. 22(4).

¹⁰³ S. 22(6).

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Fund,¹⁰⁴ established under the Act.¹⁰⁵ In establishing conservation measures, it is required that the provisions of this Act are to be in line with those of EMCA.¹⁰⁶

Section 27 of this Act is of great significance as it provides that no user rights or other licence or permit granted under this Act shall exempt a person from complying with any other written law concerning the conservation and protection of the environment.¹⁰⁷ Subsequently, before one is granted user rights over a certain natural resource, they have to ensure that they are in compliance with the requisite environmental impact assessment studies.¹⁰⁸

The Act has further mandated the county governments with the management of resources, such as national reserves within their jurisdictions and the county governments have been authorized to enter into agreements on the management of the national reserves, and the management plans formulated should include provisions for the resolution of disputes that may arise from conflicts on these resources.¹⁰⁹ The foregoing provisions are useful in preventing recurrence of bio-prospecting and bio-piracy cases such as the Lake Bogoria extremophile case, where Kenya Wildlife Service sought money from a multinational for taking, patenting, cloning and selling “extremophile” microorganisms collected from lakes in Kenya.

In the late 1980s, scientists connected to Leicester University (UK) collected microorganisms living in the hot geysers of two of Kenya’s lakes. The organisms produce enzymes that were found to be great fabric softeners and “faders,” giving fabrics a stone-washed appearance popular with consumers.¹¹⁰ With assistance from scientists at the International Centre of Insect Physiology and Ecology (ICIPE), KWS launched a claim for a share of the proceeds accruing to the US multinational giant Procter & Gamble and to Genencor International BV of the Netherlands with respect to the sales of Tide Alternative Bleach Detergent and “stonewashing” material.¹¹¹

Kenya Wildlife Service maintains that the collectors never had the proper permits to take the microorganisms for commercial use in the first place. The Kenya Wildlife Service (KWS) sought a share of the hundreds of millions of dollars generated from the

¹⁰⁴ See s. 23.

¹⁰⁵ S. 22(7).

¹⁰⁶ S. 26.

¹⁰⁷ S. 27(1).

¹⁰⁸ S. 27(2).

¹⁰⁹ S. 35(3).

¹¹⁰ Heuer, S., ‘The Lake Bogoria Extremophile: A Case Study,’ 2004, pp. 8-9, available at <http://www.public.iastate.edu/~ethics/LakeBogoria.pdf> [Accessed on 16/11/2018].

¹¹¹ *Ibid.*

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sales of the popular detergent and a bleaching agent manufactured in the US whose active ingredients were acquired in Kenya illegally. The case has not yet been resolved and it is yet to be seen what will become of it.

The most serious legal issue facing bioprospecting in the global commons, areas beyond national jurisdiction internationally recognised as the shared resources of humankind, is the lack of clear rules and guidelines, since various environmental, trade, and geographically-specific agreements currently offer incomplete, ambiguous, or conflicting provisions relating to bioprospecting activities; resulting in no clear rules on ownership, access, benefit-sharing, and environmental responsibility for bioprospecting in the global commons. The result of lack of clarity and distinct gaps in the existing laws encourages bioprospecting by companies keen to exploit the fragmented legal frameworks and policies for their own commercial benefit.¹¹² Going by the foregoing provisions, it is hoped that the Act may enable Kenya effectively deal with such incidences in future, at least at the national level. However, there is required much political goodwill to see this fully implemented.

8.5 Mining Act 2016

The Mining Act 2016¹¹³ was enacted to give effect to Articles 60, 62(1)(f), 66 (2), 69 and 71 of the Constitution in so far as they apply to minerals; provide for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals and for related purposes.

The Act provides for accruing benefits in the form of financial and other benefaction to which communities in mining areas are entitled to receive from the proceeds of mining and related activities.¹¹⁴

This clarification on what entails accruing benefits ensures that the targeted population does not direct all their focus on the monetary benefits while paying little or no attention to the non-monetary forms. This may be important in averting any disputes that may arise where a community's expectations of direct financial returns are not realized. The

¹¹² United Nations Environment Programme, 'Bioprospecting in the Global Commons: Legal Issues Brief,' p. 1, available at <http://www.unep.org/delc/Portals/119/Biosprecting-Issuepaper.pdf> [Accessed on 16/11/2018].

¹¹³ Act No. 12 of 2016, Laws of Kenya (Government Printer, Nairobi).

¹¹⁴ S. 42(1); s. 47; s. 109(i); s. 115; S. 117(2)(j); S. 183, Mining Act 2016; See also Mining Act (Licence and Permit) Regulations, LN. No. 87 of 2017; Mining (Use of Local Goods and Services) Regulations, LN. No. 83 of 2017; Mining (Employment and Training) Regulations, 2017, LN. No. 82 of 2017; Mining (Use of Local Goods and Services) Regulations, LN. No. 81 of 2017;

provisions may also be a good basis for working with the investors to get more involved in corporate social responsibility activities that directly benefit communities in terms of improved social amenities and infrastructure. Indeed, the *2009 Africa Mining Vision* correctly points out that the benefits to the local community may come in various forms including revenues which accrue to the community because of its location (property rates and land rents); benefits which are the community's share of central government revenues from mining and non-income benefits such as employment for local residents; assistance to community health and educational institutions; access to the use of mine infrastructure by the general public, amongst others.¹¹⁵

8.6 The Environmental (Management and Co-Ordination) Act, 1999

The *Environmental (Management and Co-Ordination) Act, 1999*¹¹⁶ was enacted to provide the framework provisions to regulate access to genetic resources (bio-prospecting) and benefit sharing, implemented through gazettelement of *Ministerial Regulations on Access to Genetic Resources and Benefit Sharing*,¹¹⁷ and generally providing for the establishment of an appropriate legal and institutional framework for the management of the environment.

Section 3(1) thereof states that every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment. If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may take such orders, issue such writs or give such directions, as it may deem appropriate to, *inter alia*, prevent, stop or discontinue any act or omission that is deleterious to the environment; compel any public officer; to take measures to prevent or discontinue any act or omission deleterious to the environment; require that any on-going activity be subjected to an environmental audit in accordance with the provisions of this Act; compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and provide compensation for any victims of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing. Unless these

¹¹⁵ African Union, *Africa Mining Vision*, 2009, p. 23.

¹¹⁶ No. 8 of 1999, Laws of Kenya.

¹¹⁷ Legal Notice number 160.

issues are sufficiently addressed, Kenya and its people risk suffering both in the short-term and long-term in the hands of MNCs.

8.7 Community Land Act 2016

The *Community Land Act, 2016*¹¹⁸ seeks to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes.¹¹⁹ The Act defines "community" to mean an organized group of users of community land who are citizens of Kenya and share any of the following attributes—common ancestry; similar culture; socio-economic or other common interest; geographical space; or ecological space.¹²⁰ This definition is relevant in that it helps clarify the target group in case of benefits accruing from what would fall under community land and consequently avert potential conflict. This is affirmed under section 30 thereof provides that every member of the community has the right to equal benefit from community land, where equality includes full and equal enjoyment of rights of use and access. Section 35 provides that subject to any other law, natural resources found in community land should be used and managed—sustainably and productively; for the benefit of the whole community including future generations; with transparency and accountability; and on the basis of equitable sharing of accruing benefits. This provision thus requires all those charged with administration of such jointly owned resources to not ensure equitable sharing of accruing benefits but also sustainable and productive use and management of the same.

Where need for concessions arise, the Act provides that an agreement relating to investment in community land should be made after a free, open consultative process and should contain provisions on the following aspects — an environmental, social, cultural and economic impact assessment; stakeholder consultations and involvement of the community; continuous monitoring and evaluation of the impact of the investment to the community; payment of compensation and royalties; requirement to re-habilitate the land upon completion or abandonment of the project; measures to be put in place to mitigate any negative effects of the investment; capacity building of the community and

¹¹⁸ No. 27 of 2016, Laws of Kenya.

¹¹⁹ Preamble, *Community Land Act, 2016*.

¹²⁰ Community Land Act 2016, section 2.

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transfer technology to the community; and any other matters necessary for determining how local communities will benefit from investments in their land.¹²¹

The content of this provision, if fully implemented, is likely to impact positively on the community in ways that ensure that the community becomes self-sustaining as far as livelihood sustenance is concerned. It would also help in ensuring that MNCs do not take advantage of communities or the state agencies in general. However, it must be noted that for the community to benefit through the ways contemplated above, they must be willing to take up opportunities that would be brought their way by the MNCs. They must be made to understand that the expected benefits will not only come in monetary terms only and must be made aware of the various non-monetary forms that benefits may accrue to them, envisaged under the *Nagoya Protocol*. Some of the forms would only be made possible through concerted efforts from both sides, that is, the concerned community and the investor and possibly with assistance from the county or national governments.

9. Regulating MNCs

The Regulation of multinational companies operating in developing countries, presents difficulties especially with regard to extractive industries. Scholars have pointed out that demands for greater regulation have been met with demands for stronger protection. In fact, corporations have been expected to pursue more active strategies to achieve sustainable solutions to social and environmental problems, make a major contribution to development, take account of their impact on society and the environment in the ways that they do business, employ environmentally sensitive facilities; product design and production methods that reduce energy consumption and control emissions and active participation in social and humanitarian projects.¹²²

However, this has not always been the case since the MNCs have put forth a list of demands in countries where they operate. For instance, in Kenya, it has been noted that after independence, most MNCs entering Kenya were interested in import substitution rather than in export production, and they produced final consumer goods rather than intermediate capital goods. In the negotiations that preceded their entry, they demanded from the Kenya government import barriers and market protection.¹²³

¹²¹ Ibid, section 36.

¹²² Haugh, H.M. & Talwar, A., "How Do Corporations Embed Sustainability across the Organization?" *Academy of Management Learning & Education*, Vol. 9(3), pp.384–396.

¹²³ Jansen, K., "Multinational Corporations in the Political Economy of Kenya by Steven W. Langdon,"

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MNCs operating in Kenya are required to operate within the legal structure that has been established and this includes the international legal frameworks that the country is party to. Other stakeholders like the civil society play a big role in ensuring that these corporations are held accountable. In this regard, the pressures from these entities have had positive results and it can be seen that most of the MNCs have adopted sustainable practices.

In cases of violation of their obligations, the MNCs are to be held liable and this ensures that these entities are able to comply with their obligations. Challenges however usually arise in the enforcement of liability since most of these entities are not usually incorporated in Kenya. In this regard, even where judgment is entered against these entities, enforcement becomes difficult and further worsened when these entities remove their assets from the jurisdiction.

The investment agreements between MNCs and governments have been one-sided, governments give foreign companies rights without imposing responsibilities, or without even facilitating their ability to ensure that the MNCs live up to their obligations.¹²⁴ Corporations' limited liability and corporate personhood rights, must be eliminated, and they should no longer have the same rights as human beings, and should instead serve the public. Holding shareholders accountable for any harm caused to the community, employees or the environment would create socially responsible business models.¹²⁵

In Kenya, the legal framework governing the operations of MNCs is scattered in different laws with the Constitution laying the basis for this. As discussed in the preceding sections, the Constitution contains provisions meant at ensuring that these entities respect the rights of the people amongst whom they operate. Further, the Constitution has provided in Article 20 that the provisions of the Bill of Rights are applicable to all persons, including private persons. In this regard, a person claiming that their rights have been violated by these private entities can seek the enforcement of their rights in a court of law.

Several Acts of Parliament have also been enacted to provide for the manner in which these entities are to operate. Firstly, the Investment Promotions Act, 2004 (the IPA) seeks to encourage investment in the country and ensure the elimination of bureaucratic red-tapes which are usually faced by investors in the country. Under the

The Journal of Developing Areas, Vol. 17, No.4, Jul., 1983, pp. 526-528, p. 52.

¹²⁴ *Ibid*, p. 473.

¹²⁵ Makwana, R., 'Multinational Corporations (MNCs): Beyond the Profit Motive,' *op cit*.

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Act, the Kenya Investments Authority is established and tasked with the implementation of the goals of the IPA.

In order to eliminate illegal transactions by the MNCs, the Central Bank of Kenya Act (Cap 491) provides that any payments to be made outside the country by these entities must be effected through a bank that has been authorized by the CBK to ensure accountability in the transactions effected by these entities.

The *Natural Resources Benefit Sharing Bill, 2014* provides for offences that an organisation can be held liable for. An organisation which fails to furnish information that is required by the Benefit Sharing Authority under the Act or which furnishes wrongful information commits an offence and is liable for a fine. This provision seeks to ensure that the officers tasked with managing these organisations are held accountable for their actions and seeks to ensure integrity in their actions.

In order to ensure compliance with environmental regulations, EMCA provides that environmental inspections are to be conducted. In this regard, these inspections are to be conducted to determine whether corporations are in compliance with environmental requirements. The Act has thus prohibited any person from hindering or obstructing environmental inspectors in the exercise of their duties under the Act or regulations made thereunder.¹²⁶ Under the Act, it is also required that corporations carry out improvements recommended by the environmental inspector and ensure that they comply with the environmental standards that have been provided. This Act thus ensures that corporations are held accountable for any harm that they occasion on the environment and that corrective measures are adopted in case of violation.

The foregoing discussions reveal the fact that the legislation regulating MNCs are to be found in various legislations enacted in the country. The fact that the provisions regulating MNCs in the country are scattered in different legislations makes it difficult for these provisions to be effectively enforced and as such MNCs can easily evade liability in cases where they are in violation of their obligations. There exists loopholes in the national legal frameworks, and there is need to establish legally binding framework to ensure that they operate in a socially responsible manner to protect local communities and the environment.

¹²⁶ EMCA, S.137 (a).

9.1 Human Rights-Based Approach to Natural Resources Governance

The *Declaration on a Human Rights-Based Approach to Natural Resources Management*¹²⁷ which was adopted in preparation to the Rio+20 Summit in March, 2012 affirmed the interdependence between human and economic development as well as the integral nature of the earth, our home.¹²⁸ Also noteworthy, is the *1992 Rio Declaration* which places “*human beings at the centre of concerns for sustainable development, and are entitled to a healthy and productive life in harmony with nature.*” The right to a healthy environment is a human right recognized and protected by the *International Covenant on Economic, Social and Cultural Rights*, as well as in the jurisprudence of a number of national legislations, including Kenya’s.¹²⁹ According to the OECD Principles of Corporate Governance, Enterprises should respect human rights. They should have a human rights policy, conduct human rights due diligence and have legitimate processes in place for remedying actual adverse impacts where they have *caused or contributed to* those impacts.¹³⁰

The Constitution of Kenya 2010, states that the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies. Further, it states that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.¹³¹ Article 10 provides the national values and principles of governance which include, *inter alia*, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development. Read together, the foregoing constitutional provisions bind even MNCs. While engaging in natural resource exploitation they are to observe human rights.¹³² Natural resources can be used to jump-start economies and

¹²⁷ Inter-American Commission on Human Rights and African Commission on Human and People’s Rights.

¹²⁸ Preamble.

¹²⁹ See Art. 42 & 43, Constitution of Kenya, 2010.

¹³⁰ The Trade Union Advisory Committee to the OECD (TUAC) 2012, *The OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context*, Trade Union Guide, p. 2, available at <http://www.tuaoecdmguidelines.org/Docs/TradeUnionGuide.pdf> [Accessed on 16/11/2018].

¹³¹ Art. 19.

¹³² Art. 20(1) state that ‘the Bill of Rights applies to all law and binds all State organs and all persons.’

invest in the infrastructure, institutions, and quality public services needed to translate growth into human development, if managed in transparent, inclusive, and sustainable ways.¹³³

9.2 Sustainability Reporting

Sustainability reporting has emerged as a common practice of 21st-century business, in that whereas sustainability disclosure was the province of a few unusually green or community-oriented companies, today it is a best practice employed by companies worldwide.¹³⁴ Further, a focus on sustainability helps organizations manage their social and environmental impacts and improve operating efficiency and natural resource stewardship, and it remains a vital component of shareholder, employee, and stakeholder relations.¹³⁵ Indeed, sustainability reporting has been linked to a number of benefits including: better reputation; meeting the expectations of employees; improved access to capital; and increased efficiency and waste reduction.¹³⁶

Sustainability reporting provides firms with the knowledge necessary to reduce their use of natural resources, increase efficiency and improve their operational performance. In addition, sustainability reporting can prepare firms to avoid or mitigate environmental and social risks that might have material financial impacts on their business, while delivering better business, social, environmental and financial value — creating a virtuous circle.¹³⁷ For reporting to be as useful as possible for managers, executives, analysts, shareholders and stakeholders, a unified standard that allows reports to be quickly assessed, fairly judged and simply compared is a critical asset. As firms worldwide have embraced sustainability reporting, the most widely adopted

¹³³ Grynspan, R., "The role of natural resources in promoting sustainable development," Remarks for Rebeca Grynspan, Associate Administrator of UNDP on the occasion of the Opening of the 67th UN General Assembly side event on "The Role of Natural Resources in Promoting Sustainable Development" UN New York, 28 September, 2012, available at <http://www.undp.org/content/undp/en/home/presscenter/speeches/2012/09/28/rebeca-grynspan-the-role-of-natural-resources-in-promoting-sustainable-development/> [Accessed on 16/11/2018].

¹³⁴ Ernst & Young Global Limited, 'The Value of Sustainability Reporting,' available at <http://www.ey.com/US/en/Services/Specialty-Services/Climate-Change-and-Sustainability-Services/Value-of-sustainability> [Accessed on 16/11/2018].

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

framework has been the Global Reporting Initiative (GRI) Sustainability Reporting Framework.

9.3 Environmental Litigation

Environmental litigation often transcends national jurisdictions, and it has been asserted that there is need for more effective national and international dispute settlement systems for resolving conflicts.¹³⁸ Judges, public prosecutors and auditors have the responsibility to emphasize the necessity of law to achieve sustainable development and help make institutions effective.¹³⁹ In a Congress organized by UNEP, Chief Justices from around the world declared that States should cooperate to build and support the capacity of courts and tribunals, as well as prosecutors, auditors and other related stakeholders at the national, sub-regional and regional levels, to implement environmental law, and to facilitate exchanges of best practices in order to achieve environmental sustainability by encouraging relevant institutions, such as judicial institutes, to provide continuing education.¹⁴⁰

They further stated that environmental sustainability can only be achieved in the context of fair, effective and transparent national governance arrangements and the rule of law, predicated on: fair, clear and implementable environmental laws; public participation in decision-making, and access to justice and information, in accordance with Principle 10 of the *Rio Declaration*, including exploring the potential value of borrowing provisions from the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (*Aarhus Convention*) in this regard; accountability and integrity of institutions and decision makers, including through the active engagement of environmental auditing and enforcement institutions; clear and coordinated mandates and roles; accessible, fair, impartial, timely and responsive dispute resolution mechanisms, including developing specialized expertise in environmental adjudication, and innovative environmental procedures and remedies; recognition of the relationship between human rights and the environment; and specific criteria for the interpretation of environmental law.¹⁴¹

¹³⁸ UNEP, *Advancing Justice, Governance And Law For Environmental Sustainability: Rio+20 and the World Congress of Chief Justices, Attorneys General and Auditors General, 2004*, Declaration No. 1.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*, Declaration 2.

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In addition to this, they declared that environmental sustainability, can only be achieved if there exist effective legal regimes, coupled with effective implementation and accessible legal procedures, including with regard to *locus standi* and collective access to justice, and a supporting legal and institutional framework and applicable principles from all world legal traditions. Justice, including participatory decision-making and the protection of vulnerable groups from disproportionate negative environmental impacts, must be seen as an intrinsic element of environmental sustainability.¹⁴²

In the *Endorois* case, the African Commission on Human Rights interpreted the right to property as including a justiciable right to the use of land by an indigenous community without real title.¹⁴³ The Commission laid down more detailed requirements for the justification of encroachment upon property. It examined the justifiability of the state's eviction of the Endorois from their ancestral land against the criteria of proportionality, participation, consent, compensation and prior impact assessment basically derived from Article 14 of the African Charter.¹⁴⁴ It found the state in violation of the right to property, as well as the right to development for its 'disproportionate' forced removal of the community, its failure to allow effective participation or hold prior consultation with a view to secure the consent of the Endorois, the absence of reasonable benefit enjoyed by the community, the failure to provide collective land of equal value or compensation after dispossession, and the failure to conduct prior environmental and social impact assessment.¹⁴⁵ Well implemented, the recommendations contemplated by the Declaration can go a long way in empowering the national courts and international legal institutions to enforce laws against MNCs.

¹⁴² *Ibid.*

¹⁴³ *Centre for Minority Rights Development & Others v Kenya* (2009), AHRLR 75 (ACHPR 2009) (*Endorois* case), para. 287.

¹⁴⁴ *Ibid.*, para. 218 & 224-228.

¹⁴⁵ *Ibid.*, para. 238 & 281-298.

10. Conclusion

Transnational corporations are capable of taking a more proactive role in environmental protection due to their financial, managerial and technological strength; the latter includes access to clean technologies and pollution-abatement technology.¹⁴⁶ They must be closely monitored by law and policy enforcers to ensure that they abide by the law and fulfill their obligations as per the law and the agreements.¹⁴⁷ However, it is to be appreciated, as already noted herein, that host governments especially in developing countries, in their dealings with the multinationals are in a very weak bargaining position, and this is ultimately reflected in the terms of mining and petroleum agreements, particularly the ones directly touching on the fiscal regime.

Foreign direct investment is of assistance for economic growth. However, taking full advantage of the benefits of FDI requires a well-educated labor force, to promote technological diffusion and the adoption of better technologies.¹⁴⁸ The same applies to the development of natural resources. Here too, it is beneficial to have a high level of human capital,¹⁴⁹ to allow for innovation to take place, starting in the natural resources sector and spreading downstream or to other sectors.¹⁵⁰ An economy with strong institutions and protection of property rights is the best incentive for FDI.¹⁵¹

Geographical proximity and cultural affinity are thought to give regional MNCs an advantage in terms of familiarity with the operational environment and business needs in the host country. From the host country's point of view, developing country

¹⁴⁶ Gafaru, A.A., Are Multinational Corporations Compatible With Sustainable Development? The Experience of Developing Countries, Georgia Tech Center for International Business Education and Research, Working Paper Series 2007-2008, *Working Paper*, 001-07/08, p. 12.

¹⁴⁷ Looking at the role of MNCs in host countries, the UNCTAD report notes that 'through their foreign investments and global value chains, TNCs can influence the social and environmental practices of businesses worldwide for the better, although there is uneven application and a lack of standardization regarding reporting' (p. cxxxvi). The need, stresses the report, is for the promotion of investment to be tied to CSR standards, not with one impeding the other. In this regard the role of government policies and institutional frameworks is seen as pivotal by the reports' authors.

¹⁴⁸ See generally, Javorcik, B.S., 'Does Foreign Direct Investment Increase the Productivity of Domestic Firms? In Search of Spillovers through Backward Linkages,' *The American Economic Review*, Vol. 94(3), Jun., 2004, pp. 605-627.

¹⁴⁹ See Gregorio, J.D., The Role Of Foreign Direct Investment And Natural Resources In Economic Development, Central Bank of Chile, Working Papers, N° 196, Enero 2003, p. 12.; See also Borensztein, E., *et al*, 'How does foreign direct investment affect economic growth?' *Journal of International Economics*, Vol.45 (1)1 June 1998, pp. 115-135.

¹⁵⁰ *Ibid*, p. 12.

¹⁵¹ *Ibid*, p. 13.

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MNCs are seen as likely to be in possession of more appropriate technologies, with a greater potential for technology transfer – and better able to address the needs of local consumers, especially the poor.¹⁵² Good environmental governance should take into account the role of all actors that affect the environment. From governments, to NGOs, the private sector and civil society, cooperation is critical to achieving effective governance that can help move towards a more sustainable future.¹⁵³

Multinational Corporations should operate within the rule of law as envisaged by the Constitution of Kenya and respect the previously mentioned values and principles.

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¹⁵² Obuah, E.E. (ed), 'The Sub-Saharan Business Environment Report (SABER): 2011 Findings', *International Academy of African Business and Development (IAABD)*, Vol. 13, pp. 186-206, p. 201, (Peer-Reviewed Proceedings of the 13rd Annual International Conference), held at Mazagan Beach Resort 2400 El Jadida, Casablanca, Morocco, May 15-19, 2012, available at http://www.clas.ufl.edu/users/aspring/publications/Spring_2012_2012IAABD_SABER_Findings.pdf [Accessed on 16/11/2018].

¹⁵³ United Nations Environment Programme, *Environmental Governance*, *op. cit* p. 2; See also Art. 10, Constitution of Kenya.

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