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Bernard Kengni
Ng'ani Chrisphine Ligadho
Sunday Bontur Lugard
Hannah Wamuyu
Theresa Uzoamaka Akpoghome
Theophilus Chinedu Nwano
Rafaa Mazrui
NKULU MUKUBU LUNDA Johnny
Nyangoma Catherine Atwine
Ninette Nyalyen Ninyio
Naomi Gichuki

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Schriftleitung: RA Prof. Dr. Hartmut Hamann, hamann@hamann-legal.de

Inhalt

FOREWORD

The articles presented in this volume are the second part of the results of the “Leaders for Justice Workshop” which took place in Entebbe, Uganda, from the 26th to 27th July 2024. The workshop, which was organised by the Rule of Law Program for Sub-Saharan Africa of Konrad Adenauer Stiftung, brought together lawyers from DR Congo, Ghana, Kenya, Nigeria, Rwanda, South Africa, South Sudan, Tanzania and Uganda to discuss current issues of investments in Africa.

The workshop focused on “Investments in Africa in the 21th Century, Key Legal Issues, Challenges und Prospects”. As in 2023 also this year four post-graduate students from the Tanzanian-German Centre for Eastern African Legal Studies participated and shared their thoughts.

In this “Leaders for Justice Workshop” the importance of a reliable legal framework for investments in Africa was debated.

Most of the participants have professional experience as advocates in private practice, in companies and institutions or as judges and lecturers. Very vivid debates between participants from West African and East African countries and from South Africa helped to identify challenges, possible solutions and best practices.

The discussion that was based on presentations by all the participants and which subsequently enriched the articles herein, sought

- to identify best practices and to learn from different national experiences with investments in Africa;
- to encourage the search for African solutions and to profit from lessons learnt in different African regions towards the attainment of a better framework for investments;
- to discuss measures to reduce corruption.

This volume presents the second part of the participants’ insights in written form either as articles or as reports.

Bernard Kengni, South Africa, presented on “Balancing Investments and Health and Safety in African Extractive Communities in the 21st Century: A Legal Analysis”. *Ng’ani Chrisphine Ligadho,* Kenya*,* analyses “The Impact of Corruption on Foreign Direct Investment in Kenya: Trends and Legal Solutions”. *Sunday Bontur Lugard* from Nigeria examines “Framing and enabling legal and regulatory environment to attract private climate financing in the Sub-Saharan Africa”. *Hanna Wamuyu*, Kenya, shared insights in “Investment in Renewable Energy in Kenya: Key Legal Issues, Challenges and Prospects”. *Rafaa Mazrui*, Kenya, presented on “The Relationship between Domestic Investment Laws and International Investment Laws in the Flow of Foreign Direct Investments”. The article of *Nkulu Mukubu Lunda Johnny*, DR Congo*,* is titled “Commercial Mediation as a Remedy for Corrupt Justice in Securing the Business Climante in Sub-Saharan Africa”. *Nyangoma Catherine Atwine,* Uganda*,* gave her presentation on “Assessing the Role of Anti

Corruption Legal Systems in Fostering Investment in Uganda". *Ninette Nyalyen Ninyio*, Nigeria, writes on "Foreign Direct Investment in Nigeria: Challenges and Prospects". *Naomi Gichuki*, Kenya, explained "The Impact of Money Laundering and Illicit Financial Flows on Investment in Kenya". Following the workshop *Theresa Uzoamaka Akpoghome and Theophilus Chinedu Nwano*, Nigeria, took up the discussion and wrote an article on "Evaluating the legal framework on sand mining in Nigeria: Challenges and Prospects".

Also the articles published in this second volume covering the workshop in Entebbe demonstrate the willingness of a young generation of African lawyers to share their thoughts and to engage in the future of their continent.

Once again special thanks go to Ben Nyabira and Rafaa Mazrui at the KAS Rule of Law Program, for their commitment and input.

Hartmut Hamann — Stefanie Rothenberger

Balancing Investments and Health and Safety in African Extractive Communities in the 21st Century: A Legal Analysis

Bernard Kengni*

Abstract

The African extractives sector, encompassing mining, oil and gas extraction, presents a unique set of health and safety legal concerns. These concerns affect various sectors of society, including communities near the extractives industry. Communities living near extractive operations in Africa face several specific health and safety legal concerns such as respiratory ailments resulting from air and water pollution, and land contamination. This is often a result of poor waste management practices, inadequate regulations and limited access to information, amongst others.

This paper highlights how and why managing those health and safety concerns presents legal challenges for investment in the extractives sector of Africa. Using the examples of South Africa, DRC and Nigeria, the paper highlights why and how such challenges can be resolved or mitigated.
Keywords: Health, Safety, Extractives, Investment, Communities, Legal Issues

1. Introduction

Several African countries have continuously relied on their extractive industry for economic development for decades. As a result, investment in the extractive sector in Africa has steadily climbed over the years. As an example, exploration budgets for Africa "continued to grow year over year in 2022, maintaining their 10 % share of the global budget".[1] S&P Global reveals that during the same period, the total budget of South African companies grew by an estimated $8 million.[2] This demonstrates a growing appetite for investing in extractive activities. Such growing appetite for investment is clearly spelt out in a World Bank report revealing that the production of certain minerals, including "graphite, lithium and

* LLB, LLM, Ph.D.
Research Affiliate, NRF/DST SARChI Research Chair: Mineral Law in Africa; Department of Private Law, University of Cape Town.
Lecturer, Department of Public Law, University of the Western Cape.
Bernard.Kengni@uct.ac.za.

1 *S&P Global Market Intelligence*, Africa – mining by the numbers, 2022 (2022) https://www.spglobal.com/marketintelligence/en/news-insights/research/africa-mining-by-the-numbers-2022 (accessed on 20 July 2024).

2 Ibid.

cobalt, could increase by nearly 500 % by 2050".[3] One of the main drivers behind the anticipated increase in production is the growing demand for clean energy technologies to facilitate the energy transition.

Investment in the African extractives industry should be good news as it entails development. This is even more crucial considering the fact that no African country is qualified as "developed". Even worse, several countries on the continent lack basic infrastructure, including roads, healthcare and educational facilities necessary for economic and personal development.[4] There is also a growing lack of necessities such as food and energy security which are key for improved livelihoods.[5] Investments in the extractive industry on the continent are expected to contribute to alleviating the above concerns.

However, such investments also signal the beginning of challenges such as health and safety concerns which often become constant threats to the lives and wellbeing of communities living close to extractive sites. These concerns arise because of environmental pollution caused by mining and also often largely due to flaws in the regulatory framework meant to mitigate the environmental impacts of extractive activities.[6] The regulatory framework can render the surroundings of the extractive industry safer for nearby communities or contribute to making it worse for communities and investors.

This paper aims to explain why and how the law should serve as a tool to enable investments in the extractive industry in Africa in the 21st century in ways that are safer for nearby communities. The paper also analyses how managing health and safety concerns presents legal challenges for investment in the extractives sector of Africa. Hence, using the examples of South Africa, the Democratic Republic of Congo (DRC) and Nigeria, the paper highlights the impacts of extractive activities on communities' health and wellbeing. Further, the paper analyses health and safety legal issues associated with the African extractive industry and how such issues can be mitigated to enhance perceptions *vis-à-vis* future investments in the extractive industry.

2. Background

In many resource-rich countries in Africa, the discovery and extraction of mineral resources often signal the beginning of much-awaited development, which often comes with consequences that leave huge societal scars. The extractives industry's direct and indirect

3 *Kirsten Hund, Daniele La Porta, Thao P Fabregas, Tim Laing and John Drexhage*, Minerals for climate action: The mineral intensity of the clean energy transition (World Bank 2023) 12.

4 *Uche Osakede*, 'Infrastructure and health system performance in Africa' (2022) 20 Managing Global Transitions 376–377.

5 *Philbert Mperejekumana, Lei Shen, Shuai Zhong, Mohamed S Gaballah and Fabien Muhirwa*, 'Exploring the potential of decentralized renewable energy conversion systems on water, energy, and food security in africa' (2024) 315 Energy Conversion and Management 118757, 2–3.

6 *MA Hermanus*, 'Occupational health and safety in mining-status, new developments, and concerns' (2007) 107 Journal of the Southern African Institute of Mining and Metallurgy 531, 531 & 536.

polluting effects on people's health caused by mine wastes, oil spillage and gas flaring are one such consequence.[7]

In South Africa, about 1.6 million people (mostly poor and/or historically marginalised) live on or directly next to mine dumps, where issues such as acid mine drainage and mine dust are permanent health hazards.[8] A study found a higher level of asthma symptoms like wheeze and rhinoconjunctivitis in children living near mine dumps (21.1 % and 32.9 %) compared to studies conducted in cities with less mining activities like Cape Town (20.3 % and 20.7 %) and Polokwane (18.0 % and 16.9 %).[9] A case-control study by Brusselen et al on the impacts of mining in Lubumbashi (DRC) revealed that babies with "birth defects were more likely to have been fathered by men with a mining-related job".[10] Communities around the extractives sector in Africa are thus constantly at risk of contracting diseases (at times transmissible) besides the fact that they face severe safety issues, including the collapse of waste tailing dams.[11]

Another study in Lubumbashi indicated that exposure to arsenic and cadmium is linked to cases of pre-eclampsia (hypertension) in women and the alterations of sperm in men living in mining areas.[12] In Nigeria, oil spillage and gas flaring are associated with health issues like insomnia, cancer, headaches, and respiratory ailments.[13] Despite being well documented, efforts to avoid or mitigate these health concerns remain inadequate and, in some instances, non-existent.

Healthcare facilities catering for workers in the African extractives sector and surrounding communities are either non-existent or at times poorly equipped and shut down upon

7 *Jonathan Gamu, Philippe Le Billon and Samuel Spiegel*, 'Extractive industries and poverty: A review of recent findings and linkage mechanisms' (2015) 2 The Extractive Industries and Society 162, 163 and 165.

8 *Bernard Kengni and Vusumuzi Nkosi*, 'Analysis of the current legal framework protecting the health of communities near gold mine tailings in South Africa' (2022) 37 Southern African Public Law 19 pages, 10.

9 *Vusumuzi Nkosi*, How mine dumps in South Africa affect the health of communities living nearby (2018) *The Conversation* https://theconversation.com/how-mine-dumps-in-south-africa-affect-the-health-of-communities-living-nearby-77113#:~:text=There%20was%20a%20higher%20prevalence,(18.0%25%20and%2016.9%25) (accessed 31 August 2024).

10 *Daan Van Brusselen, Tony Kayembe-Kitenge, Sébastien Mbuyi-Musanzayi, Toni Lubala Kasole, Leon Kabamba Ngombe, Paul Musa Obadia, Daniel Kyanika wa Mukoma, Koen Van Herck, Dirk Avonts and Koen Devriendt*, 'Metal mining and birth defects: a case-control study in Lubumbashi, Democratic Republic of the Congo' (2020) 4 The Lancet Planetary Health e158, e159.

11 *Lochner Marais, Deanna Kemp, Phia van der Watt, Sethulego Matebesi, Jan Cloete, Jill Harris, Michelle Ang Li Ern and John R Owen*, 'The catastrophic failure of the Jagersfontein tailings dam: an industrial disaster 150 years in the making' (2024) International Journal of Disaster Risk Reduction 104585, 4.

12 *Van Brusselen and others*, note 11, e165-e166.

13 *Nkemdilim Obi, Phillip Bwititi and Ezekiel Nwose*, 'Study proposal of the impact of gas flaring on health of communities in Delta state Nigeria' (2021) 7 International Journal of Scientific Reports 468, 471.

decommissioning of projects.[14] This exacerbates the well-being of workers and community members who contract diseases related to the sector's activities and poor environmental rehabilitation. These issues are a consequence of several obstacles, including legal challenges discussed below.

3. Current legal challenges

Health and safety remain a major concern in communities living around the extractives industry in African countries such as South Africa, the DRC and Nigeria. “Top-down” decision-making processes on mining or production rights and too little regulatory consideration given to health issues suffered by workers and communities who live near the mines and oil infrastructure are part of the problem.[15] The health and well-being of the workers and communities that must absorb the negative externalities of mining and petroleum are thus often overlooked to meet consumer societies’ demands for raw minerals. The lack of consideration is either a result of a commission or an omission, as explained below.

3.1. Limited law-making

One of the factors fuelling health and safety concerns is the fundamental flaws in the regulatory and policy frameworks across Africa. South Africa has the Mine Health and Safety Act (MHSA) which only applies to the South African mining industry. Hence, the MHSA is designed solely to govern occupational health and safety standards on mining sites.[16] Such standards range across various aspects, including risk assessments, protective equipment, emergency preparedness, and measures to mitigate the impact of hazardous substances.[17] The MHSA also provides for the monitoring, screening and mitigation of ailments induced by mining activities and their impacts on the environment.[18] Consequently, the effects of the MHSA are unlikely to be felt in mining communities. Hopefully, monitoring, screening and mitigation efforts can help, to an extent, to limit the rate of illnesses transmitted by mine workers to community members.

Similarly, in the DRC and Nigeria frameworks dedicated to health and safety in the extractive communities are simply lacking. In Nigeria, the Mineral Oils (Safety) Regulations

14 *Fabien Muhirwa, Lei Shen, Ayman Elshkaki, Hubert Hirwa, Gloriose Umuziranenge and Kgosietsile Velempini*, 'Linking large extractive industries to sustainable development of rural communities at mining sites in Africa: Challenges and pathways' (2023) 81 Resources Policy 103322, 2 and 10.

15 *George Atisa, Aziza Zemrani and Mathew Weiss*, 'Decentralized governments: local empowerment and sustainable development challenges in Africa' (2021) 23 Environment, Development and Sustainability 3349, 3354.

16 MHSA, s1.

17 Ibid.

18 Ibid, preamble.

and the Petroleum (Drilling and Production) Regulations provide for improved health and safety standards in the oil and gas industry.[19] These regulations do not apply to health and safety concerns in nearby communities for obvious reasons, including the fact that the regulations are merely designed to enforce occupational health and safety standards in the Nigerian oil and gas industry. Similarly, in the DRC there is no instrument designed to address health and safety issues arising as a result of mining and its adverse effects on mining communities. Legal instruments such as the Congolese Mining Code simply mandate mine operators to pursue transparent health and safety standards by publishing their safety instructions concerning the specific conditions of their activities.[20]

Though communities are likely to face similar adverse health and safety effects associated with extractive activities,[21] such effects in the selected countries are mostly catered for under legal instruments different from those applicable to similar issues faced by workers in the sector. These include legislation relating to environmental protection[22] and public health[23]. The major concern with such legislation is their inability to prevent or properly mitigate health and safety issues resulting from extractive activities as they are not intentionally and specifically designed to address those issues. This is mainly because extractive communities face unique health and safety challenges compared to other communities.[24] For example, these challenges differ significantly from common public health concerns often observed in communities that are beyond the reach of the negative impacts of extractive activities.[25] Thus, the current "*one-size-fits-all*" approach contributes to the ineffectiveness of the existing legal framework in resolving health and safety issues in communities affected by extractive activities.

The ineffectiveness highlighted above is further exacerbated by limited implementation, as explained below.

19 Mineral Oils (Safety) Regulations, s7.

20 Article 210 of the Mining Code.

21 *Brianna M Eiter, Zoë J Dugdale, Tashina Robinson, Carol T Nixon, Heather Lawson, Cara N Halldin and Casey Stazick*, 'Occupational Safety and Health of Women in Mining' (2023) 32 Journal of Women's Health 388, 391.

22 National Environmental Management Act 107, 1998 (South Africa); National Policy on the Environment revised 2016 and Law No 11/009 on Environmental Protection in the Democratic Republic of Congo.

23 National Health Act, 2014 (Nigeria); National Health Act 61, 2003 (South Africa) and Law No. 18/035, 2018 establishing the fundamental principles relating to the organization of Public Health in the Democratic Republic of Congo.

24 *Freek Cronjé, Suzanne Reyneke and David Van Wyk*, 'Local communities and health disaster management in the mining sector' (2013) 5 Jàmbá: Journal of Disaster Risk Studies 1, 2.

25 *Andrea Leuenberger, Mirko S Winkler, Olga Cambaco, Herminio Cossa, Fadhila Kihwele, Isaac Lyatuu, Hyacinthe R Zabré, Andrea Farnham, Eusebio Macete and Khátia Munguambe*, 'Health impacts of industrial mining on surrounding communities: Local perspectives from three sub-Saharan African countries' (2021) 16 PLoS One e0252433, 15.

3.2. Poor implementation

There are frameworks, as indicated above, that can to a limited extent contribute towards mitigating health and safety issues in extractive communities. However, those frameworks often fail woefully to mitigate the issues effectively. Limited implementation is identified as one of the major reasons behind the failure.

First, limited implementation is characterised by poor monitoring and inspection of health issues in extractive communities. Thus, to an extent, poor legal implementation for better health and safety standards in those communities can be attributed to poor monitoring and inspection.[26] Poor monitoring and inspection of health and safety hazards create a significant knowledge gap.[27] As a result, the regulator often lacks critical information on existing health and safety issues, as well as on their perpetrators, which would enable the identification of areas where implementation must be enhanced.[28] Monitoring and inspection are essential to enable the observation and identification of areas where existing legal frameworks have fallen short of their objectives. Failing this, implementation is likely to fail as seen in the Niger Delta where various sources point to the fact that limited implementation is also a result of poor or no monitoring,[29] as well as the use of outdated monitoring methods.[30]

Second, the issue of poor monitoring is exacerbated by a lack of adequate facilities. These include healthcare centres and facilities designed to gather critical data on health and safety issues affecting extractive communities. Thus, communities close to extractive activities in South Africa, Nigeria and the DRC often lack access to well-equipped health facilities capable of attending to health issues common to such areas.[31] This is attributed to poor implementation as laws and policies relating to health concerns in those countries have failed to make special provisions for the unique health and safety conditions that confront

26 *Dou Shiquan, Franklin Amuakwa-Mensah, Xu Deyi, Chen Yue and Cheng Yue*, 'The impact of mineral resource extraction on communities: how the vulnerable are harmed' (2022) 10 The Extractive Industries and Society 101090, 2.

27 Ibid 10; *Xavier Takam Tiamgne, Felix K Kalaba and Vincent R Nyirenda*, 'Mining and socio-ecological systems: A systematic review of Sub-Saharan Africa' (2022) 78 Resources Policy 102947, 13.

28 *Tiamgne and others*, 'Mining and socio-ecological systems: A systematic review of Sub-Saharan Africa' 13.

29 *Kelly Bryan Ovie Ejumudo*, 'Air Pollution and Health Challenges in the Niger Delta: Desirability of a Collaborative Policy and Action' (2011) Editorial Board 162, 185; *Daniel Raphael Ejike Ewim, Ochuko Felix Orikpete, Temiloluwa O Scott, Chisom N Onyebuchi, Amanda O Onukogu, Chinedum Gloria Uzougbo and Chiemela Onunka*, 'Survey of wastewater issues due to oil spills and pollution in the Niger Delta area of Nigeria: a secondary data analysis' (2023) 47 Bulletin of the National Research Centre 116, 9–10; *Eucharia Oluchi Nwaichi and Justice Obinna Osuoha*, 'Has the National policy on environmental pollution control in Nigeria been neglected in the Niger Delta region? An update' (2022) 24 Environment, Development and Sustainability 12494, 12496.

30 *Ewim and others* note 30, 7.

31 *Muhirwa and others* note 15, 2 and 10.

those communities. Therefore, when it comes to implementing such laws and policies, decision-makers seldom take into account the fact that health and safety issues in extractive communities differ significantly from those often observed in other communities.[32] As such public health standards are generally applied in a blanket manner. This implies that healthcare facilities, which are sometimes very far away from those communities, are not as equipped as health facilities on extractive sites to handle health and safety issues associated with extractive activities.[33] It is crucial to have well-equipped facilities because such issues are rarely experienced in areas less or not affected by extractive activities.

Third, limited financial and human resources are another factor that slows down the required legal implementation to enhance health and safety in extractive communities. In terms of financial resources, there is often a chronic lack of funds to finance monitoring and evaluation in areas adversely affected by extractive communities. For example, most South African municipalities lack the necessary finances to fund the monitoring of the impacts of mining in communities, even with support from the national government.[34] As a result, the applicable legal framework cannot be implemented as intended.

Similarly, the legal framework is not implemented as intended due to limited human resources. In the DRC, for example, health centres are often staffed by community health workers. These workers are community members trained to provide basic care under the supervision of nurses.[35] The challenge with unskilled health workers is that they lack the required ability to properly attend to affected community members and diagnose the major health challenges that extractive community members battle with, such as respiratory ailments and congenital disorders. Another problem is the lack of proper oversight from the government departments responsible for public health. This is due to limited personnel or a lack of skills necessary to discharge their functions effectively.[36]

Legal implementation is doomed to fail without sufficient financial and human resources, even with the best-crafted and inclusive legal frameworks. Even with proper implementation, the legal framework may still fail to achieve its intended objectives due to a lack of compliance as explained below.

32 *Nkosi* note 10.

33 *T Nyirenda, D Mhura, S Mashange, M Mhura and V Sithole*, 'Determine the Capacity of Mine Health Facilities to Accommodate Surrounding Communities' (2022) 10 and 47.

34 *Angelien Meggersee and Sevias Guvuriro*, 'Economic Sustainability of Small Mining Towns: A Case Study in South Africa' (2023) 13 SAGE Open 21582440231218583, 10.

35 *Jean Mukulukulu Etshumba, Dosithée Ngo Bebe, Jacques Emina and Célestin Nsibu Ndosimao*, 'Profiles of Community Care Sites and provider Community Health Workers: A Case study at Gombe Matadi, Kenge and Kisantu Rural Health Zones in the Democratic Republic of Congo' (2024) 16 Global Journal of Health Science 63, 68–69.

36 *Rosine N Bigirinama, Samuel L Makali, Mamothena C Mothupi, Christian Z Chiribagula, Patricia St Louis, Pacifique L Mwene-Batu, Ghislain B Bisimwa, Albert T Mwembo and Denis G Porignon*, 'Ensuring leadership at the operational level of a health system in protracted crisis context: a cross-sectional qualitative study covering 8 health districts in Eastern Democratic Republic of Congo' (2023) 23 BMC health services research 1362, 8–10.

3.3. *Lack of compliance*

While the poor management of health and safety issues in extractive communities in South Africa, Nigeria, and the DRC can be attributed to poor implementation, it is also a result of a lack of compliance with the rule of law. Some extractive companies, often driven by profit fail to give health and safety the attention it deserves, especially in vulnerable communities. Such failure is due to three main factors, as elaborated below.

First, the high costs of implementing and maintaining compliance measures are significant burdens that often result in further economic pressures. This is because extractive companies depend highly on highly skilled professionals and experts to facilitate proper compliance with health and safety guidelines.[37] Such professionals and experts include compliance officers, environmental health and safety managers, legal advisors, internal auditors and risk managers. These personnel are generally hired to handle compliance on extractive sites. Despite the high cost associated with acquiring their services, the eradication of health and safety concerns on sites remains farfetched as observed in the three countries selected for this paper.[38] Therefore, extending resources to cover health and safety in neighbouring communities is an unsurmountable task for many companies. Consequently, some companies may prioritise short-term financial gains over long-term sustainability in affected communities.

Second, besides economic pressures, regulatory complexity often impedes compliance, especially where legal frameworks lack clarity. The regulatory environment can be very confusing are times and keeping up with and understanding all the requirements becomes difficult, especially for smaller companies.[39] The lack of clear legal frameworks on health and safety in extractive communities, as explained above, means that companies operating in the extractives space must navigate through various pieces of legislation or government policies to figure out the right steps to follow. This can be very confusing and thus a barrier to effective compliance, especially when laws and policies on environmental protection and public health in the selected countries are not designed to specifically address most health and safety issues that are unique to communities adversely affected

37 *AC Atkins and M Ritchie*, Improving board assurance of technical and operational risks in mining (Australian Centre for Geomechanics 2019).

38 *Alex G Stewart*, 'Mining is bad for health: a voyage of discovery' (2020) 42 Environmental geochemistry and health 1153, 1157; *Christian Ahadi Irenge, Parfait Kaningu Bushenyula, Emmanuel Bayubasire Irenge and Yves Coppieters*, 'Participative epidemiology and prevention pathway of health risks associated with artisanal mines in Luhihi area, DR Congo' (2023) 23 BMC public health 121, 2; *Chizubem Benson, Christos Dimopoulos, Christos D Argyropoulos, Cleo Varianou Mikellidou and Georgios Boustras*, 'Assessing the common occupational health hazards and their health risks among oil and gas workers' (2021) 140 Safety science 105284, 2.

39 *R Alberts, JA Wessels, A Morrison-Saunders, MP McHenry, A Rita Sequeira, H Mtegha and David Doepel*, 'Complexities with extractive industries regulation on the African continent: What has 'best practice'legislation delivered in South Africa?' (2017) 4 The Extractive Industries and Society 267, 4.

by extractive activities.[40] This is also often exacerbated by a chronic lack of enforcement due to poor implementation, as explained in the previous section. As a result of insufficient enforcement of environmental and safety regulations, some extractive companies in South Africa, Nigeria and the DRC tend to take shortcuts or ignore affected communities' plight altogether.[41]

Third, the nature of extractive activities presents significant operational challenges. This is because extractive operations are inherently hazardous and environmentally impactful. Thus, balancing productivity with health and safety arising from environmental concerns can be challenging.[42] This is exacerbated by technological limitations slowing down the uphill battle against extractives-related health and safety issues in communities in the selected countries. Research points to the fact that the technology required to meet regulatory standards in that regard is very costly.[43]

While such challenges are at times be beyond the control of extractive companies, some companies may use them as excuses while it may be their corporate culture not to prioritize environmental, health and safety compliance in affected communities. This is prevalent in companies lacking ethical leadership.[44]

This paper argues that lack of compliance will continue to affect investment in extractive activities negatively in the selected countries. More and more communities are resisting extractive activities in their areas as observed in all three countries where there have been several demonstrations against activities that they qualify as deadly.[45] This may be exacerbated by existing and potential environmental-friendly investors either avoiding investing in or withdrawing their investments from the sector as they become aware and develop sympathy for communities feeling the pervasive effects of extractive activities the

40 *Edward T Bristol-Alagbariya*, 'Costs and benefits of energy and major natural resources extractive industrial operations on communities: Spotlight on host communities development regime in Nigeria's Petroleum Industry Act, 2021' (2023) 11 International Journal of Development and Economic Sustainability 1, 10, 28–29.

41 *Muhirwa and others*, note 15, 2.

42 *Oscar Rikhotso, Thabiso John Morodi and Daniel Masilu Masekameni*, 'Health risk management cost items imposed by Occupational Health and Safety Regulations: A South African perspective' (2022) 150 Safety Science 105707, 2.

43 *Oluranti Agboola, Damilola E Babatunde, Ojo Sunday Isaac Fayomi, Emmanuel Rotimi Sadiku, Patricia Popoola, Lucey Moropeng, Abdulrazaq Yahaya and Onose Angela Mamudu*, 'A review on the impact of mining operation: Monitoring, assessment and management' (2020) 8 Results in Engineering 100181, 7–8.

44 *Livhuwani Muthelo, Tebogo Maria Mothiba, Nancy Rambelani Malema, Masenyani Oupa Mbombi and Peter Modupi Mphekgwana*, 'Exploring occupational health and safety standards compliance in the South African mining industry, Limpopo Province, using principal component analysis' (2022) 19 International journal of environmental research and public health 10241, 1–2 and 9.

45 Ruth O Ogunnowo, 'An evaluation of natural resources extraction and host communities' reaction in Nigeria and South Africa 2005-2015', North-West University (South Africa) 2022) 7 and 61–62.

most.[46] Nonetheless, investment in extractives can become more acceptable to communities if the law serves as a tool to enable sustainable activities.

4. Community health and safety-friendly legal framework

South Africa, Nigeria and the DRC, as developing economies, are desperate to enhance economic development. Extractive activities contribute significantly to the gross domestic product of each country.[47] Therefore, promoting investment in the respective countries' extractive sector is crucial. However, as explained above, such investments are not always welcome due to their negative effects on community health and safety.

This paper argues that the rule of law can enable more sustainable and acceptable investments in the extractives sector in the 21st century. The first step requires state decision-makers to seek to understand the actual health impacts of extractives on communities. This requires commissioning more research, monitoring and observation to establish the actual impacts of extractive activities on communities and the reasons behind their dissatisfactions. The process must also engage with affected communities as they have first-hand experience with the highlighted health safety issues. The likely outcome of such an exercise is the shifts in thinking and approaches regarding health and safety issues associated with extractive activities and their impact on community wellbeing.[48]

Understating the health and safety issues in extractive communities will equally enable decision-makers to identify existing regulatory and policy gaps. It will also enable the identification of the causes and drivers of poor implementation and compliance which have so far been barriers to sustainable health and safety in extractive communities. This will most likely require the amendment of existing legislation or the enactment of new ones to address the existing gaps, considering the fact that legal frameworks in the three countries do not specifically address extractives-related health and safety issues in communities. It is also essential to strengthen state functionaries' capacity to close the law and policy gaps by promoting political will and hiring required staff with appropriate training or skills.[49] It is anticipated that a clear and inclusive legal framework can reduce health and safety vulnerabilities.

It must, however, be highlighted that the effectiveness of regulation in the extractives sector depends on the extent to which companies comply. While many companies evade

46 *Kwesi Amponsah-Tawiah and Justice Mensah*, 'Exploring the link between corporate social responsibility and health and safety in the mines' (2015) 6 Journal of Global Responsibility 65, 66.

47 *Makhura B Rapanyane*, 'China's involvement in the Democratic Republic of Congo's resource curse mineral driven conflict: an Afrocentric review' (2022) 17 Contemporary Social Science 117, 120–120 and 126.

48 *W Travis Selmier II and Aloysius Newenham-Kahindi*, 'Communities of place, mining multinationals and sustainable development in Africa' (2021) 292 Journal of cleaner production 125709, 2 and 7.

49 Ibid 7.

compliance, research shows that compliance can attract better returns for companies and their investments. For example, if companies extend their health and safety policies to neighbouring communities they can expect reductions in illness rates.[50] This is because workers, especially in the mining industry, come from the same communities. As a result, illnesses that start or are contracted in neighbouring communities can end up on the extractive sites. Thus, investments in health and safety measures to enhance compliance on sites and in communities can result in long-term cost savings.[51] Another way to improve compliance could be upgrading infrastructure and acquiring technology to monitor and address health and safety concerns timely.[52] This has the potential to reduce issues such as childhood mortality, improve public infrastructure and increase the wealth index and thus render investment in extractives more acceptable.[53] This is possible since vulnerable communities and society will perceive investments in extractives as beneficial and not problematic.

5. Conclusion

As discussed in this paper, investment in the extractives sector in South Africa, Nigeria and the DRC is crucial for economic development. However, the paper finds that extractive activities are a major burden, especially to extractive communities that battle with various forms of health issues caused by environmental pollution and degradation resulting from extractive activities. Part of the problem is the flaw in the legal framework. Particularly, no framework caters to health and safety in extractive communities specifically. As a result, health and safety concerns in such communities can only be addressed through legislative frameworks meant generally for environmental protection and public health in general, despite the fact that those communities face unique challenges. This paper further finds that even those legislative frameworks fall short of mitigating health and safety problems in affected and vulnerable communities. The main reasons are poor implementation by respective governments and lack of compliance by the extractive companies that are the main culprits.

To address the problem and boost the tolerability of investment in extractive activities in the selected countries, this paper has argued that countries must take the necessary steps to understand the magnitude of the health and safety challenges affecting vulnerable communities. The paper also finds that closing legal and policy gaps through reforms, law-making and political will are crucial to resolve or at least mitigate the issues much

50 *Cronjé and others*, note 25, 9.

51 *Victoria Shahly, Ronald C Kessler and Ian Duncan*, 'Worksite primary care clinics: a systematic review' (2014) 17 Population health management 306, 309–310.

52 *Guillaume Peterson St-Laurent and Philippe Le Billon*, 'Staking claims and shaking hands: Impact and benefit agreements as a technology of government in the mining sector' (2015) 2 The extractive industries and society 590, 591 and 593.

53 *Van Brusselen and others*, note 11, e159.

better. However, these steps are most likely to bear fruits only if extractive companies take the necessary measures to extend their health and safety standards to neighbouring. In so doing investment in extractive activities could attract favourable perceptions pending when South Africa, Nigeria and the DRC will be ready to transition completely from dependence on minerals and fossils.

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The Impact of Corruption on Foreign Direct Investment in Kenya: Trends and Legal Solutions

Ng'ani Chrisphine Ligadho*

ABSTRACT

Corruption significantly hampers foreign direct investment (FDI) in Kenya, despite the government's attempts to address it. This paper examines the impact of corruption on FDI in Kenya, highlighting the trends, legal framework, and effectiveness of anti-corruption strategies. The study finds that corruption has a negative impact on FDI, and that the legal framework in place is robust but ineffective due to political interference, inadequate resources, and lack of independence among anti-corruption bodies. Notably, corruption often originates within government structures and involves government officials, further complicating anti-corruption efforts. The paper recommends a multi-faceted approach to combating corruption, including securing independence for anti-corruption bodies, allocating adequate resources, building a culture of transparency, and increasing cooperation between stakeholders. By addressing corruption, Kenya can attract more FDI, promote economic growth, and achieve sustainable development

INTRODUCTION

Corruption remains a significant challenge in Kenya, as in Sub Saharan Africa. Despite various anti-corruption strategies over the years, the issue persists. It has negatively impacted various sectors including socio-economic transformation, freedom, fundamental rights and the national security.[1] Foreign Direct investment is among the sectors critically affected by corruption. International corporations often establish themselves through various means in Kenya including joint ventures, acquisition of Kenyan companies, creation of a new wholly owned subsidiary or the operation of a business in Kenya.[2] Such investments are essential in enhancing economic growth in developing countries such as Kenya. Improvements such as enhanced skills, better technology, trade efficiency, increased capital, linkages for small and medium enterprises and increasing markets for supply are some of the key benefits

* Author is an advocate of the High Court of Kenya, LL.M candidate – University of Dar es Salaam. LL.B – The University of Nairobi, School of Law, with a postgraduate diploma from the Kenya School of Law.

1 *Jayalo, Okore Jack*. Strengthening the Regulatory and Institutional Framework in Kenya to Curb Corruption in Foreign Direct Investment. MS thesis. University of Pretoria (South Africa), 2021.

2 *Moran, Theodore*. Foreign direct investment. The Wiley-Blackwell Encyclopedia of Globalization, 2012, pp. 1–9.

of foreign direct investment.[3] Kenya has failed to harness these benefits to a great extent due to the incessant corrupt practices witnessed within the FDI. Corruption is a global challenge, however, for developing countries it has a colossal negative impact. Any gains from FDI crucial for national development projects often find their way to private pockets.[4]

While corruption generally impedes reaping the benefits of FDI, some studies such as Quazi, Vemuri & Soliman (2014) through the *helping hand hypothesis* suggests that corruption enhances FDI inflows within the continent.[5] Since the regulatory framework on corruption in Africa is largely weak, it facilitates Foreign Direct Investment by greasing the wheels of commerce.[6] However, this should not be viewed in an isolated manner since other factors including economic freedom, infrastructure, effective governance, and market size among others also impact FDI.[7] Contrastingly, Guha et al., (2020) states that corruption in developing countries essentially muddles implementing policies instituted to attract FDI.[8] Such disruption of policies is likely to lower FDI inflows. However, countries that had an annual GDP growth of more than 6 % experienced an increased inflow of FDI even where there was corruption. International companies were willing to turn a blind eye to corruption where there was a high economic growth rate.[9]

Shakib H. (2016) diagnoses trends outside and within the continent and concludes that with a 1 % decrease in corruption, countries increase FDI inflows by up to 12 %.[10] Apart from this, Thede & Karpaty (2023) find that foreign investors who had operated in corrupt systems often find it easy to mitigate the effects of corruption in a new corrupt environment.[11] As such, corruption will not hinder the entry of multinational companies having past corruption experiences.[12] The above variances, however, have little impact on the over-

3 *Ateng, Benson, and Robert Arunga*. "Constraints to Foreign Direct Investment Inflows To Kenya: Stakeholders'perspective." International Journal Of Education And Research 5, No. 10 (2017): 1–10.

4 Jayalo (n1).

5 *Cheung, Yan-Leung, Raghavendra Rau, and Aris Stouraitis*. "The Helping Hand, The Lazy Hand, Or The Grabbing Hand? Government Shareholders in Publicly Listed Firms In China." (2007).

6 *Quazi, Rahim, Vijay Vemuri, and Mostafa Soliman*. "Impact of corruption on foreign direct investment in Africa." *International Business Research* 7, no. 4 (2014): 1.

7 Ibid.

8 *Guha, Sanjib, Niazur Rahim, Bhagaban Panigrahi, and Anh D. Ngo*. "Does corruption act as a deterrent to foreign direct investment in developing countries?" Organizations and Markets in Emerging Economies 11, no. 1 (2020): 18–34.

9 Ibid.

10 *Hossain, Shakib*. "Foreign direct investment (FDI) and corruption: Is it a major hindrance for encouraging inward FDI?" African Journal of Business Management 10, no. 10 (2016): 256–269.

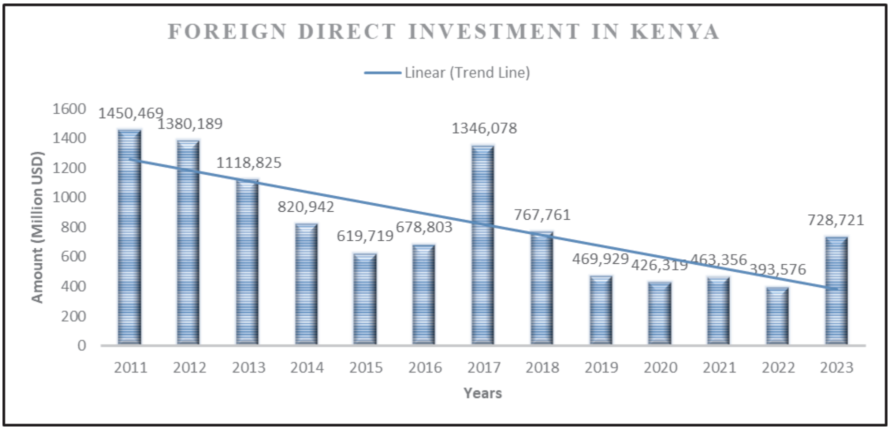
11 *Thede, Susanna, and Patrik Karpaty*. "Effects of corruption on foreign direct investment: Evidence from Swedish multinational enterprises." Journal of Comparative Economics 51, no. 1 (2023): 348–371.

12 Ibid.

all impact of corruption. As a general rule, which is the argument established in this paper, corruption hinders inflows of foreign direct investment.

TRENDS IN FOREIGN DIRECT INVESTMENT IN KENYA.

Despite varying perspectives in the literature, it is true to state, that the high levels of corruption essentially discourage investment in any country, and Kenya is not immune. Investors coming to Kenya constantly worry that they will have to bribe authorities to invest.[13] In 2023, Kenya was ranked at number 126 out of 180 countries on corruption by Transparency International and behind Tanzania and Rwanda, which were at number 49 and 87 respectively.[14] Foreign Direct Investment has steadily reduced in Kenya over the years from 1450 million dollars in 2011 to 393 million dollars in 2022.[15] The only positive trend was in 2017 when FDI incrased to 1346 million dollars.[16] Part of this trend is due to corruption in the country.



Foreign Direct Investment in Kenya, Source: (www.CEICdata.com, CEIC 2024)

13 *Njiriani Margaret*. 'Foreign Investors cite Corruption as Major Roadblock to the Region Markets' The East African, Business, East Africa, 2019. Available at: https://www.theeastafrican.co.ke/tea/business/foreign-investors-cite-corruption-as-major-roadblock-to-theregion-markets-1413274. (Accessed 17 June 2024).

14 *Transparency International*. Corruption Perceptions Index: Explore the Results. Transparency.org. 2024. Available at: https://www.transparency.org/en/cpi/2023 (Accessed 16 June 2024).

15 *CEICdata.com*. Kenya Foreign Direct Investment. CEIC. 2018 Available at: https://www.ceicdata.com/en/indicator/kenya/foreign-direct-investment.

16 Ibid.

According to the World Investment Report, Kenya's FDI was 1.3 billion dollars in 2012.[17] This was a drop of 18 % from the previous year.[18] Surprisingly, this happened despite Kenya revising its taxation laws entailing exemptions for FDI and introduction of new information technology projects.[19]A survey undertaken by the World Bank from January 2013 to September 2017 found that nearly to 30 % of businesses in Kenya, including foreign investment businesses, were limited to issuing bribes to government officials if they needed things such as licenses and other services.[20]

Kenya has always been open to Foreign Direct Investment (FDI) and is often referred to as the business hub of East Africa. Numerous foreign companies which operate in Africa have a base in Nairobi. A research done in 2017 placed Kenya second to Morocco in terms of attracting foreign investors.[21] Several factors, including human development, economic diversification, logistics, infrastructure, business environment, market size and resilience within the macroeconomic environment were considered to arrive at these rankings.[22] According to the World Investment Report 2017 by the United Nations Conference on Trade and Development (UNCTAD), FDI inflows into Kenya were at about $ 672 million. This was attributed to the enhancement of the information, communications and technology within the country.[23] Most of these investment came from South Africa and the Netherlands.[24] Another data from Kenya National Bureau of Standards in 2015 indicates Kenya's highest sources of FDI included Mauritius, China, the United States, France and the United Kingdom.[25] These foreign investors were mainly placed in sectors such as tourism, oil and gas, horticulture and infrastructure among others.[26]

Kenya took various legal and policy measures to enhance Direct Foreign Investment inflows rate. In 2013 and 2015, it enacted the Public Private Partnerships Act and the Business Registration Services Act easing the registration process for foreign investments.

17 Ibid.

18 *UNCTAD* "World Investment Report, 2020: International Production beyond the Pandemic." UNCDTA, 2020. p.34. Available at: https://unctad.org/system/files/official document/wir2020_en.pdf (accessed 20 June 2024).

19 Ibid, p101.

20 *Shipley, Thomas*. Integrity risks for international businesses in Kenya. Transparency International. 2022.

21 *Ernst & Young*. Africa Attractiveness Index. 2017.

22 *Shipley* (n20).

23 Ibid, p7.

24 *Santander*. "Kenya: Foreign Investment." 2018 Available at: https://en.portal.santandertrade.com/establishoverseas/kenya/investing.

25 *Kenya National Bureau of Statistics*. Foreign Investment Survey 2016 Report. U4 Anti-Corruption Helpdesk Integrity risks for international businesses in Kenya 19, 2017 https://www.knbs.or.ke/foreign-investmentsurvey-2016-report/.

26 Ibid.

Later, in 2017, more investment-friendly policies were enacted to improve FDI.[27]Despite these seemingly positive changes, Kenya's attraction for FDI slowly declined. The rate of FDI was comparatively lower than the country's GDP.[28] Particularly, in 2017, Kenyan rates of FDI came second in East Africa despite it being the biggest economy in the East African region.[29] Other factors such as violent electoral cycles and corruption still greatly deter investment.[30] The trend had not improved by 2023.

LEGAL FRAMEWORK ON CORRUPTION IN FOREIGN DIRECT INVESTMENT

Kenya's legal framework is robust on both corruption and how it affects FDI. The country has employed significant measures to reduce corruption and ensure that it does not affect the gains of FDI. The legality of the conduct of investors is receiving increased scrutiny. Kenya, like many host states holds the view that numerous cases of bribery and corruption often taint the lifetime of any FDI.[31] These include violation of good faith, international investment protection, deceitful conduct and misuse of the policy system, among other practices.[32] These violations necessitate viewing corruption from an investment law perspective, despite the challenges in integrating anti-corruption policies from this investment-centered approach.[33] Over the years, a multidisciplinary and multi-agency approach has been employed to tackle this challenge. Kenya has ratified numerous international and regional conventions whose objectives seek to eradicate corruption including the United Nations Convention against Transnational Organized Crimes[34], the United Nations Convention against Corruption,[35] the African Union Convention on Prevention and Combating

27 *Shipley Thomas*. Integrity risks for international businesses in Kenya. Transparency International. 2022.

28 *Santander*. "Kenya: Foreign Investment." 2018 Available at: https://en.portal.santandertrade.com/establishoverseas/kenya/investing.

29 Ibid.

30 *Shipley, T*. (n27) p. 7.

31 *Aloysius L. & Anthony S*. "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct", in Albert Jan van den Berg (eds) "Legitimacy: Myths, Realities, Challenges," ICCA Congress Series (2005) 18 Kluwer Law International at 451.

32 *Jayalo* (n1) p.14.

33 Ibid.

34 UN General Assembly, United Nations Convention against Transnational Organized Crime : resolution / adopted by the General Assembly, A/RES/55/25, 8 January 2001, https://www.refworld.org/legal/resolution/unga/2001/en/39663 [accessed 20 August 2024].

35 UN General Assembly, United Nations Convention Against Corruption, A/58/422, 31 October 2003, https://www.refworld.org/legal/agreements/unga/2003/en/21418 [accessed 28 August 2024].

Corruption.[36] At the national level there exist the 2010 Kenyan Constitution, Anti-corruption and Economic Crimes Act 2003[37] and its regulations, the Anti-Bribery Act 2016 and its regulations,[38] and the Proceeds of Crime and Anti-Money Laundering Act (cap 59) and its regulations.[39] These are the major statutes that seek to reduce corruption in every sector including FDI sectors.[40]

Domestic Legislation in Kenya

The Constitution of Kenya 2010

The constitution as the supreme law of the land takes precedence above all other laws of the country.[41] *Article 10* of the constitution entails the principles of good governance and national values, while *Chapter 6* of the constitution advocates for good leadership and integrity. *Article 79* of the same constitution instructs the legislature to create an Ethic and Anti-Corruption Commission to fight corruption.[42]*Article 75* prohibits public officers from mixing public duties with individual interests. In case of such conflict the constitution prescribes the removal or dismissal of the officer.[43] Principles such as accountability and transparency are crucial for effective financial management.[44]

The Anti-Corruption and Economic Crimes Act

This Act under *Section 44* prohibits bid rigging. Under *Section 46*, the Act prohibits use of a public office for personal benefit. *Sections 61A, 62 and 64* speak to execution against, suspension and disqualification of corrupt officials.[45] *Section 54* speaks to the compensation orders against corrupt persons and officials. *Sections 51 and 52* of the Act provides for compensation to an aggrieved person by the corrupt person and liability for receiving improper benefits and proceeds of corruption respectively.[46] *Section 41* criminalizes deceiving the principal, *Section 42* shuns having a conflict of interest between private

36 African Union, African Union Convention on Preventing and Combating Corruption, 11 July 2003, https://www.refworld.org/legal/agreements/au/2003/en/63979 [accessed 28 August 2024].

37 Anti-corruption and Economic Crimes Act No 3 of 2003, Cap 65 [Revised 2023].

38 Anti-Bribery Act No 47 of 2016, Cap 79B [Revised 2023].

39 Proceeds of Crime and Anti-Money Laundering Act [Cap 59A].

40 *Jayalo* (n1) p.16.

41 Ibid.

42 The Constitution of Kenya 2010, Article 6, 10 & 29.

43 Ibid, Art 75.

44 *Jayalo* (n1) p17.

45 Anti-corruption and Economic Crimes Act No 3 of 2003, Cap 65 [Revised 2023], art 44, 46, 61A, 62, 64.

46 Anti-corruption and Economic Crimes Act No 3 of 2003, Cap 65 [Revised 2023], s. 51, 52, & 54.

interest and role as an agent. *Section 47A and 48* seeks to punish attempts of corruption and conspiracies on the same, and the appropriate penalties which is a fine not exceeding one million Kenyan Shillings or a jail term of not more than 10 years.[47] These sections when applied to corruption within the FDI sector can contribute significantly towards enhancing FDI inflows into the country.[48]

The Proceeds of Crime and Anti-Money Laundering Act

The act under *section 3 and 4* prohibits money laundering and dealing on proceeds of crime. Misrepresentation of any sought is also prohibited under *section 9* of the act. *Section 44* requires that a reporting institution should monitor all forms of transactions and gives the obligation of due diligence on any business relationship under section 45 of the act.[49] Any persons liable for offences under the act shall have their property confiscated, seized, or appointment of a receiver on the proceeds in accordance with *Section 61, 71 and 77* of the Act.[50] Other tools such as production orders and search warrants can be used as indicated under *sections 103 and 107* of the Act. Under section 115, Kenya may make a request to other countries for help and cooperation in combating corruption, money laundering and other economic crimes.[51] These sections apply directly to FDI and can be used to tremendously reduce the extent of corruption within the sector. For increased FDI inflows there has to be a very robust implementation framework and institutions that work well.

The Anti-Bribery Act

The act under *section 5 and 6* criminalizes issuing or receiving of bribes for any financial advantage. *Section 8* of the Act is specific on criminalizing bribery on the part of public officials. *Section 10* prohibits bribery on the part of private entities. Any activity that would assist bribery is also prohibited under *section 13* of the Act.[52] *Part IV* of the Act further provides for additional provisions on offences including on the part of corporate bodies and partnerships.[53] *Part V* of the act focuses on the penalties which among others include jail term of less than 10 years and/or fine not exceeding five million shillings. Whistleblowers and witnesses are also protected under *section 21* of the Act.[54]

47 Anti-corruption and Economic Crimes Act No 3 of 2003, Cap 65 [Revised 2023] s. 41, 42, 47A & 48.

48 *Jayalo* (n1) p17.

49 Proceeds of Crime and Anti-Money Laundering Act [Cap 59A], s. 3, 4, 9 & 44.

50 Ibid, s. 61, 71, & 77.

51 Ibid, s. 103, 107 & 115.

52 Anti-Bribery Act 2016, Cap 79B [Revised 2023].

53 Ibid, Part IV.

54 Ibid, Part V; s 21.

The Ethics and Anti-Corruption Commission Act

It establishes the Ethics and Anti-Corruption commission which is a statutory body mandated to promote and develop best practices and standards on integrity and anti-corruption as stipulated under section 11 of the Act. Under the same section, the commission is mandated to recommend and investigate to the DPP any economic crimes, bribery and acts of corruption and any violations of codes of ethics.[55]

The National Intelligence Service Act

The Act under *section 3* establishes the principle of preventing corruption and promoting accountability and transparency as a guiding principle.

Public Procurement and Asset Disposal Act

This Act under *Section 62* makes a declaration that any quotation, proposal and tender submitted shall entail a declaration for no fraud or corruption. If any is detected then they shall be excluded from the procurement proceedings.

Foreign Investments Protection Act

This Act under *section 8* protects foreign investments from compulsory acquisition by any authority except in accordance with the law. As a result, no public officer will be able to intimidate and compulsorily acquire such investment with intentions to defraud them.[56] The Act further provides protections to foreign investments against any other person or public authority. These provisions may be applied in case of unfair circumstances imposed by any party to the detriment of the investors.

Investment Promotion Act

This Act provides for the revocation of an investment certificate under *section 10* where such certificate is obtained through fraud.[57] Similarly, it creates the Kenya Investment Authority under *section 14* and a board or authority under *section 16*. The members of these bodies are removed in case they are found liable for corruption.[58]

55 Ethics and Anti-Corruption Commission Act [Cap 7H], Laws of Kenya, s 11.
56 Foreign Investment Protection Act [Cap 518], Laws of Kenya, s 8.
57 Investment Promotion Act [Cap 485], Laws of Kenya, s 10, 14 & 16.
58 Ibid.

Foreign Judgements (Reciprocal Enforcement) Act

This Act allows for the enforcement of foreign judgements in Kenya. *Section 2* of the Act defines an original court to include an actual court, arbitral tribunal or an arbitrator. Similarly, designated courts refer to courts within the commonwealth, or those that are certified and approved by the cabinet secretary as such.[59] FDI involves foreign investors and the jurisdiction of court during dispute settlement might be in foreign countries. This Act gives such foreign judgements enforceability and execution capabilities in Kenya. The only exception to enforceability is where such judgements are obtained through fraud as stipulated under *section 10*.[60]

International Legal Instruments

Kenya is a signatory to several international and regional instruments. It, therefore, has to fulfill the obligations as indicated in the instruments especially on combating corruption which will in turn promote FDI within the country.

The United Nations Convention against Transnational Organized Crime (UNCTOC)

This convention seeks to enhance the combating and prevention of transnational organised crimes. States are obligated to put administrative and legislative measures in place to prohibit corruption on the part of public officials. Under *article 9* of the convention authorities should be granted adequate independence to ensure that they undertake to combat corruption.[61] The Convention does not essentially speak to the investment sector but speaks to the conduct of public officers. However, corruption within FDI is mostly manifested by undermining and compromising these public officers.[62] Further, the convention obligates states to attach civil, criminal or administrative liability to public officials who are found liable. *Articles 10 and 11* ensure that parties liable are sanctioned and judicial bodies appreciate the gravity of corruption related crimes.[63] *Article 12* of the convention advocates for measures for confiscation, seizure, freezing, tracing and identification of corruption proceeds.[64] *Article 13* espouses for cooperation between states to combat transnational corruption and organised crimes. Such cooperation includes the sharing of appropriate

59 Foreign Judgements (Reciprocal Enforcement) Act [Cap 43], Laws of Kenya, s 2.

60 Ibid, s10.

61 *Jayalo* (n1) p. 19.

62 Ibid.

63 UN General Assembly (44th sess. : 1989–1990), International co-operation in combating organized crime : resolution / adopted by the General Assembly, A/RES/44/71, UN General Assembly, 8 December 1989, https://www.refworld.org/legal/resolution/unga/1989/en/5990 [accessed 21 June 2024].

64 Ibid, Art 12.

information and sharing of legal assistance. With the application of these provisions, Kenya would significantly reduce the rates of corruption in FDI sectors and increase the gains from the sector. The dwindling trends on FDI will eventually gain momentum and increase within the coming years.[65]

The United Nations Convention against Corruption (UNCAC)

The convention seeks to enhance measures that exist to prevent corruption. One of its objectives is to increase technical assistance and fortify corporation internationally in combating corruption.[66] It also addresses the prosecution, investigation and prevention of corruption. States are encouraged to promote policies and institutions that would enhance the rule of law and influence good governance.[67] The principles of transparency and accountability are emphasized in the convention as measures of combating corruption. Strengthening judicial integrity and good record keeping of public expenditure and revenues are other measures that complement the principles.[68] Under *Article 12 and 14* of the convention, states are required to have effective auditing of both private and public sectors, and effectively monitor the transfer of money within and beyond their territorial borders.[69]

Regional Legal Instruments

The African Union Convention on Prevention and Combating Corruption

This convention portrays corruption as a hindrance to realizing cultural, economic, and social development. *Article 2* of the convention encourages the principles of accountability, social justice and transparency.[70] Further *Article 4* of the convention prohibits corruption among public officials in the form of seeking advantages as a result of an act or omission. *Article 5* requires states to enact legislations that would aid in reducing and eradicating corruption. Strict adherence to the law is expected from foreign companies operating within partner states' territories.[71] Numerous initiatives have been established to facilitate anti-bribery and enhance business strategy in Africa. One such initiative is the joint initiative by the African Development Bank (AfDB) and the Organization for Economic Cooperation

65 Ibid.

66 *Jayalo*. Strengthening the Regulatory and Institutional Framework in Kenya to Curb Corruption in Foreign Direct Investment (Master's thesis, University of Pretoria (South Africa). 2021. p. 17.

67 Ibid.

68 *Jayalo* (n66) p.18.

69 UN General Assembly, United Nations Convention Against Corruption, A/58/422, 31 October 2003, https://www.refworld.org/legal/agreements/unga/2003/en/21418 [accessed 21 June 2024].

70 African Union, African Union Convention on Preventing and Combating Corruption, 11 July 2003, https://www.refworld.org/legal/agreements/au/2003/en/63979 [accessed 21 June 2024].

71 Ibid, art 5.

and Development.[72] The partnership seeks to involve public officials in the fight against corruption and bribery which will have a ripple effect in creating a good environment for FDI.[73]

EFFECTIVENESS OF ANTI-CORRUPTION STRATEGIES FOR ENHANCING FOREIGN DIRECT INVESTMENT IN KENYA

The strategies in place have produced noticeable results but have also failed to fulfill their intended purposes. Kenya's legal framework created several institutions including the Office of the Director of Public Prosecutions (DPP), the Directorate of Criminal Investigations (DCI) and the Ethics and Anti-Corruption Commission (EACC). These institutions were to eliminate and check the sources of corruption through investigating, preventing and providing credible evidence on corrupt individuals within the FDI sector.[74] The reality is that most anti-corruption cases by the EACC and the ODPP have targeted the low-profile public officers. Hitherto, there is no high-profile anti-corruption case on Foreign Direct Investment that has been successfully handled. A major disconnect is visible in the sense that Kenya has experienced some of the biggest corruption scandals in the past two decades including the National Youth Service Scandal, the Chicken Gate and Anglo-leasing, among other scandals.[75]

On this basis, the strategies that put in place to combat corruption are very ineffective. The war against corruption is muddled with a lot of politics. Persons affiliated with the executive arm often manage to escape sanctions within the criminal justice system. Additionally, this means that the institutions fighting corruption are not independent.[76] They are politically compromised and, hence, unable to undertake prosecution and investigation without considering the social and political status of the accused. The institution which essentially enforces and implement the robust legal framework is utterly ineffective by any means.

Drawing from the Kenya's corruption index rankings, a lot of corruption still exists within the public sector.[77] More foreign investors are losing trust in the country and

72 *Jayalo* (2021). *Strengthening the Regulatory and Institutional Framework in Kenya to Curb Corruption in Foreign Direct Investment* (Master's thesis, University of Pretoria (South Africa). p. 21.

73 Ibid.

74 *Transparency International Kenya.* Voter Bribery as an Election Malpractice in Kenya. A Survey Report. December 2016. Konrad-Adenauer-Stiftung, 2016 https://www.kas.de/c/document_library/get_file?uuid=9c202a56-d8cb-759c-6acd-76faebe788af&groupId=252038.

75 *Tyce, Matthew*. "The Kenyan National Treasury: A 'pocket of effectiveness' curtailed." 2020.

76 *Tsao, Yao Chun, and Shun Jen Hsueh*. "Can the country's perception of corruption change? Evidence of corruption perception index." Public Integrity 25, no. 4.2023. pp 415–427.

77 *Transparency International*. Corruption Perceptions Index. 2023. https://www.transparency.org/en/cpi/2023.

rethinking their decision to come to Kenya or relocate from the country. More must be done to ensure that these corruption cases are limited and eliminated.

Apart from these, procedures and rules within the public institutions have encouraged and facilitated corruption within these institutions.[78] Many foreign investors and local business people are able to issue bribe to quicken the bureaucratic processes of establishment and operation within the country. With these sophisticated bureaucratic processes it is often quite hard to detect any corrupt practices within the FDI sector unless the officers plainly do them.[79] These institutions will continue to fall short in the implementation and enforcement of the anti-corruption policies due to cultural acceptance, protracted cases, glaring drawbacks and political interference.[80]

KENYAN CASE STUDIES ON CORRUPTION IN FOREIGN DIRECT INVESTMENT

a) Alleged Extortion of Tatu City Foreign Investors by Kiambu County Governor

Tatu City is a project developed and owned by one of Africa's largest city builders whose shareholders include Norway, the United States, the United Kingdom and New Zealand. In early July 2024, the developers of the project, through the Chief Operating Officer and Kenya's project head Preston Mendenhall, released a press statement condemning the actions of the Kiambu Govenor Kimani Wamatangi and his advisor who sought to extort Ksh 4.3 Million (USD 33 million) in land.[81] The investors claim that the governor held the approval of the new master plan for more than one year and a half. He sought to seize about 40 acres of land which would also include a space for the governor's residence. This delay and extortion has destroyed the investment climate in the country and harmed job creation since it cost the country about 4500 new jobs and Ksh 16 billion.[82] In reply, the governor indicated that the proposed plan sought to reduce land reserved for public amenities to 103 acres from 406 acres violating the 10 % legal requirement under the Physical and Land Use Planning Act 2019 and its regulations.[83]

78 *Tsao, Yao Chun, and Shun Jen Hsueh*. "Can the country's perception of corruption change? Evidence of corruption perception index." Public Integrity 25, no. 4 (2023): 415–427.

79 Ibid.

80 *Kinyanjui, Lucy Wanjiku*. "Effect of corruption on social welfare issues in the Kenyan economy." 2021.

81 Reporter, KahawaTungu, and KahawaTungu Reporter. "Tatu City Condemns Kiambu County Governor Over Extortion Claims." *KahawaTungu*, 11 July 2024, kahawatungu.com/tatu-city-condemns-kiambu-county-governor-over-extortion-claims.

82 Ibid.

83 *Reporter*. Kiambu Governor Wamatangi refutes Tatu City's allegations in land use dispute. Citizen Digital. 2024 https://citizen.digital/news/kiambu-governor-wamatangi-refutes-tatu-citys-allegations-in-land-use-dispute-n345705.

b) *Anglo Leasing Scandal in Kenya*

This is probably one of the biggest corruption scandals to ever hit Kenya in the past two decades. Charges were brought against 13 people including Deepak Kamani and other former government officials. Others accused were British and American citizens. This indictment came after a collaboration between the Kenya Ethics and Anti-Corruption Commission and the Swiss authorities in investigating the scandal. At the center of the scandal were 18 alleged overpriced state security contracts. All these were made by domestic and foreign companies to the tune of about 33 million dollars. The individuals charged were seeking to defraud the government of this money.[84] All the suspects in the case have now been acquitted. The anti-corruption court in Nairobi indicated that the suspects had no case to answer and discharged them from the case.[85]

c) *Controversial Bid to Operate Jomo Kenyatta International Airport (JKIA) by Adani Group*

Experts advised the government to issue a public tender for JKIA expansion, however, the government clandestinely allowed a proposal to be initiated privately to undertake the expansion.[86] The Organized Crime and Corruption Reporting Project stated that the proposal was green-flagged to the project development stage where more negotiations and consultations were expected. The nature of this procurement raises questions about how a private proposal was considered for such a sensitive project. Previously, the government had been advised to issue a public form of bidding since it would maximise the value-for-money. Such deals done in secrecy and clandestinely manner perpetuate and encourage corruption.

CONCLUSION AND RECOMMENDATIONS ON THE LEGAL FRAMEWORK ON FOREIGN DIRECT INVESTMENT.

Kenya needs to take a multi-faceted legal strategy that encompasses all sectors including establishing a culture of integrity, protecting and empowering whistleblowers, and enhancing legal safeguards.[87] With adequate efforts to combat corruption, more accountability and

84 *Financial Times*. Kenya targets architects of Anglo Leasing corruption scandal. (n.d.). Financial Times. https://www.ft.com/content/bf75a7ee-c7f9-11e4-8210-00144feab7de.

85 *Kiplagat, Sam*. “Court Acquits Kamani, Magari and Others in Sh3.5bn Anglo Leasing Case.” Nation, 14 July 2023, nation.africa/kenya/news/court-acquits-kamani-magari-and-others-in-sh3–5bn-anglo-leasing-case-4303262.

86 *Georgia Gee*. “Documents Reveal Details of Adani Group’s Controversial Bid to Run Kenya’s Largest Airport.” OCCRP, 24 July 2024, www.occrp.org/en/scoop/documents-reveal-details-of-adani-groups-controversial-bid-to-run-kenyas-largest-airport. Accessed 20 Aug, 2024.

87 *Budsaratragoon, Pornanong, and Boonlert Jitmaneeroj*. "A critique on the Corruption Perceptions Index: An interdisciplinary approach." Socio-Economic Planning Sciences 70 (2020): 100768.

transparency will be witnessed in society. At the same time, judicial bodies will be truly independent in their task of ensuring that FDI actors who violate anti-corruption laws are punished. Most of the institutions established to combat corruption are an appendage of the executive arm of government. As a result they do not possess the required nature of independence. It is from this premise that the recommendations arise.[88] They include;

1) Securing Independence of the Anti-Corruption Bodies

The executive arm of the government should secure the appropriate independence required by the Anti-corruption bodies to operate autonomously. Without independence, higher public officers can compromise them and allow corruption in FDI practices which would decrease their inflows.[89] The appropriate legal mechanism which can increase independence is to substitute the word 'secretary' under *section 2* of the Anti-Corruption and Economic Crimes act with the 'commission'.[90] This will ensure that the commissioners of the EACC have a direct control over the functions of the commission. The inclusion of the secretary to the commission was a brainchild of the influential public officers who sought to have influence on the EACC through mischief. Previously, the act provided for a 'Director'. As it is, the commissioners are expendable and not necessarily independent since with the existence of a Secretary of the commission as provided for under *section 16* of the Ethics and Anti-Corruption Act, the functions of the commission can be undertaken even in the absence of the commissioners.[91]

2) Adequate Resources for the Anti-Corruption Bodies

Adequate resources should be allocated to the anti-corruption bodies in relation to material and human resource to ensure that they undertake their duties effectively. With such resources, they can be able to investigate and prosecute any corruption within the Kenyan FDI efficiently.[92] The commission had proposed an amendment to the anti-graft laws that some of the funds recovered from corruption cases they have successfully handled should be used to support the commission's activities in case there is a budget deficit.

88 *Gilman, Stuart*. "To understand and to misunderstand how corruption is measured: Academic research and the corruption perception index." Public Integrity 20, no. sup1 (2018): S74-S88.

89 Ibid.

90 Anti-corruption and Economic Crimes Act No 3 of 2003, Cap 65 [Revised 2023], s 2.

91 *Tanui*. "Why EACC Needs Commissioners to Realise Its Mandate." Business Daily, 31 Dec. 2020, www.businessdailyafrica.com/bd/opinion-analysis/ideas-debate/why-eacc-needs-commissioners-to-realise-its-mandate-2086174.

92 *Kireri, J*. Analysis of Factors Influencing Implementation of Anticorruption Strategies by Ethics and Anti-Corruption Commission in Kenya (Doctoral dissertation), KeMU. 2022.

This proposed law would ensure that Anti-corruption bodies are adequately resourced for optimum results.[93]

3) Building a culture of Transparency through Digitalization of Government Transactions.

Kenyan public officers should build a culture of ethical governance, accountability, and transparency in all sectors including when facilitating FDI arrangements. One of the key legal reforms in this sector includes the recommendation by the government to digitalize all forms of public payments and transactions. The Public Procurement and Asset Disposal Act among other Anti-Corruption laws should include a mandatory requirement for digital transactions in government transactions. Digitalization essentially reduces corruption by limiting human interactions, enabling accountability, increasing transparency and reducing discretion. Similarly, digitalization will often leave digital footprints which can be followed during investigations.[94]

4) Increasing legal protection for Whistle blowers and encouraging Investigative Journalism

There is little protection given to whistleblowers and investigative journalists under the anti-corruption and economic crimes laws. In most instances, investigations by the anti-corruption bodies begin after a whistleblower has exposed a corruption scandal or when media houses and independent journalists have exposed such corruption.[95] Persons who undertake to expose such scandals are often in danger from the suspects who might feel threatened. The law should be very clear on the protections that such people are guaranteed as well as any benefits that might be attached to such exposure. Only in this manner will more people be encouraged to come out and report any clandestine corruption plots in FDI.

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94 *Carlos Santiso* "Digitalisation as an Anti-corruption Strategy: What Are the Integrity Dividends of Going Digital?" *Development Matters*, 11 Apr. 2022, oecd-development-matters.org/2021/08/04/digitalisation-as-an-anti-corruption-strategy-what-are-the-integrity-dividends-of-going-digital.

95 *Cooper-Millar, Jolyon*. Investigative Journalists and the Fight to Unearth the Corrupt | Centre for the Study of Corruption. 9 Nov. 2017, blogs.sussex.ac.uk/centre-for-the-study-of-corruption/2017/11/09/investigative-journalists-and-the-fight-to-unearth-the-corrupt/#:~:text=Investigative%20journalism%20is%20essential%20to%20anti-corruption%2C%20and%20is,factor%20to%20the%20improvement%20of%20the%20democratic%20system.

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FRAMING AN ENABLING LEGAL AND REGULATORY ENVIRONMENT TO ATTRACT PRIVATE CLIMATE FINANCING IN SUB-SAHARAN AFRICA

Sunday Bontur Lugard*

Abstract

This abstract highlights the key challenges faced by African countries in attracting and leveraging private capital for climate projects, including legal uncertainties, lack of efficient regulatory environment, and limited financial incentives. Additionally, issues such as political risk, inadequate infrastructure, and perceived risks further deter private investors from engaging in climate finance initiatives. Despite these challenges, there are promising prospects for enhancing the role of private capital in climate financing across Africa. These include the growing recognition of climate change as a pressing global issue, increasing investor interest in sustainable and impact-driven investments, and the emergence of innovative financing mechanisms and partnerships. By analyzing the complex interplay between private capital, climate financing, and the legal landscape in Africa, this work aims to shed light on potential strategies and pathways to overcome existing barriers and unlock the full potential of private investment for climate resilience and sustainable development on the continent.

INTRODUCTION

The Secretary General of the United Nations, Anthonio Guterres, in his 2023 press conference raised a climate alarm thus: "The era of global warming has ended; the era of global boiling has arrived. The air is unbreathable. The heat is unbearable. And the level of fossil-fuel profits and climate inaction is unacceptable."[1] Climate change and its adverse impacts on the planetary system, the natural environment and human wellbeing are enormous and continuing.

The impacts of climate change include extreme weather events and conditions that result in flooding, change in land use, impeded ability of the ocean to act as a key carbon sink

* Sunday Bontur Lugard, Ph.D., Department of International Law and Jurisprudence, Faculty of Law, University of Jos, Nigeria; lugards@unijos.edu.ng.

1 *United Nations*, Press Conference by Secretary-General António Guterres at United Nations Headquarters, New York (SG/SM/21893, 27 July 2023) <https://press.un.org/en/2023/sgsm21893.doc.htm> accessed 11 July 2024.

destination, among others.[2] Aside this, the problematic-to-measure and consequential slow onset events, like ocean acidification, glacial retreat, salinization, land and forest degradation, loss of biodiversity, desertification, especially in Africa, are gargantuan and intolerable. Flowing from this, the United Nations, under the auspices of United Nations Framework Convention on Climate Change (UNFCCC) as a purposive multi-level governance soft law, initiated and coordinated global policymaking, law reform and action targeted at addressing this phenomenon, and this initiative culminated in the adoption and ratification of Paris Agreement in 2015.[3] Driven by catastrophic scientific evidence[4], it is still directing global response to achieve its objective of 45 % reduction in carbon emissions by 2030 and reach net zero by 2050 with the aim of keeping the global temperature at 1.5 degrees Celsius above pre-industrial level, or a worst case scenario of 2 degrees Celsius above pre-industrial levels. Currently, the global average surface temperature has risen to about 1.2 °C above pre-industrial levels, resulting in heatwaves and other extreme weather events, even when GHGs have not yet peaked.[5] This certainly places a huge responsibility on humanity as it depends on habitable planetary system and biodiversity for sustenance.

2 *The Intergovernmental Panel on Climate Change* (IPCC) 2022 report presents high risks associated with extreme weather conditions which include:

Long term changes to climate related systems – atmosphere, ocean, and cryosphere.

Socio-economic indicators that reveal sensitivities of societies to weather conditions.

Socio-economic indicators – increase sensitivities of societies to weather conditions.

Ecosystems – mortality of warm water corals, movement of tropical species into temperate species.

Extreme weather events cause substantial direct economic damage, reduce economic growth in the short term, and even in the long-term cause more severe impacts on developing countries or economies.

Climate variabilities is associated with increased conflict prevalence, organized violence – though mainly conditional on high population size, low social economic development, high political marginalization, and agricultural dependence.

Anthropogenic climate forcing has high internal displacement impact – strong contribution of weather extremes on observed displacements.

Extreme temperatures increase human mortality and occurrence of water and vector-borne diseases.

Furthermore, IPCC report indicates that African region faces the following risks from the extreme weather events or conditions caused by the impact of climate change: special extinction and irredeemable loss of ecosystems and their services, risk to food security, risk to marine ecosystem, increased human mortality, reduced economic output and growth, increased risk to water and energy security due to drought and heat. See Intergovernmental Panel on Climate Change, Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC, 2022) 17 and 2414–15 <https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf> accessed 25 November 2022.

3 *The United Nations*, Paris Agreement 2015 <https://unfccc.int/sites/default/files/english_paris_agreement.pdf> accessed 26 November 2022.

4 *Intergovernmental Panel on Climate Change* (note 2) above.

5 *International Energy Agency,* World Energy Outlook 2023: Executive Summary <https://www.iea.org/reports/world-energy-outlook-2023/executive-summary> accessed 11 July 2024.

The Intergovernmental Panel on Climate Change (IPCC) special report in 2018 underscored the necessity for "rapid and far-reaching transitions in energy, land and urban infrastructure… and industrial systems" in pursuit of the realization of the objectives and target of the Paris Agreement.[6] Under the Paris Agreement, member States have committed to scale down the use of non-renewable energy resources, especially fossil fuel[7] in the pursuit of the realization of their pre-determined voluntary targets captured in their Nationally Determined Contributions (NDCs) tied to the realization of this global objective.

Implementing Paris Agreement objectives requires mobilizing finance at the required scale[8] as finance (green investment or low-carbon finance or sustainable investment, or by whatever name called) is not just necessary but vital for developing countries, especially Sub-Saharan African (SSA) countries, where the adverse impact of climate change is already being felt the most, notwithstanding their negligible contribution to the climate disaster. This. Is due to pre-existing conditions like poverty, unemployment, and limited capacity to curtail and respond adequately such impact.[9]

The geographical distribution or access to low-carbon finance, i.e. capital flows as low-carbon interventions which have direct greenhouse gas mitigation benefits[10], is highly unequal – developed regions receive the largest chunk of these funds, while developing economies, especially those in Africa, receive only a fraction.[11] The question then is: why is access to climate financing or green investments, especially from private sources, comparatively difficult to access or accessible on unfavourable terms in SSA? Secondly, how can this be addressed to enable its people have access to clean energy resources necessary for their development and to meet their climate commitments under the Paris Agreement? This work examines the intersection of private capital investment and climate financing in some legal frameworks in Africa. As African continent grapple with the urgent need for climate mitigation and adaptation measures, private capital emerges as a critical

6 *IPCC* (2018) 22 <https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf> accessed 2 August 2024.

7 At COP28 in Dubai in 2023, the global climate policy making system agreed for the first time that there should be a transition from fossil fuel to renewable energy resources in the pursuit of the goal of Paris Agreement.

8 *Megan Bowman*, Sustainable Finance and Implementing of the Paris Agreement: The Key Role of Jurisdictional Legal and Regulatory Architecture, in: Rene Smits (ed), Sustainable Finance and Climate Change: Law and Regulation, Cheltenham, UK, 2024.

9 *Phemelo Tamasiga*, et al, Is Africa Left behind in the Global Climate Finance Architecture: Redefining Climate Vulnerability and Revamping the Climate Finance Landscape—A Comprehensive Review 15 (2024), 13036 Sustainability 5 <https://mdpi-res.com/d_attachment/sustainability/sustainability-15-13036/article_deploy/sustainability-15-13036-v2.pdf?version=1694002970> accessed 30 August 2024.

10 *Buchner, B.* et al, Global Landscape of Climate Finance, 32 (2014) Climate Policy Initiative 4 <http://climatepolicyinitiative.org/wp-content/uploads/2015/11/Global-Landscape-of-Climate-Finance-2015.pdf> accessed 9 July 2024.

11 *BloombergNEF*, Clean Energy Investment Trend 2019 (BNEF insights, 2020); see also Ibid.

source of funding for climate projects. However, various legal, regulatory, and institutional challenges hinder the effective mobilization and utilization of private capital for climate financing on the continent.

AN OVERVIEW OF CLIMATE FINANCING

United Nations Framework Convention on Climate Change (UNFCCC) defines climate finance as "local, national or transnational financing—drawn from public, private and alternative sources of financing—that seeks to support mitigation and adaptation actions that will address climate change."[12] It states further that climate finance is a necessity for mitigation, as large-scale investments are required to meaningfully reduce emissions. It is equally important for adaptation, as enormous financial resources are required to adapt to the adverse effects and lessen the impacts of a changing climate. Climate finance has also been defined as "the financial resources that are allocated towards projects, initiatives, and investments aimed at mitigating and adapting to climate change. This includes funding for activities such as renewable energy projects, energy efficiency improvements, climate resilient infrastructure, carbon capture and storage initiatives, afforestation and reforestation effort, and climate adaptation measures in vulnerable communities."[13]

Its key components include: mitigation finance, adaptation finance, capacity building and technical assistance, technology transfer and innovation finance, financial mechanisms and instruments. The major concern of this research is with the use of private sector driven financial mechanisms and instruments such as venture capital, private equity, impact investing, and innovative financial instruments such as green bonds, carbon markets, climate insurance, which help to leverage added resources by attracting private sector participation and aligning financial flows with climate objectives.[14] These funds are usually accessed from sources other than public sources, including private investments, multilateral development banks, carbon markets, and climate bonds.

Inadequacy of International Public Finance

Since the adoption of the UNFCCC in 1992, there have been several global efforts targeted at providing climate finance to developing countries, flowing mainly from support from developed country parties to the Convention. The Global Environmental Facility (GEF) was the first to be designated in 1994 as the operating institution of the financial mechanism of the UNFCCC. Subsequently, in 2010, the Green Climate Fund was established at COP 16 in Cancun, Mexico, and designated as the second operating entity of the financial

12 *UNFCCC*, What is Climate Finance <https://unfccc.int/topics/introduction-to-climate-finance> accessed 9 July 2024.

13 *Climate Change Professional Group*, Climate Finance: In a Nutshell.

14 Ibid.

mechanism for the Kyoto Protocol and was similarly adopted for the Paris Agreement in 2015.[15]

The GEF from its inception as an independent international environmental or green finance coordinating institution has received about $25 billion[16] from about 40 donor countries, including SSA countries of Nigeria, South Africa and Cote d'Ivoire,[17] and disbursed mostly as grants, to several benefiting developing countries and those with economies in transition to address mitigation and adaptation projects. This is entirely from public sources. This obviously shows the inability of the Facility to fund climate-related projects at a scale that would engender the realization of climate goals under the key global regimes like the UNFCCC, the Paris Agreement, Convention on Biological Diversity, the United Nations Convention to Combat Desertification, among others. In the same vein, the $25 billion it has administered so far in three decades is a far cry from the projected $150 billion per annum required for funding of clean energy projects on the African continent alone, asides other developing countries, for a five-year period[18] to keep them on the path to realizing their GHG reduction targets under several international regimes, including the Paris Agreement. Furthermore, at COP15 of the UNFCCC held at Copenhagen in 2009, developed countries committed to collectively mobilize $100 billion per annum from 2020 for climate action in developing countries – this goal was formalised at COP16 in Cancun, and at COP21 in Paris, where it was reiterated and extended to 2025.[19] Even this is considered inadequate as funding in the region of $500 billion to $2.5 trillion is projected for developing countries annually in order to meet the climate goal under the Paris Agreement.

The Facility, realizing the inadequacy of its public funding sources has recently begun a process of catalysing private financial investments toward climate mitigation and adaptation in developing countries and countries in economic transition, while advocating for public-private partnership in the form of blended finance (under its Non-Grant Pilot Program).[20]

15 *United Nations Climate Change*, Introduction to Climate Finance <ttps://unfccc.int/topics/introduction-to-climate-finance> accessed 12 July 2024.

16 *GEF*, Three Decades of Investing in the Planet <https://www.thegef.org/newsroom/publications/gef-glance> accessed 13 July 2024.

17 *GEF*, Donor Countries <https://www.thegef.org/projects-operations/donor-countries> accessed 13 July 2024.

18 *International Energy Agency*, Global Energy Outlook 2023" <ttps://iea.blob.core.windows.net/assets/86ede39e-4436–42d7-ba2a-edf61467e070/WorldEnergyOutlook2023.pdf> accessed 11 July 2024.

19 *OECD*, Climate Finance and the USD 100 billion Goal <https://www.oecd.org/en/topics/sub-issues/climate-finance-and-the-usd-100-billion-goal.html> accessed 15 July 2024.

20 *GEF*, Private Sector <https://www.thegef.org/what-we-do/topics/private-sector> accessed 13 July 2024.

Going forward, the Facility is working out collaboration between investors and receiving States in the following areas:

a. Mid-wiving the reform of policy and regulatory environments in receiving states towards implementing feed-in tariffs for renewable energy and offering incentives that guarantee markets for new approaches, thereby encouraging long-term investments.
b. Deploying innovative financial instruments such as incremental financing for low-emission, climate-resilient investments, to incentivise private sector investments in renewables or green investments.
c. Working out multi-stakeholder partnerships to develop, harmonize, and implement sustainable practices that foster the realization of environmental objectives.
d. Strengthen institutional capacity, regulatory competence and decision-making by enhancing information, participation, and accountability in both public and private sectors.
e. Adopt innovative methods, including the validation of technologies, policy, or methods to redress environmental degradation so as to spur adoption on a wider scale.[21]

These are yet to commence but they present a plausible public-private partnership model in funding mitigation and adaptation projects and initiatives in pursuit of climate goals under the various institutional and policy regimes. For instance, public policy on feed-in tariffs to carter for above-grid renewable energy costs, partnering on the provision of support infrastructure like net-metring system, wind turbines, solar photovoltaic, among others, are essential to incentivise private sector investments in renewables and low-carbon infrastructure in SSA. All of these cannot be adequately funded from grants and other sources of funding from international public sources, except private finance (municipal and international) are exploited.

Furthermore, policymakers need to frame legal and policy systems that derisk such investments, through blended finance model and insurance against political risk in order to further incentivise private investments in renewables as necessary ingredient for realizing two goals:

a. meeting GHG emission targets by SSA countries under Paris Agreement and similar international instruments, and
b. ensuring access to modern energy for about 600 million Africans necessary for their development in realization of SDG 7 (affordable and clean energy).

The Green Climate Fund has trodden on a similar trajectory with low-level impact that has culminated in the call for the setting up of the World Environment Organization to coordinate several financial mechanisms and to govern the funds of climate related regimes in trust."[22] All these show the inadequacy of public sources, at international and municipal

21 Ibid.

22 *Firuz D. Yasamis*, World Environment Organizaton: A Desperate Need For Global Environmental Management 3(4) (2011) Multidisciplinary Research Journal 125. The call for the World

layers, for the financing of climate projects at scale in SSA, and the developing countries in general.

BENCHMARKING PERFORMANCE

The World Bank developed a tool called RISE (Regulatory Indicators for Sustainable Energy) to specifically monitor and assess the status of policy frameworks to advance access to modern energy, and renewable energy in particular.[23] It mainstreams the appraisal of the following:

a. Legal framework for renewables (existence of a legal framework for renewables; legality of private sector ownership of generation).
b. Planning for renewable expansion (existence of renewable targets and plans; extent of renewable energy in planning for generation as well as transmission; resource data and siting).
c. Incentives and regulatory support for renewables (existence of financial and regulatory incentives; transparency of legal framework; extent of grid access and dispatch).
d. Attributes of financial and regulatory incentives (predictability, efficiency, and long-term sustainability).
e. Network connection and pricing (connection cost allocation; network usage and pricing; renewable grid integration).
f. Counterparty risk (payment risk mitigation; public financial statements; utility creditworthiness).
g. Carbon pricing and monitoring.[24]

South Africa, Ethiopia and the Democratic Republic of Congo (DRC), and Nigeria are the most populous countries in each of the four sub-regions of SSA or the biggest economies in Southern, Eastern, Central, and West Africa respectively. A review of the state of policy compliance through the lens of RISE is necessary in gauging the state of energy transition, pursuit of climate goals, especially in the context of private climate finance.

South Africa presents a promising outlook on private finance as a viable tool for the realization of climate goals, and its climate commitment under the Paris Agreement, at scale. This has plausible implications on renewable energy transition, access to modern en-

Environment Organization was first conceived by Germany and presented at the Special Session of the United Nations in June 1977 (Stockholm+5). See also *Frank Biermann*, The Case for a World Environment Organization 42(9) (2000) Environment: Science and Policy for Sustainable Development 22–31; *Empire H. Nyekwere*, International Legal Reform Global Environmental Governance Reform: The Emerging Debate on the Need for a World Environment Organisation 6(2) (2018) Groningen Journal of International Law <http://creativecommons.org/licenses/by-nc-nd/4.0/> accessed 13 July 2024.

23 *Manfred Hafner, Simone Tagliapietra and Lucia de Strasser,* Energy in Africa Challenges and Opportunities, Cham – Switzerland, 2018, 68.

24 Ibid at 69.

ergy and the decarbonization of its coal-dominated electricity system. In the country, between 2019–2021, an average of 86 % climate finance invested in the country was from private actors.[25] Private commercial sources provided 92 % of annual funding flows, with 98 % of all private finance sourced domestically.[26] Annually, approximately R130 billion (USD 7.3 billion) was invested from private sources during the period under review. This represents roughly a quarter of the targeted R334–535 billion (USD 18.7 – 30 billion) needed annually[27] to bring the country closer to meeting its climate commitments under the Paris Agreement by achieving net zero goal by 2050. This scenario exemplifies the success of public policy in facilitating access to climate finance through domestic sources. An added layer of advantage from domestic climate finance is that it is often easier to manage and access, thanks to the reduced risk associated with investors' familiarity with the economic landscape and the risk profiles of their investments. Similarly, this marks a double improvement in funding from about R62 billion in 2017–2018 period.[28]

In South Africa, the dominance of the failing public energy utility, Eskom, in its inability to provide sufficient transmission capacity for some renewable energy generated, had even resulted in the initial failure of the government to implement its policy on feed-in tariff system for renewable energy conceptualized in 2009.[29] This led to the subsequently design of the Renewable Energy Independent Power Producer Pro- curement Programme (REIPPPP) as a competitive bidding system to stimulate private sector investment into grid-connected renewable energy generation.[30] The independent renewable energy producers under this arrangement were required to sell their generated power under a power sale contract with Eskom as the only buyer of electricity.[31] Adopting this approach, seven bidding rounds have been undertaken between 2011 and 2019, giving rise to a total of 6.4 gigawatts of renewable energy capacity from 112 projects.[32]

It has been contended that the South African REIPPPP has effectively mobilised private investment for renewable energy deployment at scale, having a standardised power produc-

25 *Chavi Meattle*, et al, The South African Climate Finance Landscape 2023: A technical report prepared for the Presidential Climate Commission, South African Presidential Climate Commission, 2023, 2 <https://www.climatepolicyinitiative.org/wp-content/uploads/2023/11/The-South-African-Climate-Finance-Landscape-2023.pdf> accessed 30 August 2024.

26 Ibid at 2.

27 Ibid at 1.

28 *A Cassim,* et al, South African Climate Finance Landscape 2020, South Africa: Climate Policy Initiative, 2021 <https://www.climatepolicyinitiative.org/wp-content/uploads/2021/01/South-African-Climate- Finance-Landscape-January-2021.pdf>.

29 *Axel Michaelowa*, et al, Mobilising private climate finance for sustainable energy access and climate change mitigation in Sub-Saharan Africa 21(1) (2021) Climate Policy 54.

30 *A Eberhard and R Naude,* The South African Renewable Energy IPP Procurement Programme. Review, Lessons Learned & Proposals to Reduce Transaction Costs (2021) cited Ibid.

31 Ibid.

32 *IPP Office* (2019) Independent Power Producers Procurement Programme (IPPPP), an overview as at 31 March 2019, cited ibid.

tion agreement between independent renewables producers and the Eskom which is backed by financial guarantees of the government.[33] This has positive impact on rising competition and confidence in the bidding process among private companies and has enabled REIPPPP to rapidly reduce electricity generation costs from renewable energy projects (between 50–75 %) in just four years.[34] Similarly, the flexibility of the power purchase agreement that does not impose penalty on producers for failure to meet agreed power supply under the power production agreement policy is in itself an incentive to such off-grid private renewable energy power producers as it reduces investor risk.[35]

The existence of a robust legal and policy framework, and incentives-backed policies on the decarbonization of fossil fuel-dominant sectors of the South Africa economy, especially in relation to electricity and transportation hold the key to inspiring private investments to complement public sources in mobilizing climate finance in the country. Similarly, the dominant role of private capital from local investors in the country is a model for others to emulate in the pursuit of their climate goals.

Finally, the Just Transition Energy Partnership between South Africa (on one part) and US, UK, France, Germany and European Union to raise about USD 8 billion in the first phase to decarbonize its coal-dominated electricity system to help the country meet its goal under its NDCs is a great initiative that can substantially complement private funding sources in the advancement of energy transition in the country. The financing mechanisms takes the form of grants, concessional loans and investments and risk sharing instruments, including commitment by the donor countries to mobilise the private sector.[36]

Ethiopia has an advantage of almost 100 % power generation from renewable energy sources, though as at 2018, just about 30 % of its population has access to electricity in the country,[37] but with coordinated generation and distribution with funding through several sources including the World bank, it has driven access to modern electricity to 51 % in 2023.[38] About 90 % of Ethiopia's energy comes from hydro sources while wind contributes about 9 % and solid waste, less than 1 %.[39] The wide gap in access to electricity in Ethiopia is being bridged by the government's National Electricity Programme (NEP) introduced in

33 *A Eberhard and R Naude* (note 30) above.

34 Ibid.

35 Ibid.

36 *European Union*, France, Germany, UK, US and EU Launch Ground-Breaking International Just Energy Transition Partnership with South Africa <https://ec.europa.eu/commission/presscorner/detail/cs/ip_21_5768> accessed 31 August 2024.

37 *World Bank*, Ethiopia's Transformational Approach to Universal Electrification <https://www.worldbank.org/en/news/feature/2018/03/08/ethiopias-transformational-approach-to-universal-electrification> accessed 31 August 2024.

38 *FurtherAfrica*, Ethiopia Electric Power is poised for increase its output (Further Africa, 27 November 2023) <https://furtherafrica.com/2023/11/27/ethiopia-electric-power-is-poised-for-increase-its-output/> accessed 31 August 2024.

39 Ibid.

2017 to drive universal energy access by 2025,[40] underwritten by support and loan from multilateral development banks like the World Bank.

Already, the country is facing challenges with foreign exchange and funding in the pursuit of its universal modern energy access by 2025, especially using off-grid electricity system to connect its predominantly rural population.[41]

On the whole, Ethiopia's policies and regulations favour renewable energy, however, some key hinderances in the area of implementation still serve as a hinderance to the realization of universal energy access in the country.[42] Some of these challenges pertain to the lack of clear regulations and policies which hinder off-grid energy system development, as adequate supportive legal framework is required to spur private sector investment in the sector.[43] Similarly, difficulty in accessing funding from lenders and high interest rates is another set of difficulty with private climate finance in Ethiopia[44], just like it is with most of SSA. On the regulatory environment in Ethiopia as a disincentive for private sector investment in renewables in the country, Bahta and Gebreslassie have argued that: "Barriers to investment in off-grid technologies include a cumbersome process for obtaining business licenses, verifying quality, and paying taxes involving multiple organizations that lead to delays and increased transaction costs. The involvement of inefficient actors such as ministries, banks, and agencies further aggravate these issues. Tariffs have caused a decline in off-grid solar technology adoption and made high-wattage equipment unaffordable for most consumers."[45]

The position in Nigeria and Democratic Republic of Congo are not much different from Ethiopia, in terms of the inadequacy of regulatory environment and lack of effective support infrastructure for renewables development and trading of excess capacity. Nigeria though has a robust legal and policy framework that supports renewable energy development, infrastructural support system for connection to the grid system through an effective feed-in tariff system, and the provision of net-metering (for trading of excess capacity) as practiced in the EU is lacking. The implication is that even where small and medium scale renewable energy "prosumers" generate excess power, they cannot trade the excess capacity to the grid system.

40 *Delphos*, Off-Grid Electrification in Ethiopia <https://delphos.co/off-grid-electrification-in-ethiopia/#:~:text=The%20National%20Electrification%20Plan%20(NEP)%20aims%20to%20provide%20universal%20access,of%20GDP%20across%20six%20sectors.> accessed 31 August 2024.

41 Ibid.

42 *Solomon T Bahta and Mulualem G. Gebreslassie,* The Role of Off-grid Energy Systems for Sustainable Energy Transition in Ethiopia (2023) 5 <https://shura.shu.ac.uk/33293/8/Gebreslassie-TheRoleOfOff-Grid%28AM%29.pdf> accessed 31 August 2024.

43 Ibid.

44 *L Ahmed*, et al, Decentralized low carbon electrification: global regulatory practice and implications for accelerating affordable and clean energy access in Ethiopia, cited ibid at 5.

45 *Solomon T Bahta and Mulualem G. Gebreslassie* (note 42) at 5.

Overall, it has been shown that SSA countries lag behind in the area of renewable policies, absence of carbon pricing mechanisms, lack of basic requirements like the existence of legal framework for renewable power producers in some jurisdictions, data on renewables.[46] This does not give direction to prospective producers, and the starting point is the redress of some of the basics, such as industry-specific legal and policy framework for renewables, to give positive signal to investors. And where the relevant legal and policy frameworks exist, implementation as noticed in the case of Ethiopia and Nigeria needs to be reinvigorated.

BARRIERS TO PRIVATE CLIMATE INVESTMENTS IN SSA

As shown earlier, to nurse the hope of achieving the ambitious goal of limiting global warming to ‘well below’ 2°C above pre-industrial levels (preferably 1.5 degrees Celsius), substantial climate finance flows from the private sector need to be pulled together in SSA. The insufficient private financial flows to fund climate action or projects on the continent, and especially in SSA, is exacerbated mainly by the following factors:

High financial risk level. From the investors’ perspective, investment decision is driven by forecasted risk-return profile, whether perceived or real – generally, “project sponsors, lenders, and investors want to make a return proportional to the level of risk they undertake.”[47]

In 2023, the global investment in renewable energy rose to an all-time high of $1.8 trillion (up 17 % from the preceding year).[48]While private funding for renewable projects accounts for between 10 and 14 % of the energy financing in the continent (ECA, 2019);[49] only about 2 % of global investments on renewable energy goes to Africa.[50] At the two polarities on private climate are US and Canada, on the one hand, and Africa on the other polarity. While private finance is responsible for nearly all climate finance flows in the US and Canada, they only represent 14 % of climate finance flows on the African continent.[51] Most of the private finance that underscored climate action or infrastructure in the US or

46 Ibid at 70.

47 *Remco Fischer, Jenny Lopez and Sunyoung Suh*, Barriers and Drivers to Renewable Energy Investment in Sub-Saharan Africa, 2(1) (2011) 56 <https://www.thejei.com/wp-content/uploads/2015/01/132-463-1-PB.pdf> accessed 22 July 2024.

48 *BloombergNEF*, Energy Transition Investment Trends 2024 <https://assets.bbhub.io/professional/sites/24/Energy-Transition-Investment-Trends-2024.pdf> accessed 9 July 2024.

49 While ECA places it at 10 %, *African Policy Research Institute*, Africa's Climate Finance Challenges: Reflections on Africa Climate Summit and Africa Climate Week 2023 <https://afripoli.org/africas-climate-finance-challenges-reflections-on-africa-climate-summit-and-africa-climate-week-2023> accessed 17 July 2024.

50 *Antony Sguazzin*, Africa Calls for Financing, Debt Relief to Battle Climate Change (Bloomberg, 9 June 2023) <> accessed 27 June 2024.

51 *CPI* (2023), Global Landscape of Climate Finance 2023, Climate Policy Initiative, <https://www.climatepolicyinitiative.org/publication/global-landscape-of-climate-finance-2023/>.

Canada was aggregated from domestic sources,[52] just like the case in South Africa. Despite the advantages that Africa's geographical locale places it in the production of renewable energy resources – solar, hydrogen, wind, geothermal and biomass[53] (with the huge potentials for upscaling power generation to about 300 gigawatts, up from the current 56 gigawatts); the continent, especially SSA, receives the least in renewable investments compared to other regions,[54] and one of the major disincentives to such investments on the continent is the high risk factors, coupled with the high cost of finance for private investors.

The risk level in Africa is unsustainably high and therefore constitutes a major disincentive to private capital flow generally, and in relation to climate finance in particular. The implication of this is the prohibitively high cost of finance on the continent, especially when the funding is to be accessed from outside the municipal setting of the borrower or project area, is that projects that should propel the attainment of climate goals of most SSA countries lie fallow despite the huge positive potentials. That is why the aggregation of private climate finance from South Africa is a model for other SSA countries to follow, while still supporting FDIs that fund climate mitigation and adaptation projects' execution.

Due to this high-pitched risk factor in SSA, "while export-oriented oil and gas projects are able to attract commercial financing, there are fewer bankable clean energy projects, and those that are put forward struggle to secure financing."[55] A combination of related challenges deter potential investors who are often concerned by risks stemming from relatively weak regulatory environments or the poor financial health of energy utilities. These risks can reduce the commercial viability of projects, particularly in countries with nascent clean energy sectors. They can also push up the cost of borrowing to at least two- to three-times the level in advanced economies for similar projects.[56]

Weak Regulatory Environment. Public policy and the entire regulatory environment is one of the major factors that drive away or spur private investments. The regulatory environment in most of SSA has been considered inadequate or ineffective. To further buttress this point on weak governance structure, institutional and policy instability, Dr Ajay Mathur

52 Ibid.

53 *Manfred Hafner, Simone Tagliapietra and Lucia de Strasser* (note 23) at 97.

54 Mathur, 'Powering the Net-zero Future' <https://www.worldclimatesummit.org/ondemand2022?mc_cid=ae726ce457&mc_eid=044b44209f> accessed 31 March 2023.

55 *IEA* (2023). Similarly, investment in the EACOP pipeline project in Uganda and Tanzania by TotalEnergies, State Owned oil companies of Uganda and Tanzania and CNOOC will cost a total of $5 billion. See *The Independent*, EACOP Costs Push to $5 Billion due to 'Covid-19, Other Factors (The Independent, Kampala, 24 January 2024) <https://www.independent.co.ug/eacop-costs-push-to-5-billion-due-to-covid-19-other-factors/> accessed 15 July 2024. Similarly, TotalEnergies is investing $5.7 billion in oil exploration and appraisal work in its Namibia oil find, asides other international oil companies' investments. See *The Brief*, TotalEnergies to Spend N$5.7bn on Namibia oil exploration in 2024 (The Brief, Windhoek, 11 February 2024) <https://thebrief.com.na/2024/02/totalenergies-to-spend-n5-7bn-on-namibia-oil-exploration-in-2024/> accessed 15 July 2024.

56 Ibid.

of the International Solar Alliance stated that of the total $200 billion in the solar PV investment in 2021, only 5 % of it went to Africa, despite its geographical advantage for generation and utilization of renewable energy resources, because of perceived investment risk.[57] The Alliance therefore set out to work out a risk mitigation fund that would underwrite this kind of investment on the continent and in developing countries generally to support foreign investment in renewables.[58] The Alliance also plans to coordinate a partnership between African solar start-ups and foreign investors to smoothen the technological and financial supply chains' interests in deepening renewable energy generation and deployment on the continent.[59] This perceived weak governance system and policy instability shows the investment risk, perceived or real, in developing countries and SSA in particular, that required the devising of Investor-State Dispute Settlement mechanism as an investment-risk mitigating framework, which has culminated to more public debts and intractable disputes with foreign investors. There would be surely no need for guarantees in the form stated above if there was no threat to capital by way of seemingly insurmountable political risk which may extend to unjustifiable expropriation, unfair treatment of investment, discriminatory measures, among others that could frustrate capital exposure of investors.

Another dimension to the challenging regulatory environment is the lack of policy reforms and poorly implemented reforms in improving electrification has raised doubts in implementing renewable energy practices that would lead to the region's achieving the SDGs.[60] In Ethiopia, for instance, the following have been identified as the main challenges to securing private sector funding of climate projects: high dependence on imported equipment, lack of adequate incentives to import, slow custom clearance procedures, lack of foreign currency and frequent reoccurrence of inflation.[61] Similarly, both public and private domestic stakeholders have very limited experience with multilateral climate finance activities.[62] All of these point to a regulatory environment that has not been properly reformed to align with the climate objectives of most SSA countries.

Public subsidies for fossil-fuel-based power generation. Currently, SSA power utilities are not financially sustainable. A seminal study by Trimble et al. revealed regrettably that across SSA only the utilities of Seychelles and Uganda fully cover operational and capital expenditures.[63] The remaining majority SSA utilities run in "quasi-fiscal deficit (i.e. defined as the difference between the actual revenue collected and the revenue required to

57 Mathur (note 54) above.

58 Ibid.

59 Ibid.

60 *Y Mohammed, M Mustafa, N Bashir,* Status of renewable energy consumption and developmental challenges in Sub-Sahara Africa 27 (2013) Renewable Sustainable Energy Review, 453–463.

61 *Axel Michaelowa,* et al, (note 29) above at 53.

62 Ibid.

63 *CP Trimble, M Kojima, Perez Arroyo, F Mohammadzadeh* Financial viability of electricity sectors in Sub-Saharan Africa: quasi-fiscal deficits and hidden costs (The World Bank World Bank Global Tracking Framework—Tracking progress toward sustainable energy goals, 2016), cited in *Manfred*

fully recover the operating costs of production and capital depreciation), and thus need to be subsidized by the state."[64] Legal and structural reform would appear to be the only way to scale-down these deficits and make utilities financially viable; they also need to reach "operational efficiency" by shrinking their transmission, distribution and bill collection losses, and overstaffing.[65] This may have adverse implications for affordability and by implication, access, which is the centre-piece of SDG 17, but this can be addressed through grant supported community-operated off or mini-grid generation to local communities at minimal cost, while high power consumers pay more per kilowatts of electricity consumed.

Public subsidies for renewables is low or non-existent compared to heavy-carbon energy. In Nigeria, until 2023, there was a government explicit subsidy (undercharging for the supply cost of fossil fuels) on grid-generated and distributed electricity where a lot of corrupt management process was inevitable, but there was no such specific policy in renewable energy so as to incentivise investment in the sector. Since the removal of the subsidy on electricity and petroleum products in the country, it would be expected that such subsidy would be introduced for renewables so as to encourage private investment until a certain level of competitiveness or maturity in the industry is reached. The G-20 adopted the removal of subsidy on fossil fuel and introduction of same for renewables approach in 2009 when they agreed to phase out inefficient and wasteful subsidies on fossil fuel to encourage private sector investment in renewables at scale.[66] This model of transferring a part of the explicit subsidy from fossil-fuel powered, grid-based system can incentivise private "prosumers" and the large scale investors to invest in renewables.

Generally, variables or factors that alter the risk-return outlook of a renewable energy project can either hinder or encourage investment. Of particular importance are those factors tied to the local jurisdiction where the project is proposed, such as the overall economic climate, the institutional framework and political stability, and the consistency of local regulations.[67] In addition, the following have been identified as other impediments to attracting private finance in funding climate action and projects on the continent:

a. High cost of finance in SSA than elsewhere is mainly due to the small size of the electricity market and so is the resultant lack of economies of scale.[68]
b. Insufficient support infrastructure. High level of loss of energy between generation and distribution is also a major disincentive to investors.
c. Under-performing utility companies.

*Hafner, Simone Tagliapietra and Lucia de Strasse*r, Energy in Africa: Challenges and Prospects (Cham, 2018) 80.

64 *Manfred Hafner, Simone Tagliapietra and Lucia de Strasser,* Energy in Africa: Challenges and Prospects (Cham, 2018) 80.

65 Ibid at 81.

66 *UNEP*, Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication. Geneva, (Switzerland, 2011).

67 *Remco Fischer*, et al, (note 47) at 59.

68 Ibid at 61.

d. Non-availability of market for renewable energy, despite huge potentials for generation and high level of number of persons without access to modern energy on the continent.
e. political risk – unjustifiable expropriation, unfair treatment of investment, discriminatory measures, among others that could frustrate capital exposure of investors.

ATTRACTING PRIVATE FINANCE FOR CLIMATE ACTION IN SUB-SAHARAN AFRICA

As it has been noted, financing African green development cannot be realized within the inhibiting boundary of public funds, hence partnering with the private sector is indispensable.[69] It is in this light that article 9 of the Paris Agreement requires developed countries to lead the way in "mobilizing" financial resources from wide variety of sources, instruments and channels required for climate change mitigation and adaptation measures or projects and initiatives in developing countries. it is for this reason that developed countries argued that wealthy developing countries like China[70] should contribute towards planetary restoration damaged by the impacts of climate change[71] not just as a result of their financial wellbeing but also as a homage to attribution.

In the context of Africa, meeting its energy needs, through universal energy access to modern energy, would require doubling the investment in energy on the continent, estimated at over $200 billion per annum from 2026 to 2030, two-thirds of which will go to clean energy.[72] To achieve this, the following factors are deserving of reform:

Public policy. Public policy reform is key to spurring private sector investments in renewables at scale. For instance, Remco Fischer, et al. have argued that despite the competitiveness of renewable energy technologies with conventional technologies, their financial performance still lags behind.[73] For renewable energy to be viable, regulations and incentives are needed to create a fair competition between innovative, more costly but cleaner technologies, and established, cheaper but more polluting ones; and such regulations and incentives must ultimately be established by policymakers and regulators and implemented by governments within a legal framework.[74] The critical role of public authorities in enabling private entities to deploy, install, operate, and finance renewable

69 *Gebreysus Abegaz Yimer*, Sustainable Finance in Africa: A Comparative Overview, 18(1) (2024) Mizan Law Review 131.

70 Article 9(2) of the Paris Convention encourage "other parties" in reference to the wealthier developing countries to contribute financial support on a voluntary basis for developing countries to meet their NDC targets under the Agreement.

71 *Philippe Sands,* et al, Principles of International Environmental Law (Cambridge 2018) 327.

72 International Energy Agency, Global Energy Outlook 2023 <ttps://iea.blob.core.windows.net/assets/86ede39e-4436–42d7-ba2a-edf61467e070/WorldEnergyOutlook2023.pdf> accessed 11 July 2024.

73 *Remco Fischer, Jenny Lopez and Sunyoung Suh* (note 47) at 60.

74 Ibid.

energy technologies highlights the importance of ensuring that these incentives remain stable throughout the lifetime of projects and that public institutions and the legal system are reliable and trustworthy.[75] This should extend to Public policy on feed-in tariffs to carter for above-grid renewable energy costs, partnering on the provision of support infrastructure like net-metring system, wind turbines, solar photovoltaic, among others, are essential to incentivise private sector investments in renewables and low-carbon infrastructure in SSA.

The World Bank developed a tool called RISE (Regulatory Indicators for Sustainable Energy) to monitor specifically the status of policy frameworks to advance access to modern energy, and renewable energy in particular[76] that support sector-specific legal framework for renewables, and setting targets and planning for renewable energy expansion, incentives and regulatory support for renewables. Others are predictability and efficiency of financial and regulatory incentives, network connection and pricing, counterparty risk (payment risk mitigation, public financial statements, utility creditworthiness, and carbon pricing and monitoring[77] as envisaged under the World Bank's RISE model contents of renewables regulatory system.

Prospect of derisking and blended finance. Public actors can resort to risk management instruments such as guarantees and insurance, as tools to tackle the most prevalent market risks for green investments.[78] They are gradually being deployed, in particular by direct foreign investors as the hold the potentials catalysing investment in challenging sectors and environments.[79]

Others include invigorating the emerging carbon market initiatives in Africa, encouraging development banks to support public investment in infrastructure and green initiatives, connecting political ambition (decarbonization and energy access) with private climate funding priorities, among others.

CONCLUSION

A transition from fossil fuel-based economies to renewable-energy-powered growth must adhere to the tenets of just transition as it also presents an opportunity to align investments with climate objectives. To effectively prosecute energy transition in SSA will require a multidisciplinary approach involving policy support, new financial mechanisms (especially from private sector), among others. The Just Energy Transition Partnership (JETP) model involving USD 8.5 billion support from donor countries to South Africa to support its

75 Ibid.

76 *Manfred Hafner, Simone Tagliapietra and Lucia de Strasser* (note 23) at 68.

77 Ibid at 69.

78 *Climate Policy Initiative,* Blended Finance in Clean Energy: Experiences and Opportunities <https://www.climatepolicyinitiative.org/publication/blended-finance-clean-energy-experiences-opportunities/> accessed 2 August 2024.

79 *CPI*, Global Landscape of Climate Finance 2019 17 <https://www.climatepolicyinitiative.org/wp-content/uploads/2019/11/2019-Global-Landscape-of-Climate-Finance.pdf> accessed 16 July 2024.

power sector decarbonization and just transition interventions is deserving of further study as an example for partnership building by several SSA countries.[80]

Overall, it was found out that SSA countries lag behind in the area of renewable policies, absence of carbon pricing mechanisms, lack of basic requirements like the existence of legal framework for renewable power producers in some jurisdictions, data on renewables.[81] This does not give direction to prospective producers, and the starting point is the redress of some of the basics, such as industry-specific legal and policy framework for renewables, to give positive signal to investors. Therefore, mobilizing private finance to scale up climate projects and initiatives in Sub-Saharan Africa will require a deliberate shift in policy, including the reform of legal and regulatory frameworks. This shift must ensure that the climate objectives of these countries are aligned with the expectations of private investors, particularly in areas such as investment guarantees, political stability, and financial incentives for renewable energy in order to spur private climate financing at scale that is viable and sustainable.

80 *European Union* (note 36) above.

81 Ibid at 70.

Investment in Renewable Energy in Kenya: Key Legal Issues, Challenges and Prospects

Hannah Wamuyu*

Abstract

Kenya launched its Kenya Vision 2030 in 2008 which identified "energy" as one of the key enablers to economic, social and political growth. The political economy supports transition from fossil fuels to clean energy sources which is in line with the global commitments to address the climate change problem by reducing greenhouse gases. To achieve the transition, development of renewable energy sources has been identified as one of key components in addressing climate change problem. Renewable energy provides a large source of Kenya's electricity today of about 80 %, a country of over 50 million people which helps in the transition to clean energy by 2030. Achieving the final 20 percent will require the input of country's energy policy experts and investors in utilising Kenya's rich natural potential for geothermal energy, solar energy and wind energy among other sources of clean energy. The legislative framework and institutional changes Kenya put in place are conducive to foreign investment and especially on-grid, off-grid and micro-grid projects. The paper analyses the scope of investment in renewable energy in Kenya, which is important for the purpose of mapping the legal aspects that support such investment, challenges and prospects.

A. Introduction

Kenya is one of the African countries with the largest share of renewables in its generation mix.[1] In 2015, renewables supplied over 70 per cent of electricity, mainly from hydropower and geothermal plants. Climate change creates a justification for a transition to sustainable energy in order to mitigate the impacts.[2] Most countries have committed to do more to achieve a clean energy transition in order to fulfil the ambitions of the Sustainable Development Goals (SDG) especially in making provision for access to affordable, reliable,

* Lecturer, Faculty of Law, Jomo Kenyatta University of Agriculture & Technology, Kenya. PhD Candidate(Environmental Law), Center for Advanced Studies in Environmental Law and Policy (CASELAP), University of Nairobi, Kenya. hkaguru@jkuat.ac.ke

1 *Helen Osiolo et al*, The Political Economy of Investment in Renewable Electricity in Kenya in Institute for Development Studies, Green Power for Africa: Overcoming the Main Constraints 48[2017] 120.

2 A*gnieska Kazimierczuk*, Wind Energy in Kenya: A Status and Policy Framework Review Renewable and Sustainable Energy Reviews 107 (2019) 434.

sustainable and modern energy and clean energy for all.[3] SDG 13 requires the countries to address the challenge of climate change. Further commitments were made during the 21st Conference of the Parties (COP21) to the United Nations Framework Convention on Climate Change (UNFCCC) in Paris in 2015.[4]

Lack of access to energy supplies and transformation systems is a constraint to human and economic development.[5] Sustainable energy is an imperative enabling for better healthcare; food security, shelter, and clothing. A number of initiatives have emerged to address Africa's energy challenges and to support the necessary expansion and modernisation, notably programmes such as Sustainable Energy for All (SEA) to promote universal electricity access, increase the global percentage of renewable energy from 18 % to 36 %, and enhance energy efficiency.[6] Other initiatives are the African Union's Programme of Infrastructure Development in Africa (PIDA), Power Africa, the Africa-EU Energy Partnership, the African Clean Energy Corridor, as well as numerous bilateral, civil society and community efforts.[7] The focus is renewable energy due to the ability to offer sustainable energy that is in line with the objectives of the climate change global legal framework.[8]

Renewable energy is one of the sustainable or modern options for energy security.[9] Renewable energy (RE) is derived from the naturally occurring resources including geothermal, hydro, solar, wind, ocean energy, biomass, biofuels, biogas and municipal waste. RE can supply our energy needs and those of future generations in a sustainable way if effectively harnessed through careful planning and advanced technology, therefore renewable energy can enhance energy security, mitigate climate change, generate income, create employment and generate foreign exchange savings.[10]

Kenya has promising potential for power generation from renewable energy sources due to the availability of solar, hydro, wind, biomass and geothermal resources. The government has prioritized the development of geothermal, wind and solar energy plants as well as solar-fed mini-grids through least cost approach, for rural electrification.[11] Yet, Kenya continues to face significant energy challenges such as issues of energy security, en-

3 UNEP, Goal 7: Affordable and Clean Energy https://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-7(accessed July 7, 2024).

4 *Kazimierczuk,* note 2, 434.

5 UNEP, note 3..

6 *Ibrahim Rotich et al*., Renewable Energy Status and Uptake in Kenya [54[2024] Energy Strategy Reviews.

7 *Rotich*, note 6.

8 *Nurtaj Vidadili et al.,* Transition to Renewable Energy and Sustainable Energy Development in Azerbaijan Renewable and Sustainable Energy Reviews 80[2017].

9 *Anthony Amoah*, Corruption: Is it a Bane to Renewable Energy Consumption in Africa? 163[2022] Energy policy.

10 Ministry of Energy, National Energy Policy [October 2018] 11.

11 Energy and Petroleum Regulatory Authority (EPRA) et al, Least Cost Power Development Plan, 2021, 48.

vironmental sustainability, and affordability. Energy equity and security play important roles at the population level based on social and economic pillars. Energy poverty in Kenya is characterized by limited access to modern energy services and reliance on traditional biomass for cooking and heating; remains a significant challenge. According to the World Bank, as of 2020, approximately 75 % of the rural population in Kenya lacks access to electricity. In urban areas, this figure drops to around 23 %, highlighting a stark contrast between urban and rural energy access.[12] In urban areas, the classification can be further performed for high-density areas with perceived better infrastructure for the middle class and the high social class. However, slums experience severe energy poverty due to low income. Approximately 85 % of the population relies on biomass, such as wood, charcoal, and dung, for cooking.[13] This heavy reliance on biomass not only poses health risks due to indoor air pollution but also contributes to deforestation and environmental degradation. The World Health Organization (WHO) estimates that exposure to indoor air pollution from traditional cooking methods leads to approximately 21,560 deaths annually in Kenya.[14]

Being part of the Sustainable Energy for All Initiative (SE4All) launched by the United Nations, Kenya developed in 2016 an Investment Prospectus (Sustainable Energy For All – Kenya Investment Prospectus, 2015) targeting foreign investors, in which it highlighted the reasons Kenya was an attractive renewable energy investment destination. The report highlighted important factors at play enabling a business climatefor foreign renewable energy investors. Some of the factors are :clear tax regimes with incentives on equipment needed renewable energy investment; enforceability of laws and contracts, ability to repatriate profits, existence of bilateral trade agreements, insurance cover for investment which provides political risk insurance, and fair dispute resolution forums such as the Nairobi Centre for International Arbitration.[15] The Renewable Energy Policy Network for the 21st Century (REN21) has indicated in its annual report issued in 2018 that Kenya has renewable energy targets for its power sector as well as an Intended Nationally Determined Contribution (INDC). The regulatory policies that support of renewable energy include feed-in tariff and net metering, fiscal incentives and public financing policies such as tax incentives, energy production payment, as well as public investments, grants, and capital subsidies.[16]

Kenya is moving towards diversifying energy sources by procuring more of its additional power from wind and solar and with the substantial growth in hydro, wind and solar energy in the recent years which has led to a decline in generation from oil, gas and coal

12 *A. O'Neill*, Kenya: Urbanization from 2012 to 2022 https:// www.statista.com/statistics/455860/urbanization-in-kenya/(accessed July 2, 2024).

13 Ministry of Energy, Assessment of the Supply and Demand of Cooking Solutions at the Household Level, 2019.

14 *I.K. Rotich & P.K. Musyimi*, Indoor Air Pollution in Kenya, Aerosol Science and Engineering 8 (1) (Mar. 2024) 54–65.

15 *Rotich & Musyimi*, note 14.

16 *Rotich & Musyimi*, note 14.

sources and electricity imports.[17] Kenya has an estimated hydropower potential of about 6,000MW comprising of large hydros (sites with capacity of more than 10MW) and small hydros. Of the large hydros, 823.8MW has been exploited and accounts for 35.3 % of installed generation capacity as at 2017.[18] The Kenyan electricity system is skewed towards industrial and urban consumers. Large commercial and industrial customers represent 54 per cent of the national electricity sales but only 0.1 per cent of the total connections. On the other side, domestic consumers represent 90 per cent of the connections but only 25 per cent of the sales of electricity. Geographically, 52 per cent of electricity sales are in the Nairobi area (Kenya Power 2014). Industrial and urban consumers are therefore the most powerful actors in pressuring the government to keep electricity tariffs low.[19]

B. The Legal, Policy and Institutional Framework for Investment in Renewable Energy Enabling Policy Framework

Energy is recognised as one of the economic drivers and one of the main focus areas in the Kenya's Vision 2030 and the Big 4 Agenda development programs.[20] Kenya's Vision 2030 (Vision 2030) was launched in 2008 as a vehicle for accelerating the transformation of Kenya into a rapidly industrialising middle-income nation by the year 2030. The Least Cost Power Development Plans (LCPDPs) is another critical policy tool that informs forecasting, generation planning and transmission planning which impact on macroeconomic environment, introduction and application of new technologies.[21]

There have been plans to increase the electricity access and reduction of costs through initiatives such as Vision 2030, the BIG-4 Agenda and universal electricity access through the Last Mile Connectivity Program aiming to ensure reliable and climate-resilient energy systems. The goal of achieving a 100 % transition to renewable energy by 2020 has laid a strong foundation for greener and more sustainable energy. With electricity demand expected to triple in the next decade in East Africa, diversification is necessary to supplement and increase energy equity.[22] In line with the 'Last Mile Project' plan, Government of Kenya appreciates the need to continually invest in infrastructure as well as upgrading energy technology to ensure that all Kenyans have access to modern and sustainable energy.[23] The Last Mile Project is a Government of Kenya programme that is aimed at facilitating the objec-

17 *Kariuki Muigua,* Exploring Alternative Sources of Energy in Kenya, Journal of CMSD, 5 (2) 2020, 3.

18 Ministry of Energy, National Energy Policy, October 2018, 11.

19 Osiolo et al 124.

20 *Kariuki Muigua*, note 17, 3.

21 Energy Petroleum Regulatory Authority et.al, Least Cost Power Development Plan 2021–2030, 2021, 8.

22 *S.J. Chemengich, D.O. Masara,* The State of Renewable Energy in Kenya with a focus on the Future of hydropower, AER Journal 5 (1) (2022) 246–260.

23 *Kariuki Muigua*, note 17, 13.

tive of affordably connecting Kenyan households to the national network grid. This is geared towards achieving a national connectivity rate of 70 % by 2017 as part of the government's goal of universal access to electricity by 2020.[24]

The Third Medium Plan 2017–2022 identifies energy as the country's economic driver that strengthen industrialisation; providing a high quality of life to all its citizens in a clean and secure environment," and as a result access to competitively-priced, reliable, quality, safe and sustainable energy as an essential ingredient for the country's social -economic development.[25] Similarly in the Fourth Medium Term Plan 2023–2027 the government of Kenya seeks to promote the development of energy generation and distribution by increasing investments in green energy (geothermal, wind, solar and hydro) as part of infrastructural development.[26]

In the National Renewable Energy Master Plan under Kenya's Vision 2030; the government outlines energy plans to 'promote development of renewable energy as an alternative source of energy which will include generation of energy from solar, wind, biogas, development of bio-energy including bio-ethanol and diesel value chains and promotion of the use of improved cooking stoves and charcoal kilns, and re-afforestation of water towers.[27]

The Kenya Energy Transition & Investment Plan (ETIP) is another policy developed on the backdrop of Kenya's commitment to champion the fight against climate change. The ETIP provides a clear pathway for the Energy Sector to contribute to the attainment of Kenya's climate ambition of Net Zero emissions by 2050 with opportunities for financing and investment. The ETIP identifies main decarbonization technologies that will anchor an orderly transition, including renewable energy, green hydrogen, e-mobility, energy storage and clean cooking. It further supports the scoping of projects to catalyze funding from both public and private sources.[28]

To promote direct use of geothermal resources, the project targets the establishment of a Green Energy Industrial Park at the Olkaria geothermal hub in Naivasha, which will accommodate both industrial and non-industrial activities such as offices, data centres, research and development centre, hospitality, visitor experience centre, and administrative and commercial uses.[29]In terms of achieving power distribution and access, the energy project aims at enhancing power network expansion and improvement and electricity access in both on-grid and off-grid areas. It entails: construction and upgrading of 54 sub-stations and extension of 1,183km associated HV and MV lines; connecting to electricity 2.3

24 Last Mile Connectivity Program Q & A " https://kplc.co.ke/img/full/TTfrdXBeliBJ_Last%20Mile%20QA.pdf (accessed July 20, 2024).

25 *Kariuki Muigua*, note 17, 2.

26 The National Treasury and Economic Planning 2024, Fourth Medium Term Plan 2023–2027 Bottom Up Economic Transform Agenda for Inclusive Growth, nnniii.

27 *Kariuki Muigua* note 17, 13.

28 Ministry of Energy & Petroleum, Kenya Energy Transition & Investment Plan 2023–2050.

29 State Department for Economic Planning, Fourth Medium Plan 140.

million additional customers and 30,000 public facilities (government institutions, health facilities and public schools); installation and maximization of 90,000 transformers; installation of 248 mini grids; and installation of 75,000 lanterns under the Public Lighting Project.[30]

Further, the energy project aims at promoting clean, affordable, and quality alternative renewable energy sources through the expansion of energy centres; installation of more solar PV systems; development of small hydro's; wind masts and data loggers; development bio fuel plants for value addition; construction of biogas plants in counties; development of energy efficient charcoal kilns and promotion of clean cooking solutions.[31] Other planned activities include promotion of energy efficiency and conservation including e-mobility, green building and reduction of GHGs; electrification of institutions and community boreholes; development of Kenya green hydrogen; and promotion of energy production from municipal waste.[32]

The legal and policy framework has a special focus on investment and is skewed towards encouraging and promoting foreign investment.

I. Kenya Investment law and Policy

The Kenya Investment Policy (KIP) and the Country Investment Handbook promote and facilitate private investment in Kenya through attracting and retaining foreign investment.[33] The policy is guided by seven core principles of which includes: openness and transparency; inclusivity; sustainable development; economic diversification; domestic empowerment; global integration; and investor centeredness.[34]

The Foreign Investments Protection Act (FIPA) seeks to protect the interests of foreign investors in Kenya by affording protection to certain approved investments.[35] For a foreign investor to enjoy the protective measures and incentives envisaged under the Foreign Investments Protection Act, the investor is required to register and obtain a certificate from the Cabinet Secretary. The investment value must be of at least USD 100,000 and must be for a lawful activity which is beneficial to Kenya. To determine whether an investment is beneficial to Kenya; the investment should result in creation of employment for Kenyans; lead to acquisition of new skills or technology for Kenyans; make a contribution to tax revenues or other government revenues; lead to a transfer of technology to Kenya; lead to an increase in foreign exchange, result in utilisation of domestic raw materials, supplies

30 Fourth Medium Term, note 29,140.

31 Fourth Medium Term, note 29,142.

32 Fourth Medium Term, note 29, 142.

33 *Joyce Karanja et al*., Foreign Direct Investment: An Overview of Policy and Regulatory Developments in East and Southern Africa in Mathew Levitt & Baker Bolts(Eds), Foreign Direct Investment Regimes, 2022, 15.

34 Ministry of Industry, Trade and Cooperatives, Kenya Investment Policy, 2019,15.

35 Chapter 518 Laws of Kenya.

and services adoption of value addition in the processing of local, natural and agricultural resources; and utilisation, promotion, development and implementation of information and communication technology.[36] The Kenyan government may have special arrangements with a government of any country to promote and protect investments.[37]

The Investment Promotion Act seeks to promote and facilitate investment by assisting investors to obtain the licences necessary to invest and by providing other forms of assistance and incentives.[38] The legislation establishes the Kenya Investment Authority (KenInvest) whose main objective is to promote investments in Kenya by facilitating the implementation of new investment projects, providing after-care services for new and existing investments, as well as organising investment promotion activities both locally and internationally.[39] A general investment approval can be sought from KenInvest, who will grant the investor an investment certificate that grants the investor a number of advantages such as assistance in obtaining any necessary licences and permits; assistance in obtaining incentives or exemptions under various tax legislation.

The Special Economic Zones Act[40] establishes special economic zones and are aimed at promoting and facilitating global and local investments through offering tax incentives. The Capital Markets Act[41] and Capital Markets (Foreign Investors) Regulations of 2002 regulate capital markets and public issuers of securities and govern the manner in which foreigners may invest in the capital market in Kenya.[42] Any such foreign company must be registered as a foreign company under the Companies Act[43] in order to carry on a business in Kenya.

The National Construction Authority Act[44] provides that foreign contractors (companies incorporated outside Kenya or with more than 50 % ownership by non-Kenyan citizens) must enter into subcontracts or joint ventures with local firms so that at least 30 % of the construction work is carried out by local firms.[45] This legislation may apply as construction is critical in any energy infrastructure.

The Energy Act[46] provides the enabling framework for investment in renewable energy being the framework that lays the structure of energy production in Kenya. The objectives of the legislation are: to consolidate the laws relating to energy; promote renewable ener-

36 *Karanja et al*, note 33,16.
37 Karanja et al,note 33,16.
38 Act No 46 of 2004, *Karanja*, note16.
39 *Karanja* note16.
40 Act Number 16 of 2015.
41 (Cap. 485A) Laws of Kenya.
42 *Karanja* note 16.
43 Act Number 17 of 2015.
44 Act No 41 of 2011.
45 *Karanja* note 17.
46 Act No 1 of 2019.

gy; promote exploration, recovery and commercial utilization of geothermal energy. The Cabinet Secretary (CS) and other institutions established under the Energy Act bear heavy responsibilities in managing the energy sector and enabling investment in the sector. The legislation mandates the government to facilitate the provision of affordable energy services to all persons in Kenya.[47]

The Cabinet Secretary (CS) representing the national government (NG) in the Ministry and county government bear several responsibilities with respect to investment in energy. The respective governments have roles to play in enabling access to affordable energy. The CS while in consultation with the relevant stakeholders is required to develop, publish and review energy plans in respect of coal, renewable energy and electricity so as to ensure delivery of reliable energy services at the least cost. This is after consolidation of plans from the energy service provider and county energy plans.[48] Where the National or County Government determines that a supply of energy in any area is necessary and upon assessment it is established to be commercially inexpedient to provide for the necessary reticulation by any licensee, the CS or County Executive Committee member may undertake the provision of any such works or provide the funds necessary for the development of such works.[49]

The CS is further required to develop and implement a fair, transparent and equitable strategy to ensure that all households are connected to a supply of electricity by 2030.[50]While at it, the CS is supposed to develop a conducive environment for the promotion of investments in energy infrastructure development, including formulation of guidelines in collaboration with relevant county agencies on the development of energy projects and to disseminate the guidelines among potential investors.[51] The National and County Governments are expected to facilitate the acquisition of land for energy infrastructure development in accordance with the law.[52]

EPRA established under the Energy Act; is an independent regulatory agency that regulates; through licencing; generation, importation, exportation, transmission, distribution, supply and use of electrical energy with the exception of licensing of nuclear facilities and production, conversion, distribution, supply, marketing and use of renewable energy.[53] There are a number of considerations to be made by EPRA before they make any grant of licence most of which suffice as obligations that need to be fulfilled. The considerations are: the impact of the undertaking on the social, cultural or recreational life of the community; the need to protect the environment and to conserve the natural resources; land use

47 S 7(1) Energy Act.
48 S 5(5) Energy Act.
49 S 7(2) Energy Act.
50 S 7 (1) Energy Act.
51 S 8 (1) Energy Act.
52 S 8 (2) Energy Act.
53 S 10,119(2) Energy Act.

or the location of the undertaking; economic and financial benefits to the country or area of supply of the undertaking; the economic and energy policies; that the contractual rights, privileges, liabilities and obligations accrued to an existing licensee or any other person are not materially adversely affected; the cost of the undertaking and financing arrangements; the ability of the applicant to operate in a manner designed to protect the health and safety of its employees and users of the service for which the licence is required and other members of the public who could be affected by the undertaking; the technical and financial capacity of the applicant to render the service for which the licence is required.[54]

Rural Electrification and Renewal Energy Corporation (REREC) is another institution set up under the Energy Act which is responsible for accelerating the pace of rural electrification; developing, promoting and managing the use of renewable energy (excluding geothermal); and offering clean development mechanisms, such as carbon credit trading; establishing energy centers in the counties and developing appropriate local capacity for renewable technologies.[55] The institution is therefore critical in the acceleration of investment in the area of rural electrification and renewable energy. The Rural Electrification Programme Fund (REPF) is set up in the Energy Act with the objectives of accelerating electricity infrastructure in the country.[56] The fund consists of the electricity sales levy; such monies as may be appropriated by parliament for that purpose; donations, grants and loans; interests from bank deposits; and all other monies lawfully received or made available for the Rural Electrification Programme as the CS may approve.[57]

The Renewable Energy Resource Advisory Committee (RERAC) an inter-ministerial committee is responsible for advising the responsible CS on matters concerning the: allocation of renewable energy resources; licensing of renewable energy resource areas; management of water towers and catchment areas; development of multi-purpose projects such as dams and reservoirs; and management and development of renewable energy resources.[58] The body is important in influencing decisions that culminate in investment in renewable energy infrastructure.

The CS in consultation with Renewable Energy Resource Advisory Committee may grant a licence for extraction of geothermal resources under such terms and conditions as the CS may determine in accordance with the provisions of the Constitution.[59] The Cabinet Secretary shall promote the development and use of renewable energy technologies, including but not limited to biomass, biodiesel, bioethanol, charcoal, fuelwood, solar, wind, tidal waves, hydropower, biogas and municipal waste.[60] The Cabinet Secretary may impose a

54 S 121(1) Energy Act 2019.

55 S 44 Energy Act.

56 S 143 (1) Energy Act.

57 S144 (2).

58 S 76(4) Energy Act.

59 S 80(1) Energy Act, art 71 Constitution of Kenya on agreements relating to natural resources.

60 S 75(1).

levy of up to five percent on all electricity consumed in the country, the proceeds of which shall go into the Rural Electrification Programme Fund.[61]

The private sector is important in driving investment in the energy sector. The Public Private Partnership Act provides for the legal framework of engagement enabling participation of the private sector in the financing, construction, development, operation, and maintenance of government infrastructure and development projects through concession and other contractual arrangements; and institutions that regulate, monitor and supervise the implementation of project agreements relating to infrastructure or development projects.[62] The Public Private Partnership Unit (PPPU) that is established under the PPP Act as a unit of the National Treasury to serve as the secretariat and technical arm of the PPP committee is responsible for assessing and approving PPP projects in Kenya.

The legal framework allows for establishment of Independent Power Producers (IPPs) which are private companies which generate power and sell electricity in bulk to KPLC. There are about fourteen (14) IPPs in operation which account for about 24 % of the country's installed capacity. As at 2018 there were about five thermal plants, one geothermal power plant; several tea factories that run mini hydro power plants and one biogas power plant.[63]

The local private sector in the renewable energy sector is represented by the Kenya Private Sector Alliance (KEPSA), the Kenya Association of Manufacturers (KAM), and the Kenya Renewable Energy Association (KEREA). Whereas KEREA mainly represents the small-scale solar industry, KEPSA and KAM represent a broader range of larger and more powerful businesses.[64]

In resolving disputes relating to renewable energy investment, the Energy Petroleum Tribunal hears and determines disputes and appeals relating to the energy and petroleum sector arising from the Energy Act 2019 and other statutes. The tribunal has power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance and power to, on its own motion or upon application by an aggrieved party, review its judgments and orders.

The investors are expected to comply with local content regulations requiring companies to submit a local content plan when applying for a licence.[65] The local content plan requires the investor to give first consideration to Kenyan services, products, and employees and commit to train Kenyans on the job. The regulations set minimum local content requirements for energy operations in the country, with levels increasing from the start of the project to 75 per cent of the duration of the project to reach 80 per cent of goods

61 S 144.

62 Public Private Partnerships Act 2013.

63 Ministry of Energy, National Energy Policy,2018, 21.

64 *Osiolo*, note 1, 124.

65 The Energy Local Content Regulations of 2014.

and services, 70–80 per cent of management and technical core staff, and 100 per cent of other staff.[66]

The investor is also expected to comply with law for environmental protection. This is with respect to energy related projects that may adversely impact the environment. The investor is expected to undertake environmental impact assessment licence and keep records indicating compliance where necessary.[67]

II Incentives

Kenya is one of only a very few countries in sub-Saharan African to have put in place a system of feed-in-tariffs (which they did in 2008) that cover geothermal, wind, biogas, and small-scale hydro generation.[68] Kenya adopted the FiT Policy 2012 to meet its targets for tackling climate change by reducing reliance on fossil fuels. The FiT Policy promotes the generation of electricity from renewable energy sources by enabling power producers to sell electricity generated at a pre-determined tariff for a given period. Tariffs are available for energy generated from wind power, biomass, small-hydro, geothermal, biogas, and solar resources. The FiT policy provides electricity purchase guarantees by the main power utility KPLC and includes all power generation categories.[69]

The investors may also enjoy tax exemptions under the Finance Act, 2021, for solar and wind energy specialized equipment which promotes the realization of universal electrification and advancing green energy goals in the country.[70]

The Energy Act lays down the architecture for net metering which may act as an incentive especially for investors in others sectors besides the energy sector who may want to generate their energy. The Act allows a consumer to generate their own electricity and to offset the power they utilize from the national grid during peak hours, from the excess power they generate to the grid during off-peak periods.[71] The Energy Act caps the net-metering system to 1MW, beyond which it would consider the electricity producer large enough to enter into a Purchasing Power Agreement (PPA) with Kenya Power. The drive behind the net-metering system is to further encourage households and businesses to invest in renewable energy technologies as a reliable and uninterrupted source of energy.

The Ministry of Energy & Petroleum is required by law to develop an "inventory and resource map for renewable energy resources" which would be made available to interested investors and would save time and cost that would have otherwise been taken

66 *Osiolo* note 1,122.

67 S58, EMCA.

68 *Remco Fischer* note 79, 70.

69 *Osiolo* note 1,122.

70 *Esther Githinji*, Tax Incentives on Renewable Energy, 2021https://cleanenergy4africa.org/tax-incentives-on-renewable-energy/(accessed July 22, 2024).

71 S 162, Energy Act.

up in self-performing resource exploration and assessment efforts.[72] The legislative and institutional framework established in place are conducive to foreign investment which enables renewable energy transformation for on-grid, off-grid and micro-grid projects.[73]

C. Challenges in the Renewable Energy Sector

Despite the elaborate legal and policy framework enabling investment in renewable energy, challenges abound that may hamper the much needed investment. Connectivity rates remain lower than the sub-saharan African average, and reliability is low for those connected outside of the cities, mainly as a result of an insufficient transmission and distribution network.[74] Three key constraints cited that prevent further investment in renewables are namely: low demand and inability to pay in rural areas; high system costs due to a lack of networking infrastructure and an inflexible generation mix; and serious problems of social acceptance and access to land.[75] Low levels of demand are due to high poverty rates and a lack of productive uses. According to data from a private company operating mini-grids in the country, the average monthly electricity consumption of their rural consumers is just 5KWh, compared to more than 200KWh in Nairobi.[76]

Other gaps exist that affect the effectiveness of current renewable energy range from inconsistency and inadequate coordination between relevant regulatory frameworks and agencies. While there are policies in the Energy Act, 2019 promoting renewable energy, such as the Feed-in Tariff (FiT) policy, their implementation often suffers improper governance. The other critical gap revolves around insufficient financial incentives and support mechanisms for renewable energy projects. Although licenses and current policies like FiT aim to provide guaranteed prices for renewable energy producers, the rates are not competitive to attract investment from private sector. Lack of comprehensive fiscal incentives, such as tax subsidies, lowers the initial capital expenditure for renewable energy projects. This gap is worsened by limited access to affordable monetary resources, especially for small and medium-sized enterprises (SMEs) involved in renewable energy.[77]

The uptake of opportunities like renewable energy is hindered in developing countries by corruption in public institutions in the energy and other complementary sectors which makes it inefficient for investors due to the increase of the cost of production for companies

72 Sec 74, Energy Act.

73 Renewable Energy in Kenya: An examination of the legal instruments and institutional changes that successfully attracted foreign investment https://energycentral.com/c/pip/renewable-energy-kenya-examination-legal-instruments-and-institutional-changes (accessed August 22, 2024).

74 *Osiolo* et al note 1, 120.

75 *Osiolo* note 1,120.

76 *Osiolo* note 1, 125.

77 *Chemengich & Masara* note 22.

in the sector.[78] Still, the public institutions and legal systems often lack the stability, ability, and reliability over the medium to long term to put in place and enforce laws and private sector regulation in general, as well as supportive incentives for renewable energy.[79] The politicians may also interfere with the projects through rent seeing behaviour when seeking political or financial gain from the projects.[80]

The other challenge is that the cost of electricity in most of sub-Saharan Africa is exceptionally high already, due to a combination of the small size of the electricity markets and the resulting lack of economies of scale; the common reliance on expensive oil-based generation; and other inefficiencies such as low historic levels of maintenance investment and resulting inefficiencies and electricity losses in generation and distribution.[81] Other fundamental challenges include limited scope and coverage of energy infrastructure in terms of both geographic area and users; a large gap in generating capacity; obsolete employed technologies and the poor state of the overall energy infrastructure; the low levels of resource efficiency that lead to high costs per output unit, given low affordability levels among local populations which are often kept down through subsidies from already constrained public budgets.[82]

Customers served through the grid or mini-grids benefit from cross-subsidies for consumption tariffs, but must still pay a high fee to cover the costs of connection. This keeps connection rates low even for those households within reach of the grid. Grid extension to rural areas that are not able to pay for it places a heavy financial burden on Kenya's distribution utility and creates tension between the goals of universal access to electricity and financial sustainability of the power supply system.[83] Solar mini-grids with higher installed capacities allow a wider diversity of electricity uses, comparable to those provided by the national grid. However, when they are not subsidised, they are considered too expensive for most of the rural population and can only target relatively wealthy households and commercial establishments.[84]

Energy investment is associated with high system costs due to transmission and distribution infrastructure needs and the balancing costs of intermittent renewables. The country has long suffered from a weak power transmission and distribution infrastructure, due to insufficient investments in upgrading the system which brings about a large share of system

78 *Anthony Amoah* et al, https://www.sciencedirect.com/science/article/abs/pii/S0301421522000799 (accessed August 17, 2024).

79 *Remco Fischer et al*, Barriers and Drivers to Renewable Energy Investment in Sub-Saharan Africa, Journal of Environmental Investing [2011] 60.

80 *Osiolo* note 1,132.

81 *Fischer et al*, note 79, 61.

82 *Fischer* et al, note 79, 64.

83 *Osiolo* note 1,125.

84 *Osiolo* note 1,126.

losses, outages, and voltage fluctuations.[85] The electrical network faces new challenges, including the long distance between some renewable energy generation resources and demand centres; the goal of universal electrification; and the growing share of intermittent generation, mainly from wind power plants which lead to increased costs for final consumers.[86]

Social acceptance to energy investment is critical in terms of access to land for putting up the necessary infrastructure. Challenges in social acceptance may exercebate the cost of investment. The local population may contest the right of private and government developers to use the land where they live or work hence raising issues of compensation and consultation. The process may be further complicated when the current users of the land do not hold formal titles. The lack of clarity over land rights also creates the possibility of rent-seeking from local communities seeking compensation for land not used by them. Communities are more favourable to projects when they are given full information about their costs and benefits, when benefit-sharing mechanisms are in place, and when they are involved in consultation and decision-making.[87]

D. Conclusion

The legal and policy framework enabling renewable energy investment is in place despite the challenges that must be addressed. Challenges abound being low demand of electricity and inability to pay in rural areas; high system costs due to a lack of networking infrastructure and an inflexible generation mix; problems of social acceptance and access to land for investment; lack of comprehensive fiscal incentives; rent seeking cost; feed in rate tariffs that do not attract private investment; obsolete employed technologies and the poor state of the overall energy infrastructure; the low levels of resource efficiency that lead to high costs per output unit, given low affordability levels among local populations. Besides investment in renewable energy Kenya has trained her eyes on investment on nuclear energy[88] which is high cost that could lead to slackened growth in renewable energy investment. There should be efforts to achieve policy coherence in order to attract such investment for the right energy mix that could benefit the country.

85 Government of Kenya, Sessional Paper 4 on Energy 2004.

86 *Osiolo* note 1, 128.

87 *Osiolo* note 1,131.

88 *Diana Musyoka & Robert Field*, 'Review of the environmental oversight framework in Kenya, in light of a nuclear power programme' 108 [2018].

Evaluating the Legal Framework on Sand Mining in Nigeria: Challenges and Prospects

Theresa Uzoamaka Akpoghome and Theophilus Chinedu Nwano*

A. Abstract

The need for discussions around the sustainability of natural resources in Nigeria cannot be overemphasized. Nigeria is blessed with a number of minerals. Despite these, the country has operated a monolithic economy and has neglected activities in other areas of mining especially sand. Sand is a major resource mined in Nigeria due to its high demand in various industries and most times illegally. This necessitates the evaluation of the legal framework on sand mining in Nigeria. This paper adopts a doctrinal approach and finds that sand mining in Nigeria faces several challenges ranging from the non-implementation of the relevant legal framework to unregulated activities in the sector. The paper further finds that the Nigerian Minerals and Mining Act of 2007 did not specifically address sand mining but mentions sand in the interpretation section as a mineral in the country. The regulation of sand mining was not specifically given prominence but is subsumed under small-scale mining. The paper notes that sand mining has attendant socio-economic and environmental impacts. The paper further notes that one of the challenges in this sector is inadequate infrastructure and poor monitoring by the relevant government agencies. The research therefore recommends the enactment and enforcement of regulations on sand mining specifically. It also recommends public private partnership in the sector to help in infrastructural development. The paper concludes that effective community participation and engagement in the sector will help address the issues of conflict and environmental degradation.

Keywords: Sand, Mining, Community, Development, Conflict, Challenges

B. Introduction

The boom in the construction industry in the 21st Century has led to unregulated mining of sand all around the world. This activity has eroded rivers and coastlines, disrupting ecosystems and damaging livelihoods. From Abuja and other cities in Nigeria to China, America and several parts of the world, sand mining is a significant component of development. The cities we have in Nigeria and other cities are built on sand. There is sand in the cement and concrete that constitutes the bulk of the buildings. The glasses in the building windows are

* Theresa Uzoamaka Akpoghome, Professor, Faculty of Law, Benson Idahosa University, Benin City. Email: teremajor@gmail.com, takpoghome@biu.edu.ng. Ph: +2348065436545, +2348056317472.

Theophilus Chinedu Nwano, Associate Professor, Faculty of Law, Benson Idahosa University, Benin City. Email: tnwano@gmail.com, tnwano@biu.edu.ng.

made with sand. The tarmacs laid on the roads are also made with sand. Sand is the planet's most mined mineral, with some 50 billion tons extracted from lakes, riverbeds, coastlines and deltas each year, according to the United Nations Environment Programme.[1] According to the UN, 'the global daily demand for sand is around 18kg per person on average, per person, that's about 6,570 kilograms (14,500 pound) per year – more than an elephant's weight in sand.[2]

Demand for sand has continued to grow as the population of the world continues to grow, with expansion in cities. In almost all parts of the world, sand mining has not been fully regulated and transactions scrutinized by the relevant government agencies. Regulations for protecting the environment or the safety of the workers are few and sparse. It is doubtful whether the agencies monitor or document the activities in this trade for the impact it is generating.

The resultant effect of this unregulated business is that sand is being extracted far more quickly than it can be replaced naturally.[3] This causes environmental damage and in some instances, threatening the lives and livelihood of citizens. It is also important to observe that most of the sand mined is used in the countries where they are mined or extracted. In Africa, sand extraction has enabled the vast majority of the people to build strong homes but this has left the ground pocked with open pits, which can fill up in rainy seasons, providing breeding ponds for disease carrying mosquitoes.[4] People have also suffered from these mining activities whether they are legal or illegal.

It is in view of the above that this paper seeks to evaluate the laws and processes regulating sand mining in Nigeria examining the challenges and the prospects in sand mining. Therefore, for a lucid discussion of the issue under review, this paper is divided into six parts including the introduction. Part II discusses the relevant concepts that will occur in the course of the discussions. Part III examines the regulatory framework for sand mining in Nigeria and the attendant consequences for the regard of the existing legal regime. Part IV discusses the impacts or challenges associated with sand mining. Part V examines the prospects of the industry while the sixth part concludes the paper.

C. Conceptual Clarifications

I. What is Sand?

Sand is defined as a mixture of small and fine grains of various materials and rocks. It is a granular material that can be defined as per a size ranging between 0.06mm to 2mm.

1 Marco Hernandez, Simon Scarr and Katy Douglee, "Shifting Sands: The Messy Business of Sand Mining Explained," (Feb 18, 2021), <https://www.reuters.com/graphics/Global-Environment/Sand/ygdpzekyavw/> accessed August 11, 2024.

2 United Nations Environment Programme, UNEP.

3 Hernandez (n1).

4 *Ibid*.

It can be formed because of erosional or weathering activities, sediments, etc.[5] The major component of sand is quartz and other components found in sand depend on the location and geographical features of where it is found.[6]

Toky Siddiquee[7] posits that 'sand is a mixture of small grains of rock and granular materials which is mainly defined by size, being finer than gravel and coarser than silt. And ranging in size from 0.06mm to 2mm. Particles which are larger than 0.0078125mm but smaller than 0.0625mm are termed silt.' He further observed that sand is made by erosion or broken pebbles and weathering rocks, which is carried by seas or rivers.[8]

Sand is composed of unconsolidated granular materials consisting of either rock fragments or mineral particles or oceanic materials. It is mainly made of silicate minerals and silicate rock granular particles.[9] Sand is made up of different colours.[10] There are also different types of sand although it is observed that sand is a highly variable substance and therefore an attempt can be made to classify it into separate categories[11] and depending on the particle grain size, sand can be very coarse, hoarse, medium or fine grained.[12]

II. Sand Mining

Sand mining or extraction is defined as the removal of primary (virgin) natural sand and sand resources (mineral sands and aggregates) from the natural environment (terrestrial, riverine, coastal, or marine) for extracting valuable minerals, metals, crushed stone, sand and gravel for subsequent processing.[13] Sand mining is the extraction of sand usually from an open pit. It can also be mined from sand dunes, beaches, and even dredged from river and ocean beds. The main reason is to provide sand for concrete, which is due to

5 "Sand – Meaning, Types, Construction Sand, and FAQs," <https://www.vedantu.com/geography/sand> accessed August 11, 2024.

6 *Ibid*.

7 Toky Siddiquee, "What is Sand? Composition and Types of Sand – Civil Engineering," <https://www.civiltoday.com/civil-engineering-materials/sand/233-sand-composition-types/> accessed August 11, 2024.

8 *Ibid*.

9 *Ibid*.

10 There are white sand, black sand, pink sand, red-orange colour, white-grey colour and light brown color.

11 These include coral sand, glass sand, immature sand, gypsum sand, doid sand, silica sand, pit sand, river sand, sea sand, green sand, desert sand, lithic sand, mixed carbonate-silicate sand, brogenicc sand, olivine sand, volcanic sand, heavy mineral sand, sand with hematilic pigment, continental sand, quartz sand.

12 Farooq, "What is Sand? Types, Advantages and Properties," (Feb 12, 2024), <https://www.alphasand.in/blog/types-of-sand/> accessed August 11, 2024.

13 UNEP, "Sand and Sustainability: Finding New Solutions for Environmental Governance of Global Sand Resources." GRID – Geneva, United Nations Environment Programme (UNEP); Sand Mining, <https://www.preventionweb.net/understanding-disaster-risk/terminology/hips/en0022> accessed August 11, 2024.

urbanization boom all over the world.[14] Sand can also be used as a mixer with salt to prevent ice on roads or to reshape coastlines that have significantly eroded.[15]

Picture of a mining site in Zamfara state of Nigeria. Courtesy: Daily Nigerian News Desk

III Dredging

Dredging is the removal of sediments and debris from the bottom of lakes, rivers, harbours, and other water bodies. It is a routine necessity in waterways around the world because sedimentation – the natural process of sand and silt washing downstream – gradually fills channels and harbours.[16] Dredging often focuses on maintaining or increasing the depth of navigation channels, anchorages, or berthing areas to ensure the safe passage of boats and ships.[17] Dredging is basically performed to reduce the exposure of fish, wildlife, and people to contaminants and to prevent the spread of contaminants to other areas of the

14 Envirotech, "What is Sand Mining?" (March 11, 2017) <https://www.envirotech-outline.com/news/water-wastewater/9/breaking-news/what-is-sand-mining/42070/> accessed August 11, 2024.

15 *Ibid*.

16 National Ocean Service, "What is Dredging?" <https://www.oceanservice.nwag.gov/facts/dredging.html> accessed August 11, 2024.

17 *Ibid*.

water body. Environmental dredging is often necessary because sediments in and around cities and industrial areas are frequently contaminated with a variety of pollutants.[18]

The sand that is used for several purposes is dredged by a hydraulic dredge and picks up small amounts of silt, shell and mud along with sand. The mix will dewater over a few days and depending on the content of the mixture, can look as good as any sandy area nearby.[19] Dredging is a critical process with wide-reaching benefits serving both environmental and industrial needs and these include – maintaining existing waterways, creating new waterways, increasing waterway depth, and cleaning ponds and lagoons.[20]

Sand dredging is an important and fundamental process for beach reclamation or nourishment, where the issue of beach erosion needs to be mitigated. It's essentially a form of excavation that is carried out underwater, specifically in shallow seas or freshwater areas. Its primary purpose is to preserve the existing shoreline by adding sand back to a beach that is suffering from erosion.[21]

Sand dredging is typically employed to combat the adverse effects of coastal erosion, maintain navigable waterways or create new land from the sea or riverbeds.[22] It is important to note that dredging does not stop erosion and there is the potential of habitat destruction due to dredging. Flora and fauna may be destroyed by removing large quantities of sand from the sea bed. Again, adding new sand to the beach may cover up ecosystems that are not clear to the human eye.[23]

18 *Ibid*.

19 Southern Dredging and Marine, "Beach Restoration Renewal: Southern Dredging," <https://www.southerndredgingandmarine.com/beach-restoration-renewal/> accessed August 11, 2024.

20 International Geoform, "Dredging 101: What it is, How it Works, Benefits and More," <https://geoinforminternational.com/sediment-removal-101/> accessed August 11, 2024.

21 US Aqua Services, "Understanding Beach Reclamation and Sand Dredging," (July 26, 2023) <https://www.usdredge.com/learn/understanding-beach-reclamation-and-sand-dredging?hs_amp=true/> accessed August 11, 2024.

22 *Ibid*.

23 *Ibid*.

Sand dredging in Nigeria. Courtesy: richbongroupng.wordpress.com

D. Legal Framework on Sand Mining in Nigeria

Having noted that sand is a valuable resource for crucial purposes like construction and other industrial uses such as the production of glass, it is also an essential material used for other important infrastructure for economic development, serving livelihoods within communities as well as maintaining biodiversity.[24] Sand is the key raw material in concrete, asphalt and glass, used to build infrastructure.[25] It is also used for reclamation of land and as a protection against flood in coastal areas, and part of the efforts to protect eroding coasts and address climate change impacts such as sea level rise and increasingly severe storms.[26] In view of the enormous roles that the mining industry plays in Nigeria and world over towards the realization of a carbon-free future and Nigeria's position as the largest economy in the African region, it is difficult and impossible to ignore the mining sector in Nigeria. Living by the available data from the Federal Ministry of Mines and Steel Development, Nigeria is endowed with 44 types of minerals available in commercial quantities across 500 locations in the 36 states of the Federation and the Federal Capital

24 International Association of Dredging Companies (IADC), "Sand as a Resource: Best Practices to Conduct Responsible Dredging Projects," Fordeyn J., Janssens T., Kranendonk Y. and Vijverberg T (The Hague: IADC, 2023), 1–24 at 3.

25 *Ibid*.

26 *Ibid*.

Territory (FCT).[27] Although the mining sector has experienced some challenges, it has also shown a steady growth pattern.[28] The growth trend however requires more effort to set the sector on the path to earning Nigeria a place of pride on the global mining map and one of these measures includes having a strong regulatory framework and policies to check activities and ensure that due processes, compliance and monitoring mechanisms are not jettisoned.

Nigeria has the Nigerian Minerals and Mining Act, 2007. This Act is the major framework in the mining sector. On November 16 2023, the Hon. Minister of Solid Minerals Development launched the 'Guidelines for the Production of Community Development Agreement in the Solid Minerals Sector' (the Guidelines).[29] The Guideline was issued in pursuance of Section 116 of the Nigerian Minerals and Mining Act, 2007 which is the principal legislation. The Act provides that "…The Minister shall upon the receipt of a valid application from a qualified applicant, grant and issue to that person a mining lease for the purposes required within forty-five days of such application.[30]

The reason for the application for a license is predicated on the fact that the Act provides that:

> *The entire property in and control of all mineral resources in, under or upon any land in Nigeria, its contiguous continental shelf and all rivers, streams and water courses throughout Nigeria, any area covered by its territorial waters or constituency and the Exclusive Economic Zone is and shall be vested in the Government of the Federation and on behalf of the people of Nigeria.*[31]

27 Benjamin Amans, Emediong Essien and Deborah Samson, "Nigeria Mining Outlook: Wrap-up of Recent Developments and Updates," (August 2023) Newsteller, Jackson Etti and Belu, Lagos, <https://www.jee.africa/> accessed August 7, 2024.

28 *Ibid*. This growth can be linked to the technological advancement, intensified efforts aimed at combating illegal mining activities, increased global recognition, revenue generation and accountability among other factors. These positive developments highlight the sector's potential to attract foreign investment which will in turn help Nigeria to further diversify its economy towards a non-oil source for increased economic sustainability.

29 Bashur Toyin, Habiba Ellawulh, Ayorunde Esther and Femi-Oydekola Kolapo, "Highlights of the Guidelines for the Production of Community Development Agreements in the Solid Mineral Sector issued by the Ministry of Solid Minerals Development," (February 1, 2024, <https://www.mondaq.com/nigeria/mining/1421454/mining-regulatory-update-highlights-of-the-guidelines-for-the-production-ofc-community-development-agreements-in-the-solid-minerals-sector-issued-by-the-ministry-of-solid-minerals-development/> accessed July 27, 2024. See also <https://www.banwo-ighodalo.com/grey-matter/mining-reegulatory-update> accessed July 27, 2024.

30 Nigerian Minerals and Mining Act 2007, Section 65(1).

31 *Ibid*, Section 1(1).

It further provides that:

> *All lands in which minerals have been found in commercial quantities shall, from the commencement of this Act be acquired by the Government of the Federation in accordance with the provisions of the Land Use Act.*[32]

The import of these provisions is that all minerals in Nigeria is owned by the federal government who holds such in trust for the benefit of the citizens and if a mineral is discovered on any land, such land automatically becomes the property of government in line with the Land Use Act. Nigerians therefore do not have absolute right of the ownership of their lands unless a mineral is not found on the land. If it is found, they only enjoy surface rights as the land is acquired by the government upon the payment of compensation to be determined through arbitration.

The above provisions are supported by the Constitution of the Federal Republic of Nigeria as amended. The Constitution provides that:

> *...Notwithstanding the foregoing provisions of this Section, 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 manners as may be presented by the National Assembly.*[33]

The question then arises as to why sand mining in Nigeria has not been fully regulated like oil and gas. Is it that the government does not see sand as a core mineral deserving of its attention considering the environmental consequences that occurs due to sand mining? A quick review of the Nigerian Mining and Minerals Act reveals that 'Sand' Mining was not specifically mentioned in any of its provisions. In chapter 2 of the Act particularly sections 90 and 91, the Act dealt with "small scale mining." In the interpretation section,[34] 'small scale mining' is defined as 'artisanal, alluvial, and other forms of mining operations involving the use of low-level technology or application of methods not requiring substantial expenditure for the conduct of mining operations within a small scale. In the same vein, minerals or mineral resources means any substance whether in solid, liquid or gaseous form occurring in or on the earth, formed by or subjected to geological processes including occurrences or deposits of rocks, coal, coal bed gases, bituminous shales, tar, sand, any substance that may be extracted from coal, shale or tar sand, mineral water and mineral component in tailings and waste piles, but with the exclusion of petroleum and waters without mineral content.[35] This is the only place sand was mentioned in the entire Act.

32 *Ibid*, Section 1(2).

33 Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 44(3).

34 Nigerian Mining and Minerals Act 2007, Section 164.

35 *Ibid.*

> *Quarry operations under the Act includes any forms of activity for the extraction of mineral resources for construction, other than an activity conducted or to be conducted underground, and any activity preparatory or incidental to that activity those to.*[36]

Having noted that sand is mentioned in the interpretation section as constituting mineral or mineral resource and can be extracted via quarrying, it then presupposes that those involved in its mining or extraction are involved in what the Act terms "small scale mining" and are to be issued the "small scale mining lease" which is defined as "small-scale mining lease granted for exploitation of mineral resources and in this Act, in an area subject of a small scale mining lease described as small-scale mining area".

The mining and Mineral Act provides that a person to be issued with a small-scale mining lease should be:

(a) A citizen of Nigeria with legal capacity and who has not been convicted of a criminal offence, or
(b) A mining cooperative, or
(c) A body corporate duly incorporated under the Companies and Allied Matters Act, or
(d) The holder of an Exploration License granted in respect of the areas subject to the application; provided that the applicant has fulfilled the conditions attached to the Exploration License.[37]

The same conditions were set out for the granting of a quarry license except that a person holding an exploration license cannot apply but 'any person extracting construction materials for the construction of roads, railways lines, dams and other engineering works or structures of public interest.'[38] The Act designates the areas to be covered by a small-scale Mining lease. It stipulates that it shall not be less than 5 acres and shall not exceed 35 square kilometers. It further provides that "all lease holders shall carry out effective rehabilitation of the mined-out areas to the satisfaction of the Mines Environmental Compliance Department and also pay prescribed rehabilitation fee, proportionate to their profits as a way to defray further cost of rehabilitation and reclamation.[39]

The small-scale Artisanal Mining Department shall ensure that mining activities are restricted to the established zones of mineralization.[40] The challenge here is that the small-scale mining lease does not have a duration like the other mining lease which is expected to last for 25 years,[41] and shall be renewable every twenty-four years. Is the small-scale mining lease renewable or lasts in perpetuity and if it is renewable, what is the time frame?

36 *Ibid.*
37 *Ibid,* Section 49.
38 *Ibid*, Section 51 (a)-(d) particularly (d).
39 *Ibid*, Section 90 (1) (2).
40 *Ibid*, Section 90(3).
41 *Ibid*, Section 66.

How effective has the Small-Scale Mining Department been in ensuring that the small-scale miners keep to the designated area assigned for mining and that they keep to the area specified in the license. The absence of time frame for renewal of this lease in the law is a huge gap and makes monitoring and evaluation difficult. If there is an opportunity for the renewal of the lease, it creates an environment for effective monitoring as renewal will be dependent on the applicant's ability to meet and fulfill the laid down rules attached to the license/lease.

Furthermore, it is clear that the Mining Department has not performed optimally as there are burrow pits constituting dangers to the environment, lives and livelihoods. This is so when compared to their duties listed under the Act. The Mines Environmental Compliance Department shall in addition to any other function prescribed by the Act and subject to the directive of the Minister:

- …Monitor and enforce compliance by holders of mineral title with all environmental requirements and obligations established pursuant to this Act, its regulations and by any other law in force;
- Periodically audit the environmental requirements and obligations established pursuant to this Act, its regulations and by any other law in force and make recommendations thereon to the Minister, and
- dLiaise with relevant agencies of government with respect to the social and environmental issues involved in mining operations, mine closure and reclamation of land.[42]

Of particular relevance is the issue of environmental monitoring with the attendant obligations and the cooperation with other agencies of government to ensure the social and environmental issues are complied with and ensure the closure and reclamation of land. This is a huge challenge as lands are not recovered or reclaimed and these mining sites remain as death traps to citizens. In some cases, the lands around such areas become erosion gullies affecting buildings and other infrastructure around them. This is in contrast with Section 111 of the Act which stipulates that 'the holder of mineral title shall, in exercise of his rights under the mineral title, have regard to the effect of the mining operations on the environment and take such steps as may be necessary to prevent pollution of the environment resulting from the mining operation.' Furthermore, the Act provides that where land which 'is the subject of a mining lease has been exploited, the mined-out areas shall be restored by the applicant under the condition of its grant otherwise the relevant provision of the Act will apply.'[43]

It is interesting to observe that the penalty for not complying with the provision of the Act is revocation of license and on conviction at the first instance, to a fine of not less than N20, 000,000 and imprisonment of not less than five years, and if the offence continues, whether or not it is a first offence, the person convicted shall, in addition be liable to

42 *Ibid*, Section 18 (b)-(d).

43 *Ibid,* Section 115.

a fine of N20, 000 in respect of each day during which the offence continues.[44] The penalty, prima facie appears punitive but the extent of its implementation and application in relevant situations is another issue in its entirety. This is because, if the law has been duly implemented and enforced, there would be compliance by the lease or license holders and a great improvement would be seen in these mining/extraction fields. It can be argued that the law is honoured more in breach.

Another critical provision of the Nigerian Minerals and Mining Act is the Community Development Agreement.[45] This provision will be reproduced hereunder:

i. Subject to the provision of this Section, the holder of a Mining Lease, Small-Scale Mining Lease or Quarry Lease shall prior to the commencement of any development activity within the lease areas, conclude with the host community where the operations are to be conducted on agreement referred to as a Community Development Agreement or other such agreement that will ensure the transfer of social and economic benefits to the community.
ii. The Community Development Agreement shall contain undertakings with respect to the social and economic contributions that the project will make to the sustainability of such community.
iii. The Community Development Agreement shall address all or some of the following issues when relevant to the host community.
    a) Educational scholarship, apprenticeship, technical training and employment opportunities for indigenes of the communities.
    b) Financial or other forms of contributory support for infrastructural development and maintenance such as education, health or other community services, roads, water and power.
    c) Assistance with the creation, development and support to small scale and micro enterprises;
    d) Agricultural product marketing; and
    e) Methods and procedures of environment and socio-economic management and local governance enhancement.
iv. In the event of the failure of the host community and the lessee, after several attempts to conclude the Community Development Agreement by the time the title holder is ready to commence development work on the lease area, the matter shall be referred to the Minister for resolution.
v. The Community Development Agreement shall be subject to review every 5 years and shall, until renewed by the parties, have binding effect on the parties.

The implication of the above stated provision is that the holder of the lease must finalise with the host community an agreement to be known as “Community Development Agree-

44 *Ibid*, Section 133.

45 *Ibid*, Section 116.

ment (CDA)" and the agreement will ensure the transfer of social and economic benefits to the host community before the commencement of mining/extractive activities within the area covered by the lease. Such social and economic benefits that will lead to sustainable development includes educational scholarship, apprenticeship, technical training, employment opportunities, financial or other contributory support for the development of critical infrastructures like roads, water and power; assistance with the creation and development of small scale and micro enterprises; agricultural marketing, environment and socio-economic management and local governance enhancement. The CDA will be developed and sent to the Minister of Solid Minerals Development and such CDA will be binding on the parties and subject to review every 5 years.

This provision is quite laudable. On November 16, 2023, the Honorable Minister of Solid Minerals Development Dr. Dele Alake launched the 'Guideline for the Production of the CDA in the Solid Mineral Sector.'[46] This is a good innovation but is also an indication that prior to 2023, much had not been done to ensure that the CDA becomes implementable years after the enactment of the Minerals and Mines Act of Nigeria. The revised guideline is part of the Ministry's efforts to stop disputes between communities and mining companies. The Minister also revealed that 252 mining companies have signed Community Development Agreements to provide basic infrastructure to host communities.[47] He further noted that the Agreements is a better means to help the mining companies define their relationships and obligations with their host communities as the agreement provides a means of strengthening and advancing relationship.[48]

The vision of the CDA includes the improvement of the relationship between host communities and the companies, the government, the civil societies and other stakeholders; to improve sustainable and mutually rewarding benefits from mining projects to the host communities.[49] The previous guideline of 2014 was not effective as the mining companies did not develop CDAs nor were they willing to implement the Agreements. This led to numerous complaints and Petitions from the communities. It is hoped that the revised guideline of 2023 will address the gaps identified in the existing CDA of 2014. The Nigeria Extractive Industries Transparency Initiative (NEITI) disclosed that 82 mining firms default

46 Damilola Aina, "Mines Ministry unveils revised CDA Guidelines (Nov 17, 2023) <https://www.punchng.com/mines-ministry-unveil-revised-cda-guidelines/?amp> accessed August 14, 2024.

47 Sami Tunji, "Dele Alake says 252 Mining Companies agree to provide basic infrastructure to host communities in Nigeria," (November 16, 2023) <https://www.naurametrics.com/2023/11/16/dele-alake-say-252-mining-companies-agree-to-provide-basic-infrastructure-to-host-communities-in-nigeria/pamp=/> accessed August 14, 2024.

48 The CDA can help prevent a repeat of social crises experienced in the Niger Delta by the oil sector, which may undermine the efforts of the federal government amend at diversifying Nigeria's monolithic economy.

49 Aina (n46).

in their payment to host communities.[50] They further noted that in their 2021 report for the solid minerals industry that out of 121 companies, only 39 made the mandatory social payments in line with the CDA.[51] NEITI further reported that only 50 out of 121 companies representing 41.32 percent fully complied with environmental standards, indicating low overall compliance with environmental laws and regulations by most companies. The overall objective of the CDA is 'to specify appropriate consultative and monitoring frameworks between the title holders and the host communities and the means by which the community may participate in the planning, implementation, management and monitoring of activities carried out under the agreement.'[52] This is good as it encourages local participation in activities in the communities. This type of participation enables the locals to make valuable contributions on investments within their territories and enhances monitoring and compliance when effectively engaged.

E. Impacts of Sand Mining in Nigeria

Sand mining has tripled in the past two decades, with demand reaching 50 billion tons a year in 2019 according to UNIEP. The volume of sand and gravel used each year is estimated to build a wall around the equator measuring 27 meters wide.[53] But extraction, sourcing, use and management of sand is unregulated in many parts of the world including Nigeria, which means, the world is consuming sand faster than it can be replaced naturally by geological processes[54].

The United Nations Environment Programme (UNEP) has noted that sand mining from riverine and marine eco-systems can lead to erosion, salination of aquifers, loss of protection against storm surges and impacts on biodiversity, which pose a threat to livelihoods through among other things, water supply, food production, fisheries, or to tourism industry.

In 2018, the World Wildlife Fund (WWF) warned that sand mining of river Deltas, such as the Yangtze and Mekong, is increasing the risk of climate related disasters because there is not enough sediments to protect against flooding.[55] They further noted that sand mining puts unprecedented pressure on rivers, flood plains and delta. The impacts also include changes in the shape of river beds and flood plains to alterations to instream habitats,

50 Sami Tunji, "NEITI – 82 mining firms default payments to host communities," (September 17, 2023) <https://www.punch.ng.com/82-mining-firms-default-payments-to-host-communities-neiti/> accessed August 14, 2024.

51 *Ibid.*

52 The Nigerian Minerals and Mining Act 2007, Section 117.

53 Kate Whiting and Medeleine North, "Sand Mining is close to being an Environmental Crises. Here's Why and What can be done about it?" (September 21, 2023) < https://www.weforum.org/agenda/2023/09/global-sand-mining-demand-impacting-environment> accessed August 12, 2024.

54 *Ibid.*

55 WWF, "Uncovering Sand Mining's Impacts on the World's Rivers" (August 24, 2018), <https://www.wwf.panda.org/wwf-news/p333451/uncovering-sand-minings-impacts-on-the-worlds-rivers/> accessed August 15, 2024.

groundwater reserves and water quality. In addition, sand mining can result in a reduction in diversity and abundance of fish in mined areas and changes to riverside vegetation.[56] Unsustainable sand mining will lead to bank erosion and shrinking, sinking deltas – with the loss of agricultural land, houses and infrastructure, including failure of roads, dikes and bridges.[57] In Nigeria, where unregulated sand mining has been the practice, the act has had severe impacts for local communities. A significant impact is the displacement of communities that depend on natural resource for their livelihood.[58] Sand mining often involves dredging and excavation, which can destroy crops, fisheries and other sources of livelihood.[59] Again, sand mining in Nigeria causes environmental pollution, as the act involves the use of heavy machinery that releases emission and noise pollution.[60] Another impact recorded by sanction on sand mining in Nigeria is the damage to infrastructure. This can cause erosion and sedimentation, which can affect bridges, road and other infrastructure and lead to costly repairs and even accidents such as road and bridge collapses.[61] Sand mining contributes to climate change. This is due to the fact that sand mining releases large quantity of carbon dioxide into the atmosphere, which contributes to global warming.[62] Again, the loss of vegetation due to sand mining can reduce the capacity of natural ecosystems to absorb carbon dioxide from the atmosphere.[63]

In Nigeria, there are specific instances recorded in previous studies on the impact of sand mining in Nigeria. The first is the Lekki Beach Erosion which has been blamed on sand mining. The erosion has affected the beach front, causing damage to buildings and infrastructure. It was recorded that in 2017, the Lagos State government banned sand mining in Lekki but the ban has been difficult to enforce and illegal sand mining continues unabated.[64] Another impact is the environmental degradation in Cross River State another costal Community. Here, sand mining has caused extensive environmental degradation. The activity has destroyed farm lands, aquatic habitats, and forests. The government had set up

56 *Ibid.*

57 Social Development Integrated Center, "Sand Mining and the Environmental Impacts on Coastal Communities in Nigeria," (August 21, 2023) <https://saction.org/sand-mining-and-the-environmental-impacts-on-coastal-communities-in-nigeria/> accessed August 2, 2024.

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

62 *Ibid.*

63 Ventures Africa, "Illegal Sand Mining in Lagos has been a long standing Problem: This is how its being combated" <https://www.venturesafrica.com/illegal-sand-mining-in-lagos-has-been-a-long-standing-problem-this-is-how-it-being-combated/> accessed August 15, 2024.

64 Okereke C.E. and Eze F.N., "Environmental Degradation from Indiscriminate Sand Mining in Cross River State, Nigeria. *Journal of Environmental Science and Public Health* (2020), 4(2), 63–73.

a task force to enforce the ban on sand mining, but it has been difficult to curb the illegal activity.[65]

The activity of sand mining has damaged fishing ground, making it difficult for fishermen to make a living. The government has set up a committee to investigate the issue, but no concrete action has been taken.[66] A study carried out at Ekiti State reveals that the economic impact of mining activities in the areas showed that the sum of N81,057,000 will be required to sand fill the mined areas. The environmental impact of the mined areas on the communities includes the attendant valley that has been created and the enhancement of erosion activities in the community. Farming activities no longer take place in the mined areas because the top soil has been removed.[67]It was revealed at Chibiri, Kuje Area Council of the FCT, Abuja, that large volumes of sand are being lost to mining and the continuous movement of heavy trucks used in carrying the sand disturb agricultural land, human habitation, borehole user and traffic hazards. The big wheels of the trucks also destroy gravel road leading to mining sites and makes the roads uneven for other road users.[68] The effect of those trucks on the roads can also be seen in Benin City, Edo State and Agbor in Delta State. These trucks also use diesel and further pollute the environment due to the smokes emitted by these trucks. These smokes cause difficulties and blur the vision of motorists and sometimes lead to accidents.

A study done on sand mining in Port Harcourt, Rivers State revealed that Choba, a community within the state, suffers the most visible impact of soil erosion that stood at 27 % while in Abuloma, the impact also accounted for 27 % with noise pollution at 33 %. Road destruction at Choba had 28 %, while land alteration and degradation featured very low in occurrence across the study locations.[69] The study also revealed that commercial activities along the mining sites have exploited coastal resources such as sand, indigenous forest and sea grasses indiscriminately and the consequences are coastal erosion and vegetation loss. This was attributed to heavy vehicular traffic and lack of maintenance by miners

65 Nkarocha, E.E and Opara, C.E, “the Effects of sand Mining on the fishing ground of selected Rivers in Delta State, Nigeria” *Journal of Geography, Environment and Earth Science International* (2018) 15(3) 1–10, <doi:10.9734/JGEESI/2018/42241> accessed August 15, 2024.

66 Atejioye A.A. and Odeyemi C.A., “Analysing Impact of Sand Mining in Ekiti State, Nigeria using GLS for Sustainable Development,” *World Journal of Research and Review* (WJRR) (2018) 6(2) 26–31.

67 Oluyori N.R. and Umeh C., “Environmental Impact of Sand Mining and its Attendant Soil Loss in Chibiri, Kuje Areas Council FCT, Abuja,” <https://www.researchgate.net/publication/375837625> accessed July 27, 2024.

68 Ohaeri, M.C.A., Ogbonna D.N., Gobo A.E. and Ngah S.A., “Environmental Impacts of Sand Mining in some Coastal Communities in Port Harcourt Metropolis, Nigeria,” *Journal of Applied life Sciences International* (2021) 24(10) 31–43. Doi: 10.9734/JALSI/2021/vi1030265> accessed July 27, 2024.

69 *Ibid* at 36.

and this causes environmental concerns.[70] In Minna, the erosion caused the destruction of roads in the mining communities. The original landscape of the communities was destroyed and altered as a result of excavated pits and branches, learning behind unpleasant sights which render the land unsuitable for any productive purpose.[71]

During raining season, the pits and depressions created by abandoned mine sites collect water which become a health risk to the community because these waters become stagnant and serve as breeding ground for mosquitoes and other water borne disease.[72] In Choba, roads are destroyed by heavy trucks and equipment which move in and out of the mining site. The heavy trucks cause soil compaction which increases the erodibility of the soil, reducing soil infiltration which causes overland flow. Heavy vehicular traffic in Choba caused the destruction of access roads. The roads are badly damaged and most times, the vehicles get stuck and damaged during wet seasons, and this results in seeking of alternative routes to mine sites by the miners. These impacts affect the environment and cause environmental pollution which is a huge problem in these communities where mining activities take place.[73] The pollution are usually air, land, water, and noise pollution and the National Environmental Standard Enforcement Regulation Agency Act of 2007 (NESREA Act) ought to be deployed in regulating these pollution.[74]

Indiscriminate waste disposal is another environmental hazard experienced in villages and mine sites around the coastal communities where mining take place. The above analysis is proof of the fact the mining has had a lot of negative impacts on the communities within the mining zone and these impacts are similar and present in the same pattern on the community and the inhabitants.

70 Ako T.A., Onoduku U.S., Oke S.A., Essien B.I., Idris F.N., Umar A.N. and Ahmed A.A., "Environmental effects of Sand and Gravel Mining on Land and Soil in Luku, Minna, Niger State, North Central Nigeria", *Journal for Geoscience and Geomatics* (2014) 2(2) 42–46.

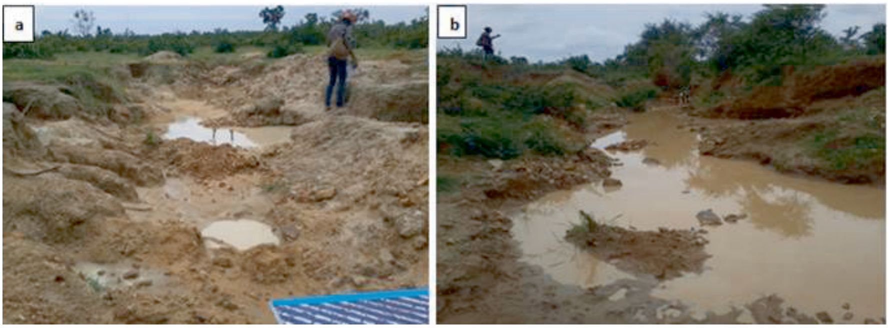
71 Ohaeri (n 68) 36.

72 *Ibid.*

73 NESREA Act 2007, National Environmental Standards and Regulation Enforcement Agency (Establishment) Act, 2007 (No 25 of 2007). This Act repealed the Federal Environmental Protection Agency (FEPA) Act of 1990.

74 Abraham C.M., Essien K., Umoh E.U., Umoh E.C., Ehiremen L.E., Akpan V. and William N.I., "Towards Effective Monitoring of Sand Mining Sites and Post Management Techniques in sand dredged environment of Akwa Ibom State, Nigeria, *Global Journal of Ecology*, (2021) 6(1) 092–099 at 094. Doi: https://dx.doi.org/10.17352/gje.0000150 accessed July 27, 2024.

Pictorial images of impact of Sand mining in Nigeria



Mining on Land and soil in Lukku, Minna, Nigeria[75]

75 Ako T. A, et al. "Environmental Effects of Sand and Gravel Mining on Land and Soil in Luku, Minna, Niger State, North Central Nigeria." *Journal of Geosciences and Geomatics* 2.2 (2014): 42–49.

Sand mining in Nigeria waterways[76]

The next section discusses the challenges to effective monitoring and control of mining in Nigeria.

F. Challenges of Sand Mining in Nigeria

Sand and gravel are extracted globally as we have earlier noted and they account for the largest volume of solid minerals extracted by erosive process.[77] There is a heightened demand for sand and gravels for developmental purposes and this has led to severe impacts on lives and livelihoods. What then are the challenges? This section discusses some of these challenges and how the situation can be improved. Some of these challenges include but not limited to:

76 Bekede Masade-Olowola, ‘Sand Dredging in Nigeria’s Waterways: Between the Economic Boom and Environmental Doom’, (Sept 5, 2017),< https://www.linkedin.com/pulse/sand-dredging-nigerias-waterways-between-economic-csr-in-action/> accessed August 24, 2024.

77 Mining Review Africa, “Mining in Nigeria: Challenges, Opportunities and Prospects,” (September 20, 2023), <https://www.miningreview.com/gold/mining-in-Nigeria-challenges-opportunities-and-propects/> accessed August 15, 2024.

1. Security Concerns

Most mining areas in Nigeria face severe security challenges which include incidences of illegal mining, conflicts within the communities and sometimes banditry. This has made it difficult for investors to venture into the trade as the existing ones are not growing due to the instability in the operating environment.[78] The level of illegal mining of sand in sub-Saharan Africa including Nigeria is unprecedented. These illegal mines are not licensed and recognized by government and this negatively affects the management and control of activities in the sector by the relevant authorities.

2. Inadequate Infrastructure

There is infrastructure gap in the industry. These include the obvious lack of modern facilities and machines, transportation, access to water, power supply, etc. The infrastructure deficit increases the cost of operation and makes mining unattractive to investors.

3. Social and Environmental Effects

The social and environment effects of mining activities in Nigeria already discussed in this paper calls for concern. Poor mining activities, such as the use of unregulated mercury and deforestation have negative effects on the immediate local communities as well as the ecosystem.[79] The use of excessive dredgers has the capacity of destabilizing the ecosystem and this leads to the deepening and ending of the riverbed and other attendant environmental challenges.[80]

4. Lack of Support from Financial Institutions

This is a great challenge in the industry as both the small- and large-scale mining do not have access to funds. Nigerian banks are often hesitant in producing funding in terms of loans to the industry due to perceived risks.[81]

5. Legal and Regulatory Framework

The mining sector or industry in Nigeria has struggled with a complex legal framework. These are cases of inconsistent policies, overlap in the responsibilities of the federal and state government, the stringent land tenure system imposed on Nigerians with the introduc-

78 Abraham (n74), 095.

79 Mining Review Africa (n75).

80 Abraham (n 74).

81 Mining Review Africa (n 75).

tion of the Land Use Act of 1978 have made it difficult for the industry to grow as expected.[82]

6. *Poor and Inadequate Monitoring by relevant Government Agencies*

There is need for proper monitoring of activities in the sand mining industry. This is very crucial because the implementation of the legal framework largely depends on the effectiveness of the relevant statutory agencies in living up to their responsibilities by ensuring the enforcement of the regulation. Rules that are not enforced will become dead letters of the law no matter how beautifully they have been couched. In Nigeria, most laws are honoured more in breach. The challenge has never been the existence of rules but the lack of political will to enforce or implement existing regulations. Strict enforcement of the legal framework in the sand mining industry is imperative as it will discourage potential defaulter from embarking on activities that would affect resource management and sustainability. It will also lead to the detection, arrest, prosecution and punishment of illegal miners who have operated in the industry unhindered.

7. *Absence of the Involvement of Stakeholders in Decision Making Process*

There is a clear lack of stakeholders' participation in decision making process in the sand mining industry. The inability to get the input of the local communities has led to resource conflict in Nigeria. The Environmental Impact Assessment Act of Nigeria encourages community participation in decision making on projects that will affect their lives and livelihood. Section 116 of the Mining and Minerals Act already discussed made provision for Community Development Agreement that must consider the input of the Communities affected by mining activities and these Agreements are to be renewed every 5 years. It was also seen that prior to 2023, the CDA had not been effective and a new guideline had to be issued in 2023 to ensure that stakeholders in the industry are captured in all the process in order to eliminate potential conflicts.

G. Way Forward

Nigeria over the years has operated a monolithic economy by depending solely on oil and gas. Investment in other sectors such as small scale and artisanal mining presents an opportunity for the diversification of the economy. Developing this sector will lead to job creation and other attendant social economic and environmental protection. Nigeria's enormous mineral wealth provides a good foundation for economic growth if effectively harnessed. Government must take steps to make the mining sector attractive so investors will be lured to make investments. This they can do by revising existing policies and

82 *Ibid.*

create incentives for investors. The development of local content in the mining sector will promote technology transfer, job creation, and skill development in Nigeria in line with the objectives of the Local Content Act of 2010.

To ensure that the mining industry succeeds in Nigeria, the regulatory framework should be developed and implemented. There is need to have a legislation on sand mining and dredging activities. This will enable the government to streamline and clarify regulations, ensuring there is consistency and transparency. The land tenure system foisted on Nigerians by the Land Use Act must be revisited, providing a clear guideline for community engagement is key to solving a lot of issues that have arisen in mining communities. The introduction of public private partnership in sand mining will lead to infrastructural development that will include access roads, power supply and water.

Security concerns at the sand mining sites should be addressed. Local security groups can be deployed to these sites and be made to write reports on this site to the government on the activities on the sand mining sites. The Ministry of Environment should put a policy in place mandating miners to re-invest and repair old disused mine sites in order to reduce incidences of landslides. There should be a laid down policy on the rate of excavation and sand tonnage allowed from any mining site. This will discourage the excessive extraction of sand from any of the sites leading to environmental hazard. Sand miners must be encouraged to adopt best management practices in order to avoid degradation, environmental pollution and resource conflicts. There should be the promotion of sustainable sand mining activities that will reduce environmental impacts, the introduction of environmentally friendly technologies like the use of dredging machines. This will reduce sedimentation and the restoration of mined areas to their original state.

Finally, community engagement in addressing the dangers of sand mining in Nigeria is invaluable. The local communities must be involved in the decision making process with respect to sand mining in their locality. This will help safeguard their rights and interest and ensure responsible and sustainable sand mining practices. If the communities are involved, they will help in raising the awareness about the social and environmental impacts of sand mining and the promotion and adoption of sustainable best practices in the field.

H. Conclusion

This paper evaluated the legal framework on sand mining in Nigeria, the challenges experienced in the sand mining industry and avenues for improvement. The paper noted that sand mining is a booming industry in Nigeria but predominantly occupied by illegal miners who have exploited the absence of a clearly defined framework for activities in the sector. The paper noted that the Nigerian Minerals and Mining Act of 2007 which is the extant regulation did not specifically address sand mining as a topic in the law but captured sand mining under small-scale and artisanal mining. The provision only mentioned sand in the interpretation section as one of the minerals in Nigeria. It was also discovered that the land tenure system in Nigeria has affected sand mining and there has been cases of violent conflicts in the sector between the sand mines and the local communities. The paper further discovered that the Community Development Agreement stipulated by law has not been religiously adhered to prior to 2023 as most investors in the industry did not sign up to the agreement and those that signed never bothered to implement or discharge their obligations. It was further noted that the relevant agencies have not been able to regulate the activities of sand mining. The paper further noted the environmental hazards caused by sand mining in Nigeria and the attendant risks that communities are exposed to due to unregulated sand mining activities. The paper also noted the challenges in the sector and made far reaching recommending that will lead to improvements in the sand mining sector in Nigeria and the much-needed diversification in the economy of Nigeria and this will lead to job creation and reduction in vulnerabilities in the sector.

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'THE RELATIONSHIP BETWEEN DOMESTIC INVESTMENT LAWS AND INTERNATIONAL INVESTMENT LAWS IN THE FLOW OF FOREIGN DIRECT INVESTMENT.'

Rafaa Mazrui*

ABSTRACT

The Liberal International Order (LIO), established in the aftermath of World War II, is underpinned by political and economic liberalism, alongside liberal internationalism, emphasizing liberal democracy, open markets, and cooperative security. However, a dialectical tension between nationalism and internationalism shapes the evolution of international organizations and their governance, impacting their effectiveness in promoting the global common good versus state-centric interests. This paper explores the dynamics of Foreign Direct Investment (FDI) within this framework, particularly considering recent trends of de-globalization, exacerbated by the 2008 financial crisis and the COVID-19 pandemic, which have led to a notable decline in global trade and FDI flows.

A. INTRODUCTION

Political liberalism, economic liberalism, and liberal internationalism serve as the pillars of the Liberal International Order (LIO), which was founded in the years following World War II.[1] It is founded on ideas like liberal democracy, open markets, and cooperation in the security sphere. These are constrained by legal norms like the rule of law and human rights. Liberal internationalism includes cooperation with the aid of multilateral organizations, such as the World Trade Organization (WTO) and the United Nations (UN).[2] 'Nationalism' and 'internationalism' have a dialectical relationship that has shaped the development of international organizations, including the governance of those organizations as a whole.[3] Nationalism expresses the belief that international organizations should serve the interests

* Rafaa Mazrui is a Kenyan lawyer with an LL.B from Kenyatta University and an LL.M in European Legal Perspectives, specializing in International Economic Law from University of Cologne, Germany. Currently, she serves as a Program Consultant at Konrad Adenauer Stiftung's Rule of Law Program for Sub-Saharan Africa. For correspondence, she can be reached at: rafaamazrui@gmail.com.

1 Barnett, M. *"International progress, international order, and the liberal international order."* The Chinese Journal of International Politics, 41, (2021): 1–22.

2 Chaisse, Jullien, and Georgios Dimitropoulos. "*Domestic Investment Laws and International Economic Law in the Liberal International Order."* World Trade Review 22.1 (2023): 1.

3 Mazower, M. *Governing the world: The history of an idea, 1815 to the present*. 2013.

of States, whereas internationalism proposes that these organizations should ultimately serve the interests of the world's population.[4] International institutions of the economic sphere served as vehicles in the post-World War II international order for the liberalization of cross-border trade and investment; the dialectic appeared to have settled in favor of the international, at least when it came to economic issues. Following the global financial crisis of 2008, there has been a relative decline in economic globalization. Since at least 2012, global trade has been declining, and global FDI has been declining since 2016.[5] The COVID-19 pandemic has accelerated these trends even further. This phenomenon has been dubbed "de- globalization”.[6] This has affected various aspects of the global economy but most relevant to this study, the flow of Foreign Direct Investments (FDI).

This paper begins by delving into how International Investment Law facilitates FDI and examines the evolution of investment treaties and their contributions to FDI promotion.

The paper further explores the domestication of investment laws, focusing on the historical context, dispute resolution mechanisms, and the legitimacy crisis of the Investor State Dispute Settlement system. It discusses alternatives and the interplay between international and national investment laws in promoting FDI.

A case study on Kenya is presented, analysing its legal framework for FDI in the context of regional frameworks from the East African Community and the African Union, and comparing them to the ASEAN investment system.

Finally, the paper concludes with recommendations for potential reforms and areas of harmonization that could enhance the coherence and effectiveness of the existing framework.

B. PROTECTION OF FDI UNDER INTERNATIONAL INVESTMENT LAW

I. Introduction

Governments and development economists in developing countries see FDI as critical to long-term economic growth. FDI is a relatively stable source of investment capital, in contrast to development models based on international debt or portfolio investment. Because FDI involves a management stake in a company, ex post, investment is relatively immobile. This characteristic of FDI makes it less susceptible to abrupt stops and reversals that have characterized other types of international financial flows.[7] Furthermore, there is substantial evidence that FDI is associated with economic growth by significantly contributing to

4 Mazower.

5 UN Conference on Trade and Development (2020) Global Investment Trends Monitor, Issue No. 33.

6 Irwin, D. A. *"The pandemic adds momentum to the deglobalization trend."* Peterson Institute for International Economics 23 (2020).

7 Danzman, S. B. *"The political economy of bilateral investment treaties."* (2019): 11.

capital formation, technology transfer, and job creation.[8] Given the potential positive effects of FDI on growth, governments are often keen to attract investment flows.[9]

While economic and geographic factors explain a significant portion of FDI flow patterns, political factors also matter because differences in political institutions expose foreign firms to varying degrees of political risk.[10]

International investment laws are treaties and agreements between countries that establish rules and safeguards for foreign investors. Bilateral investment treaties (BITs) and multilateral investment treaties (MITs) are the most common types of these agreements, which aim to protect foreign investors from unfair treatment, expropriation, and other risks. These treaties frequently include provisions for dispute resolution mechanisms, such as international arbitration, that allow investors to seek redress if they believe the host country has treated their investments unfairly.

II. Evolution of International Investment Agreements

It may appear strange at first to suggest that the "BIT era" began in 1989, some 30 years after Germany and Pakistan signed the first treaty commonly referred to as a bilateral investment treaty. A few numbers, on the other hand, indicate that the modern BIT era began later than 1989. The fall of the Berlin Wall, however, serves as a conceptually significant starting point, because the changed political and economic conditions that underpinned the enormous growth in the number of BITs and BIT arbitrations can be traced back to the late 1980s and early 1990s.[11]International Investment Agreements (IIAs) have evolved significantly ever since, reflecting shifts in global economic and political dynamics as well as shifts in investment protection and promotion priorities.

Early versions of IIAs were frequently bilateral in nature, referred to as Bilateral Investment Treaties (BITs). With the passage of time, there has been a shift toward more comprehensive agreements, such as Free Trade Agreements (FTAs) or Economic Partnership Agreements (EPAs), which include investment provisions in addition to trade-related provisions.[12]

Earlier BITs were primarily concerned with protecting foreign investors' rights and ensuring compensation for host-state expropriation and other adverse actions. However,

8 Alfaro, Laura, et al. *"FDI and economic growth: the role of local financial markets."* Journal of international economics 64.1 (2004): 89–112.

9 Danzman, 12.

10 Danzman, 12.

11 Johnson Jr, Thomas, and Jonathan Gimblett. *"From gunboats to BITs: the evolution of modern international investment law."* Yearbook on international investment law and policy 649 (2011): 685.

12 Agreement between Japan and the United Kingdom of Great Britain and Northern Ireland for a Comprehensive Economic Partnership, Japan- United Kingdom CEPA (2020); Economic Partnership Agreement between the Republic of Kenya and the United Kingdom of Great Britain and Northern Ireland, Kenya- United Kingdom EPA (2020).

concerns have arisen that these safeguards may limit a host country's ability to regulate in the public interest. Subsequent IIAs sought to strike a balance between investor protection and the regulatory space of the host country. For instance, in the sensitive sector of public health.[13]

The ISDS mechanism, which allows foreign investors to sue host countries for alleged violations of investment protections, has been criticized for a perceived lack of transparency, the possibility of frivolous claims, and a lack of accountability. As a result, there has been a push for ISDS reform, with efforts to increase transparency, establish appeals mechanisms, and implement anti- abuse safeguards.[14]

Provisions that promote sustainable development, environmental protection, labor rights, and social standards are increasingly being included in modern IIAs. These provisions reflect a growing awareness of the importance of aligning investment activities with larger societal goals.[15]

Some IIAs have been abused through a practice known as "treaty shopping," in which investors purposefully structure investments to take advantage of favorable provisions in specific agreements.[16] Newer IIAs frequently include provisions designed to prevent such abuse and ensure that only legitimate investors benefit from treaty protections.

Large-scale multilateral treaties, such as the Trans-Pacific Partnership (TPP) and the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU, have resulted in new standards for investment protection and dispute resolution.[17] These treaties seek to establish a more consistent and predictable international investment framework. Domestic and regional reforms have been implemented by some countries and regions in order to modernize their investment policies and agreements. These reforms frequently entail revising or terminating older BITs and negotiating new agreements that reflect current concerns and priorities.

IIAs are increasingly being accompanied by discussions about corporations' responsibility to respect human rights and the role of states in regulating business conduct. References to international human rights standards and corporate social responsibility are now included in some IIAs.[18]

13 Sheargold, E, and Andrew D. Mitchell. *"Public health in international investment law and arbitration."* Handbook of International Investment Law and Policy. 2021. 1852.

14 Bernardini, P. *"Reforming investor–state dispute settlement: the need to balance both parties' interests."* ICSID Review-Foreign Investment Law Journal 32.1 (2017): 38–57.

15 Alschner, W, and Elisabeth Tuerk. "*The role of international investment agreements in fostering sustainable development."* Investment Law Within International Law: Integrationist Perspectives (CUP 2013) (2013).

16 Chaisse, J. *"The treaty shopping practice: corporate structuring and restructuring to gain access to investment treaties and arbitration."* (2015): 225.

17 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018); Canada- European Union Comprehensive Economic and Trade Agreement (CETA) (2018).

18 Simma, B. *"Foreign investment arbitration: a place for human rights?"* International & Comparative Law Quarterly 60.3 (2011): 574.

III. *Effectiveness of International Investment Laws in Promoting the Flow of Foreign Direct Investments*

Determining the effect of BITs on inward investment has become increasingly relevant to policymakers as concerns about the sovereignty costs these treaties impose have mounted. As a whole, the empirical evidence is decidedly mixed. Some scholars find BITs attract a substantial amount of investment, while some find no evidence that BITs are useful tools for generating FDI inflows. Some find BITs function as substitutes for domestic rule of law in countries that have weak property rights protections, while others find BITs can only attract investment in jurisdictions that achieve some minimum threshold of domestic legal institutional quality.[19]

Some academics argue that BITs serve as costly signals of governments' seriousness about protecting foreign firms' assets. Ratifying BITs can be costly because it necessitates the formation of a domestic coalition, despite the fact that such treaties frequently provide foreign investors with greater legal protection than domestic firms.[20] Thus, ratifying even one treaty may signal to the global investment community the strength of a polity's pro-FDI coalition. To the extent that governments believe they will be punished if they do not follow the terms of the treaty.[21] If BITs function as expensive signals, host countries with an active BIT program should attract more FDI overall, regardless of whether they have a treaty with a specific country partner.

Several studies find evidence to this effect. Neumayer and Spess find in a sample of 119 developing countries from 1970 to 2001 that signing more BITs increases undirected FDI inflows.[22] They estimate a one standard deviation increase in the number of signed BITs a developing country increases FDI inflows between 43.7 and 93.2 percent.[23] Kerner also finds evidence of a positive effect of extra-dyadic BITs on dyadic FDI flows in a sample of 127 developing host countries and 22 developed home countries from 1982 to 2001.[24] Bastiaens finds BITs have a positive effect on monadic FDI inflows in a sample of 87 authoritarian countries from 1990 to 2008.[25]

Another prominent argument is that BITs can influence investor behavior by credibly committing governments to providing specific and enforceable rights to investors covered

19 Danzman, 18.

20 Kerner, A. *"Why Should I Believe you? The Costs and Consequences of Bilateral Investment Treaties."* International Studies Quarterly 53 (2009), 79–82.

21 Peterson, L. E. International Institute for Sustainable Development and Suisse. *Bilateral Investment Treaties and Development Policy-Making*. 2004.

22 Neumayer, E and Spess, "*Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?"* World Development 33 (2005): 1567–85.

23 Neumayer and Spess, 1582.

24 Kerner, 79–82.

25 Bastiaens, Ida. "*The Politics of Foreign Direct Investment in Authoritarian Regimes."* International Interactions 42 (2016) 141.

by a treaty. This logic is derived from the literature on bargaining theories of war, which stresses the importance of hand-tying mechanisms to prevent reneging due to time-inconsistent preferences.[26] Scholars argue that BITs credibly commit host states to upholding treaty provisions due to the reputational and financial costs of breaching these treaties. BITs clarify host governments' obligations to foreign investors, making it easier to detect and punish fraud.[27]

Losing in investor-state arbitration can be costly financially and merely having an arbitration claim initiated against a host government may wipe out all of the increased FDI afforded by a BIT as the host country develops a reputation for truculence.[28]

BITs may impose greater restrictions on some countries while only weakly binding others. On the one hand, if BITs serve as a commitment to investor- friendly policies, the credibility of that commitment is determined by both the extent to which investors believe governments will honor their treaty commitments and the extent to which treaty terms offer strong or weak protection. This logic implies that BITs should be used to supplement local domestic laws and that only countries with a minimum level of rule of law and government constraints will be able to use BITs to attract investment.[29]

The impact of BITs on investment flows may be influenced by the prior relationship of the co-signatories to a specific BIT. According to Desbordes and Vicard, BITs are most useful in promoting FDI from home to host countries with a history of tensions; the BIT serves as a signal of the host countries' commitment to pro-market policies as well as important legal safeguards if bilateral relations deteriorate.[30] Investment treaties like BITs might hold a stronger influence on some forms of FDI over others. Kerner and Lawrence demonstrate US BITs increase fixed asset investments in treaty partners, but not other forms of more mobile investment like cash holdings. They argue this indicates that BITs are useful in reassuring investors that their immobile assets are safe, but do not increase more liquid investments.[31]

The totality of evidence suggests BITs probably do have some influence on investment decisions, but this effect is conditioned on several factors including the host country domestic legal environment, treaty design, signatories’ political and economic relationships, and investment type.

26 Fearon, James. “*Signaling Foreign Policy Interests: Tying Hands versus Sinking Costs.”* Journal of Conflict Resolution 41 (1997): 68–90.

27 Garcia-Bolivar, O. E and Schmidt. *“The Rise of International Investment Arbitration in Latin America.”* Latin American Law and Business Report 12 (2006) 25.

28 Allee, T and Peinhardt. *“Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment”* International Organization 65 (2011): 401–32.

29 Danzman, 23.

30 Desbordes, R and Vicard. “*Foreign Direct Investment and Bilateral Investment Treaties: An International Political Perspective.”* Journal of Comparative Economics 37 (2009): 372- 86.

31 Kerner and Lawrence, 107–21.

IV. Conclusion

International investment laws help to promote FDI flows and contribute to economic development in both host and home countries by creating a stable and appealing environment for foreign investors. It is important to note, however, that the effectiveness of these laws can vary depending on factors such as the specific terms of the agreements, host country implementation, and changes in global economic and political conditions.

C. DOMESTICATION OF INVESTMENT LAWS GOVERNING FDI

I. History of domestication of Investment laws.

Political liberalism, economic liberalism, and liberal internationalism serve as the pillars of the Liberal International Order (LIO), which was founded in the years following World War II.[32] It is founded on ideas like liberal democracy, open markets, and cooperation in the security sphere. These are constrained by legal norms like the rule of law and human rights. Liberal internationalism includes cooperation with the aid of multilateral organizations, such as the World Trade Organization (WTO) and the United Nations (UN).[33] 'Nationalism' and 'internationalism' have a dialectical relationship that has shaped the development of international organizations, including the governance of those organizations as a whole.[34] Nationalism expresses the belief that international organizations should serve the interests of States, whereas internationalism proposes that these organizations should ultimately serve the interests of the world's population.[35] International institutions of the economic sphere served as vehicles in the post-World War II international order for the liberalization of cross-border trade and investment; the dialectic appeared to have settled in favor of the international, at least when it came to economic issues.

Following the global financial crisis of 2008, there has been a relative decline in economic globalization. Since at least 2012, global trade has been declining, and global FDI has been declining since 2016.[36] The COVID-19 pandemic has accelerated these trends even further. This phenomenon has been dubbed "de- globalization”.[37] This has affected various aspects of the global economy but most relevant to this study, the flow of Foreign Direct Investments (FDI).

32 Barnett, M, 1–22.

33 Chaisse, Jullien, and Georgios Dimitropoulos. “Domestic Investment Laws and International Economic Law in the Liberal International Order.” *World Trade Review* 22.1 (2023): 1.

34 Mazower, M. *Governing the world: The history of an idea, 1815 to the present*. Penguin, 2013.

35 Mazower.

36 UN Conference on Trade and Development (2020) Global Investment Trends Monitor, Issue No. 33.

37 Irwin, D. A. *"The pandemic adds momentum to the deglobalization trend."* Peterson Institute for International Economics 23 (2020).

Overall, trust in post-World War II LIO of international institutions is dwindling. This is especially true of the institutions of the international economic order, particularly international investment arbitration, which helped shape the post-WWII international order's internationalism.[38]

States have the sovereign right to regulate foreign investment entry and establishment within their borders.[39] Domestic instruments and institutions that regulate foreign investment fall into two categories: domestic investment laws and non-investment specific laws relevant to cross-border trade and investment, such as property laws and arbitration laws.

Such laws coexist with international economic law instruments such as free trade agreements (FTAs) and international investment treaties (IIAs). The domestication of International Investment Law

The domestication of IEL appears to be challenging the post-WWII international order's assumptions. In an era of LIO dominance, IEL was shaped as a separate discipline of international law and has largely accommodated the free movement of goods and capital.[40] This explicit or implied ideological dominance of the LIO, as well as the legitimacy of this order and the international law it gave rise to, has gradually waned as a result of three interconnected developments: the rise of state capitalism as an opposing ideological paradigm, the crisis of international trade law, and the backlash against international investment law and arbitration.

The 'backlash' against international investment law and its institutions is now commonplace, and it is a symptom of a broader loss of faith in global capitalism's institutions.[41] Governments and other stakeholders in both the South and the North have expressed outrage and a desire to reform international investment law.[42] This shift could have far-reaching consequences for the foreign investment regime. The current crisis is serving as a catalyst for much-needed change.

Domestic laws were heavily relied on to regulate cross-border economic activity in the immediate postwar years. Following independence, the new states of the post-colonial world in Asia and Africa began developing domestic investment laws. During the 1950s and 1960s, this sparked academic interest in the field.[43]

Thus, until the middle of the twentieth century, international law was less relevant for regulating cross-border trade. Foreign trade was primarily conducted through the unilateral opening of domestic borders, and it was aided by a series of Treaties of Friendship,

38 Waibel, M. *The backlash against investment arbitration: perceptions and reality*, 2010.

39 UN Conference on Trade and Development (2019) World Investment Report: SEZs, 92, Doc. No. UNCTAD/WIR/2019.

40 Charnovitz, S. *"The historical lens in international economic law."* Journal of International Economic Law 22.1 (2019): 93–97.

41 Waibel.

42 Reisman, W. M. *"The empire strikes back: the struggle to reshape ISDS."* (2017).

43 Ahooja, K. *"Investment Laws and Regulations in Africa."* The Journal of Modern African Studies 2.2 (1964): 300.

Commerce, and Navigation (FCN).[44] FCN Treaties were usually signed bilaterally between Western States and included provisions for both trade and investment. Separate international investment treaties have begun slowly when the South's decolonization was well underway.[45] For investment and investor protection, specialized bilateral investment treaties began to replace FCN Treaties. In the second half of the twentieth century, international law largely replaced domestic law as the dominant system for cross-border trade and investment protection.

The rise of LIO and economic globalization accelerated the adoption of international trade and investment treaties. The LIO signaled a shift from domestic to international; an increase in the signing of international investment treaties, as well as a decrease in foreign property nationalization.[46]

In 1992, the World Bank released a study of existing instruments that focused on the admission, treatment, expropriation, and dispute resolution sections of 48 developing country investment codes.[47] Since then, developing countries have adopted some of the World Bank study's recommendations. In response to the World Bank's designation of arbitration as "international best practice," developing countries frequently incorporated international arbitration into their domestic laws.[48]

IEL crises are once again driving countries to adopt strong domestic frameworks for managing foreign economic flows. IEL generally regards FDI regulation as a sovereign right of states. There are no general international obligations to grant foreign investors market access or accept foreign investment into the host country. The standard BIT does not grant a foreign investor a right of admission or any other type of pre-entry protection for foreign investment; instead, BITs generally defer to the requirements of the host states.[49] The same can be said about the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which contains no rules on pre-entry protection for foreign investments.

44 Coyle, John F. *"The treaty of friendship, commerce and navigation in the modern era." Colum. J. Transnat'l L.* 51 (2012): 302–359.

45 Anghie, Antony. *Imperialism, sovereignty and the making of international law*. Vol. 37, 2007: Chapter 4.

46 Chaisse and Dimitropoulos, 3.

47 World Bank. General Counsel, International Finance Corporation. General Counsel, and Multilateral Investment Guarantee Agency. General Counsel. *Legal Framework for the Treatment of Foreign Investment*. Vol. 2. World Bank, 1992.

48 Berge, T. L, and St John. *"Asymmetric diffusion: World Bank 'best practice' and the spread of arbitration in national investment laws."* Review of International Political Economy 28.3 (2021): 584–610.

49 Article 2(1), Model BIT of Germany (2005).

In IEL, 'domestication' can be defined as a process of devolution from the international to the domestic, i.e. a shift from using international to domestic legal instruments to regulate cross-border trade and investment flows.[50]

States have resorted to domestic means to regulate foreign trade and investment more frequently in recent years. Policies aimed at attracting FDI have explicitly emphasized efforts to improve the host countries' overall enabling environment. Domestic law is being used by an increasing number of countries to govern the entry and development of foreign investments, provide assurances for profit repatriation, and resolve investment disputes. Tax breaks are frequently provided as well.[51] For example, use of extremely low corporate tax rates to entice both foreign corporations and domestic enterprises to stay. Preferential tariff regimes reduced red tape, increased infrastructure investment, and educational initiatives have also been implemented. These domestic policies are frequently implemented in order to replace international legal instruments.

These domestic policies are frequently implemented in order to replace international legal instruments. Other countries strengthen their domestic investment legal frameworks while pursuing international economic agreements.

II. Interplay

Overall, these changes in International Investment law may be interpreted as a shift from international to domestic. However, the interaction between domestic and international in IIL is extremely complex. Domestic laws, particularly when it comes to investment treaty arbitration claims, can be viewed as a source of international investment law. Domestic legal frameworks, according to Salacuse, are one of three legal layers of international investment that seek to encourage and control foreign investment.[52]

Domestic law, according to some scholars, is a formal source of foreign investment law.[53] Domestic investment laws may be construed as unilateral acts of states under international law.[54]

In order to promote FDI, governments often adopt national foreign investment statutes. Many of the same substantive protections are provided by these foreign investment laws (FILs) as investment treaties. FILs use definitions of "investor" and "investment" that closely resemble those found in investment treaties. FILs frequently include guarantees

50 Chaisse, Jullien, and Georgios Dimitropoulos, 3.

51 UN Conference on Trade and Development (2000) Tax Incentives and Foreign Direct Investment Doc No. UNCTAD/ITE/IPC/Misc.3.

52 Salacuse, J. W. *The three laws of international investment: national, contractual, and international frameworks for foreign capital*, 2013: 36.

53 Douglas, Zachary, Joost Pauwelyn, and Jorge E. Viñuales, eds. *The foundations of international investment law: bringing theory into practice*, 2014: 213, 222.

54 Caron, D. D. *"The interpretation of national foreign investment laws as unilateral acts under international law."* Looking to the Future, 2011: 649.

on capital transfer, expropriation, and non-discrimination i.e national treatment, reflecting core protections in investment treaties. Some FILs also include, the almost universally found in investment treaties, guarantee of fair and equitable treatment.[55] These are aimed at providing assurance about the treatment of foreign investments, and provide consent for non-national dispute resolution mechanisms such as ICSID arbitration.[56]

National Foreign Investment Laws as a Basis for Consent to ICSID Jurisdiction

It is not sufficient that a contracting State ratifies the ICSID convention but both parties should further provide written consent to arbitration under the Convention.[57] Consent can be given in three different ways.

First, through a clause in the Investment agreement between the host state and the investor submitting future disputes to the jurisdiction of ICSID. Second, through national legislation by the contracting state. For this to amount to consent, the investor must accept it or it could be structured in a manner that the mere institution of arbitral proceedings amounts to acceptance. Third, through a BIT or Multilateral Investment treaty between host and home state containing an ICSID arbitration clause where the acceptance by the investor is achieved by instituting the arbitral proceedings.[58]

Therefore, as much as national legislations are unilateral actions, they must be evaluated according to the Vienna Convention and the ILC Guiding principles on unilateral acts which may lead to unilateral obligations that may affect its relationships with other states. it is clear that national legislation can serve as a form of consent to ICSID arbitration.[59]

III. Conclusion

In conclusion, international investment laws play an important role in promoting FDI by providing a stable and predictable legal framework that encourages and protects foreign entities' investments in a host country. These laws foster an environment of trust and security for foreign investors, resulting in increased FDI flows. On the other hand, domestic investment laws encourage and control FDI. Therefore, the two are co-dependent in promoting foreign direct investment.

55 Hepburn, Jarrod. *"Domestic investment statutes in international law."* American Journal of International Law 112.4 (2018): 658.

56 Caron, 649.

57 Article 25(1) ICSID Convention.

58 Schreuer, C. H. (2009). *The ICSID Convention: A Commentary*.241 – 45.

59 Caron, 674.

D. A LOOK AT KENYA'S INVESTMENT FRAMEWORK

I. Legal Framework of Investment Protection

The Investment sector in Kenya is regulated by both domestic, regional and international laws. Domestically, Kenya has various Acts of Parliament including the Investment Disputes Convention Act and the Foreign Investments Protection Act and the Investment Promotion Act. In accordance with Article 1(6) of the Constitution of Kenya, 2010, international treaties on Investment also apply provided they are ratified and are not inconsistent with the Constitution of Kenya.[60] Regionally, the East African Community and the African Union laws and policies also apply.

This section will therefore look into the various domestic and regional instruments governing Investment law and protection of Foreign Direct Investment.

1. Investment Disputes Convention Act

This Act was enacted in November 1966 and was last revised in 2012. This Act gives legal sanction to the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other states. This Act confirms the status, immunities and privileges of ICSID as it accepts its Jurisdiction. This could be taken as an expression of Consent in the part of Kenya to arbitral proceedings before the ICSID tribunals. This Act further recognises awards rendered pursuant to the ICSID Convention and provides an obligation for the enforcement of such awards as if they were a final decree of the High Court of Kenya.[61]

2. Foreign Investments Protection Act

This Act was enacted in December 1964 and was last revised in 2017. This Act gives protection to certain approved foreign investments. It provides that the holder of an investor certificate under this Act shall be entitled to transfer out of Kenya profits arising out of his investments, capital and principal and interest of any loan specified in the certificate.

It also provides that no approved property belonging to a foreign investor shall be compulsorily acquired except with the payment of full and prompt payment of compensation as provided for in section 75 of the CoK.[62]

60 The Constitution of Kenya, 2010.

61 Laws of Kenya, Investment Disputes Convention Act, Act No. 31 of 1966.

62 Laws of Kenya, Foreign Investments Protection Act, Act No. 35 of 1964.

3. Investment Promotion Act

This act was enacted in December 2004 and was last revised in 2014. This Act aims at promoting and facilitating investment by assisting investors in obtaining the license necessary to invest and by providing further assistance and incentives. The act provides that an applicant shall be entitled to an investment certificate if the application is complete and satisfies the applicable requirements under this Act, the amount to be invested by a foreign investor is at least one hundred thousand United States of America dollars or the equivalent in any currency; the amount to be invested by a local investor is at least one million shillings or the equivalent in another currency ($10,000); and the investment and the activity related to the investment are lawful and beneficial to Kenya.

The Kenya Investment Authority (Ken Invest) is the primary investment agency in Kenya established by this Act of Parliament. According to the act, the Authority's primary mandate is to promote and facilitate the growth of both domestic and foreign investments in Kenya.[63]

4. EAC Investment Policy

The investment provisions of the EAC Customs Union Protocol include, among other things, rules on pre and post-entry treatment, investment incentives, competition, and dispute resolution.[64] Article 29 of the Common Market Protocol requires Partner States to protect cross-border investments and investment returns of other Partner States' investors within their territories, as well as a timetable for removing existing restrictions on the free movement of capital within the EAC region.[65]

According to the EAC Treaty, Partner States must "harmonise and rationalize investment incentives, including those relating to industry taxation." The free movement of goods, labor, services, and capital is guaranteed by the EAC Common Market Protocol. Its investment provisions call for the protection and harmonization of tax regulations. Finance Ministers developed and approved an EAC Domestic Tax Harmonization Policy at the Sectoral Council on Finance and Economic Affairs' 8th Meeting in May 2018. Detail harmonization proposals for VAT and excise tax rates were being developed for the finance ministers' consideration.

The EAC Model Investment Code of 2006 allows for free asset transfer as well as protection from unjustified expropriation. EAC countries can negotiate and sign third-country investment treaties. A Model Investment Treaty was adopted in 2016 with the intention of guiding and serving as a template for negotiations.[66]

63 Laws of Kenya, Investment Promotion Act, Act No. 6 of 2004.

64 Protocol on the Establishment of the East African Customs Union.

65 Protocol on the Establishment of the East African Community Common Market.

66 www.eac.int/regional-framework/investment-framework (last accessed 8/24/2023).

In contrast, double taxation remains a significant impediment to cross-border investment flows. Cross-border investment income is taxed not only in the country of origin, but also in the taxpayer's home country. The East African Community signed an Agreement on the Avoidance of Double Taxation in November 2011, but the ratification process is still ongoing (EAC, 2016, The East African Community Handbook on the Avoidance of Double Taxation). Because of concerns about revenue loss and tax evasion, the ratification process is taking its time. Kenya, Rwanda, and Uganda have so far ratified the Agreement.

Furthermore, the EAC Partner States have established their own institutions and regulatory frameworks to deal with foreign investment. Each country's requirements for company registration and incorporation procedures, permits and licenses, property acquisition, capital and land access, ownership and management control, and exit procedures are different.

In conclusion, the EAC Investment framework is comprehensive yet it all trickles down to the individual national laws to provide the right environment and good will to advance the EAC objectives.

5. African Continental Free Trade Area (AfCFTA)

The African Continental Free Trade Area (AfCFTA) is one of the African Union (AU) Agenda 2063: *The Africa We Want* flagship projects. It is a high- achievement trade agreement with a broad scope that includes critical areas of Africa's economy, such as digital trade and investment protection, among others. The AfCFTA's goal is to significantly increase intra-Africa trade, particularly trade in value-added production and trade across all sectors of Africa's economy, by eliminating trade barriers in Africa.

The African Continental Free Trade Agreement (AfCFTA) is the world's largest free trade agreement, bringing together the 55 countries of the African Union (AU) and eight (8) Regional Economic Communities (RECs) to form a single market for the continent. The goal is to facilitate the free flow of goods and services across the continent and to strengthen Africa's trading position in the global market.

The AfCFTA's mandate includes removing trade barriers and increasing intra- Africa trade. Its primary goal is to promote trade in value-added production across the African economy's entire service sector. The AfCFTA's goal is to help Africa establish regional value chains, allowing for investment and job creation. The practical implementation of the AfCFTA has the potential to promote industrialization, job creation, and investment, thereby improving Africa's long-term competitiveness.

The AfCFTA entered into force on May 30, 2019, following the deposit of 24 Instruments of Ratification by 24 Member States following a series of continuous continental engagements that began in 2012. It was launched in July 2019 at the 12th Extraordinary Session of the AU Assembly of Heads of State and Government in Niamey, Niger. The AfCFTA was set to go into effect on January 1, 2021.

The Pan-African Investment Code (PAIC) is the African Union's first model investment treaty covering the entire continent. The PAIC was written with developing and least-developed countries in mind, with the goal of promoting sustainable development. The PAIC contains a number of Africa-specific and innovative features, presumably making it a one-of-a-kind legal instrument today.

Throughout the last fifty years of international investment law practice, African countries have been viewed as 'investment rules takers.' This is due in part to the economic development asymmetry between African host countries and the home countries of investors. African economies relied heavily on international private capital commitments in the past and continue to do so today. In order to attract more foreign investment, African countries signed numerous BITs with capital-exporting countries, typically by accepting those countries' pre-drafted Model BITs.

With the adoption of modern investment treaties or model investment treaties, African RECs have now become "investment rule makers." The COMESA and SADC regions developed instruments that not only protect foreign investors, but also take into account larger policy objectives, particularly sustainable development goals. However, within Africa, regionalism carries the risk of overlapping legal commitments and uncertainty about the applicable rules. If Africa's various RECs develop their own investment regimes, the risk of fragmentation is high. The PAIC is the first continent-wide model investment treaty, which may help to ensure greater consistency in the regulation of foreign investments across the African continent. Despite its non-binding nature, the PAIC will serve as a guide for the IIA negotiations of AU Member States.

II. Reflecting the African Context with the Association of East Asian Nations (ASEAN)

After reviewing the AfCFTA, it is critical to consider how other successful regions have organized themselves and whether Kenya and Africa as a whole are on the right policy track. The ASEAN region is the best and has the fewest disparities with the African context. The establishment of the AEC in 2015 marked a watershed moment after the ASEAN Charter granted the organization legal personality 'as an inter-governmental' organization.[67] In response to the shortcomings of the ASEAN Free Trade Area and the Asian financial crisis, the AEC is one of the three pillars of an ASEAN Community.[68]

The new AEC Blueprint 2025, which succeeded the AEC Blueprint 2015, is an integral part of the guiding document of 'ASEAN 2025: Forging Ahead Together'.[69] The first and most important feature of the AEC Blueprint 2025 is 'A Highly Integrated and Cohesive

67 Arts. 1(1) and 3, Charter of the Association of Southeast Asian Nations (2007).

68 Mercurio, B. *"Trade liberalisation in Asia: why intra-asian free trade agreements are not utilised by the business community."* Asian J. WTO & Int'l Health L & Pol'y 6 (2011): 109.

69 Kuala Lumpur Declaration on ASEAN 2025: Forging Ahead Together (2015).

Economy.'[70] Its main goal is to "create a more unified market" by enabling "the seamless movement of goods, services, investment, capital, and skilled labor."[71]

The ASEAN way was restructured, and the concept of ASEAN law was reinforced by the AEC and ASEAN Plus One FTAs. The ASEAN way refers to the collective principles of sovereignty, non-intervention, and decision- making consensus, which are based on the Indonesian concepts of musyawarah and mufakat (consultations and consensus).[72] In practice, it has served as an inter-state code of conduct as well as a decision-making mechanism for reaching consensus through consultations.[73]

I believe that the legalization of the AEC has galvanized the ASEAN way into a hybrid political and legal concept. The ASEAN approach to regionalism is no longer regarded as a non-binding soft law approach. The new ASEAN approach, on the other hand, combines structured flexibility with hard-law obligations.[74] The ASEAN Comprehensive Investment Agreement (ACIA) is the key instrument for investment liberalization and protection under the AEC Blueprint 2025. ASEAN's FDI inflows more than tripled during the Third Regionalism, and the value of FDIs now accounts for 21 % of FDI stock in developing countries.[75] In terms of attracting FDI, ASEAN has also surpassed China. The ACIA, which was signed in 2009, combines the Investment Promotion and Protection Agreement of 1987 and the Framework Agreement on the ASEAN Investment Area of 1998. These pre-ACIA agreements and their amending protocols did not have the desired impact.

The 1987 Agreement was comparable to traditional BITs that did not allow for liberalization of investment.[76] With its exclusion lists, the 1998 Framework Agreement was unable to assist ASEAN in recovering from the Asian financial crisis. As a result, the ACIA seeks 'progressive liberalization' of existing restrictions, as well as increased investment protection and transparency of investment rules.[77]

Despite the absence of a direct EU-like effect, the ACIA facilitates the harmonization of domestic investment laws in the ten ASEAN countries and provides best practices for investment reforms.

While de-globalization has reduced multilateral institutions' effectiveness, domestication of international economic law has strengthened the mutual relationship between re-

70 ASEAN Economic Community Blueprint 2025 (2015) (AEC Blueprint 2025).

71 ASEAN Economic Community Blueprint 2025 (2015) (AEC Blueprint 2025).

72 Acharya, Amitav. *Constructing a security community in Southeast Asia: ASEAN and the problem of regional order*, 2014: 3–5.

73 Acharya, Amitav. *"Ideas, identity, and institution-building: From the 'ASEAN way' to the 'Asia-Pacific way'?"* The Pacific Review 10.3 (1997): 319, 328–330.h.

74 Hsieh, P. L. *New Asian regionalism in international economic law*, 2022: 37.

75 Secretariat, A. S. E. A. N. *"ASEAN at 50: A Historic Milestone for FDI and MNEs in ASEAN."* ASEAN Secretariat: Jakarta (2017) :6–7.

76 Chaisse, J, and Jusoh, S. *The ASEAN comprehensive investment agreement: The regionalisation of laws and policy on foreign investment*, 2016: 67- 68.

77 AEC Blueprint 2025.

gional and national investment regimes. New investment laws, particularly in Laos and Myanmar, demonstrate the ACIA's normative impact.[78] The Investment Promotion Law of Laos, as amended in 2016, applies to both domestic and foreign investments, bringing national standards much closer to ACIA requirements.[79]

The ACIA is applicable to ASEAN investors and investments and exemplifies Asia's evolving investment law rulemaking. While investors include both natural and legal persons, a non-ASEAN enterprise may be eligible for ACIA benefits and protection if it is incorporated and maintains 'substantial business operations' in an ASEAN country. The ACIA, influenced by the US Model BIT, adopted a broad, non-exhaustive, asset-based definition of investments that includes 'every kind of asset'.[80]To prevent claims from multiplying, the ACIA excludes assets that lack "investment characteristics."[81]

The ACIA also does an exemplary job in balancing domestic law and traditional bilateral treaties. It provides FET with 'greater certainty' by preventing the host country from denying justice and, according to the investors, due process 'in legal and administrative proceedings'.[82] The ACIA's MFN clause also excludes ISDS proceedings to protect regulatory sovereignty.[83] The ACIA's denial of benefits provisions, which exclude certain investors from the agreement, may further reduce treaty shopping, according to best practices in domestic law.[84] ASEAN Plus One FTAs include similar provisions.[85]

III. Conclusion

In many ways, ASEAN and AfCFTA are similar, but one appears to be more progressive than the other. Perhaps because of the five-year time lag between the implementation of the two systems. Both regional systems are distinguished by a diverse range of cultural and linguistic contexts. The diversity is also visible in the two regions' general economic development levels, which range from developed to least developed. One point of difference is that ASEAN covers a smaller geographical area with ten countries compared to the AU's 55 member states. This, however, does not diminish the similarities between ASEAN and AfCFTA, as they both provide similar levels of diversity. As a result, if ASEAN

78 Jusoh, Sufian. *"Investment Liberalization in ASEAN: Moving Myths to Reality."* ASEAN Law in the New Regional Economic Order: Global Trends and Paradigms, 209 (2019): 209, 218–225.

79 Organisation for Economic Co-operation and Development, *'OECD Investment Policy Reviews: Lao PDR'*, 2017.

80 Art. 4(c), ACIA.

81 Art. 4(c), ACIA.

82 Art. 11, ACIA.

83 Art. 6, ACIA.

84 Ramli, I. M. *"Denial of Benefits in Investment Arbitration: Genesis, Trends, and Application."* Handbook of International Investment Law and Policy, 2021: 1014, 1016–1026.

85 Ramli, 1027–1029.

can be used as a time machine to predict the AfCFTA in the next five years, Africa is unquestionably on the right track.

E. RECOMMENDATIONS AND CONCLUSION

I. Recommendations

Improving the coherence and efficiency of the International Investment Law (IIL) regime and domestic law regime in the context of Foreign Direct Investment (FDI) necessitates careful consideration of a number of factors. Here are some possible reform or harmonization areas that could contribute to a more coherent and effective framework:

1. Definitions and standards must be consistent and clear.

There is need for the establishment of clear and consistent definitions of key terms, such as "investor," "investment," and "expropriation," in order to reduce ambiguity and conflicting interpretations. To further reduce confusion and ensure predictability, there is need for harmonization of the standards of protection and treatment offered to foreign investors across different international agreements and domestic laws.

2. Reform of Investor-State Dispute Settlement (ISDS):

To increase transparency and accountability in ISDS proceedings, open hearings and increased participation of third parties such as civil society organizations should not only be allowed but encouraged.

There is also a need for an appellate mechanism similar to the World Trade Organization's (WTO) Appellate Body to ensure consistency and coherence in the interpretation of investment treaties.

3. Investor Rights vs. Regulatory Sovereignty:

It is important to clarify the scope and limitations of investor rights, such as the right to fair and equitable treatment, in order to strike a balance between protecting investors and preserving host states' regulatory space. There should be clear provisions giving guidance on legitimate public policy objectives such as, health, the environment, and human rights that can be used to justify regulatory measures that may have an impact on foreign investments. Cooperation and coordination:

To facilitate the sharing of best practices and experiences, there is need to establish a platform for regular dialogue and cooperation between international organizations such as UNCTAD and ICSID and national governments. This cooperation and coordination will encourage host countries to implement mechanisms for consulting with foreign investors before making significant regulatory changes that may affect FDI.

4. Technical assistance and capacity building:

Technical assistance and capacity-building programs should be made available to developing countries to assist them in effectively negotiating, implementing, and managing investment agreements. This should be part of an incentive to encourage the development of knowledge-sharing and peer-learning platforms where countries can share their experiences and lessons learned in managing FDI-related issues.

5. Promotion of Alternative Dispute Resolution and Dispute Prevention:

To avoid costly and time-consuming ISDS cases, there is need to encourage the use of alternative dispute resolution mechanisms such as mediation and negotiation. For this to work, however, there is a requirement for the creation of guidelines for the early assessment and resolution of investment-related disputes in order to avoid the need for formal arbitration.

6. Reform of Domestic Law:

To ensure coherence and avoid conflicting obligations, domestic laws should be aligned with international commitments. It is important that clear and transparent domestic investment frameworks are created in order to provide a stable and predictable environment for foreign investors. These potential reform or harmonization areas reflect a comprehensive approach to improving the coherence and efficiency of the International Investment Law regime and the domestic law regime governing Foreign Direct Investment. However, implementing such reforms would necessitate the cooperation of a wide range of stakeholders, including governments, international organizations, investors, and civil society, and would have to take into account the unique circumstances and needs of each country.

II. Conclusion

In conclusion, while domestic investment laws lay the groundwork for a favorable investment climate within a country, international investment laws provide an additional layer of protection and recourse for foreign investors, thereby encouraging FDI by improving legal certainty, transparency, and risk mitigation. Both sets of laws complement one another in order to attract and facilitate foreign direct investment.

Domestic investment laws lay the groundwork for a favorable investment climate within a country. These laws establish the legal framework that governs business operations, protects property rights, and encourages investment. International investment laws, on the other hand, provide an extra layer of protection and assurance for foreign investors, assisting in mitigating the risks associated with investing in a foreign jurisdiction. Together, these laws make the environment more appealing and secure for FDI.

Domestic investment laws that are clear and transparent improve predictability and legal certainty for all investors, both domestic and foreign. This transparency is critical for increasing investor trust and encouraging long-term investment commitments. International investment laws help to achieve this by establishing minimum standards of treatment and dispute resolution mechanisms that contribute to a stable investment environment. International investment laws can assist in mitigating the perceived risks of investing in a foreign country. When investors are confident that they are protected by international treaties, they may be more willing to invest in projects that benefit the host country's economic development.

When a foreign investor and a host country disagree, international investment laws provide mechanisms for resolving disputes outside of the host country's domestic legal system. This can provide a level of impartiality and fairness that is not always guaranteed within the legal framework of the host country.

To sum it up, domestic and international investment laws serve distinct but interconnected functions in promoting foreign direct investment.

COMMERCIAL MEDIATION AS A REMEDY FOR CORRUPT JUSTICE IN SECURING THE BUSINESS CLIMATE IN SUB-SAHARAN AFRICA

NKULU MUKUBU LUNDA Johnny*

ABSTRACT

Since their independences, in most of sub-Saharan African countries the administration of justice has suffered from a wickedness that is eating away at it and compromising the judicial security necessary for economic development: corruption. Corruption has many faces and form but one of the worst forms is judicial corruption, because it is really a break the development of our countries and even for the sub-region. In the face of corruption, commercial mediation is proposed as a remedy for the countries of the sub-region. Mediation is an alternative method of conflict resolution where the parties try to find a solution to a conflict on their own, under the supervision of a third party: the mediator. This alternative dispute resolution method excludes any possibility of judicial corruption or financial domination by one party over another, simply because the mediator has no role to play in favour of one party to the detriment of another. This definitively excludes any intention or possibility of corruption

Rather, the objective of mediation is to re-establish lasting and quality communication between the parties because, free from all the misunderstandings that caused the conflict, they can even after the dispute consider better relations, which is crucial in the business world. Commercial mediation offers a framework of trust, since the parties are freed from intimidating legal proceedings with judges and lawyers, a considerable time saver, since the parties do not bother with long trials, an ideal framework for commercial collaboration, since no one loses out but also an infallible remedy against corruption, since no party has an interest in influencing the mediator, whose role is not to agree with one party or another but rather to lead them to a solution that suits them all.

A. Introduction

Since their independences, several of the countries of sub-Saharan Africa, whether they are in the Romano-Germanic system or in the common wealth, have experienced a rather pathological judicial situation, the symptoms of which are in particular corruption, the elasticity of procedures, their exacerbated cost, the complexity and ineffectiveness of the solutions proposed.

* Lawyer at the Bar of Haut-Katanga, Assistant at the Faculty of Law of the University of Lubumbashi and PhD student in Law. Email address johnnylunda@gmail.com, tel; +243 990 197 624.

This situation has the direct consequence of judicial insecurity that is harmful to investments in the sub-region and does not promote the rapid development of this part of the continent. Without just justice, the challenge of sub-Saharan Africa's development remains a distant dream. To cure it, drastic measures would be needed, requiring both the political will of the countries concerned and above all a 180° change in the mentality of both judicial actors and the population.

While the mechanism proposed above seems conceivable, its implementation nevertheless remains a headache and requires considerable time to materialize. It is therefore timely and urgent that an alternative mechanism be tried: mediation seems to be the long-awaited remedy.

Since November 23, 2017 in Conakry, the Council of Ministers, acting as a legislator within the community of the Organization for the Harmonization of Business Law in Africa, OHADA in acronym, has adopted a new uniform act relating to mediation as an alternative method of conflict resolution.

> *It has taken twenty-four years since the signing of the OHADA treaty to witness the diversification of its justice offer. Its previous system was based only on the adjudicative methods of public justice by the state courts and private justice by the office of arbitrators. The offer of justice was therefore monolithic, de facto excluding litigants from decision-making*[1].

Thus, the advent of a dispute resolution system centered on the deliberate will of the parties to find a fair, equitable and pragmatic solution to their dispute constitutes a major advance in the perception that litigants had of justice, thus excluding the punitive aspect characterizing it to arrive at a consensual and harmonious approach to the solution to the dispute, and a hope for medication or a remedy for the ills that plague justice in a sub-Saharan Africa sick with corruption.

B. About mediation

I. Definition

It could be defined in the context of Africa as a new alternative dispute resolution method where the parties try to find a solution to a conflict situation by themselves, supervised by a third party: the mediator. Indeed, considered as a non-jurisdictional method of conflict resolution, mediation postulates the hypothesis that the judicial process is not the only and universal technique for resolving disputes between the members of a society.

While judicial logic proposes to settle a dispute by ruling in favour of one or the other of the parties in conflict, mediation is intended to be "*a formal process by which a neutral*

1 *Ibii OTTO*, The OHADA Uniform Act on Mediation: The Faculty of Evolution from Adjudication to Collaboration in the Field of Justice in French-Speaking Africa, in OHADATA, D-17–24, Abidjan 2017, p.1.

third party attempts, through the conduct of a meeting, to allow the parties to confront their points of view, and to seek, with his or her help, a solution to the dispute between them[2]. »

We can define it in the context of justice by using the definition of the consultative council of Europeans judges. In its Opinion No. 21 (2018), Preventing corruption among judges, the Consultative Council of European Judges proposes a definition of judicial corruption: it is the dishonest, fraudulent or unethical conduct of a judge with the aim of obtaining a personal advantage or an advantage for third parties. This definition forgot other actors like Lawyers and bailiffs.

This alternative method of dispute resolution excludes any possibility of judicial decadence or financial domination of one party over another, simply because the mediator has no role in ruling in favour of one party to the detriment of another. This definitively excludes any intention or possibility of corruption.

II. Function of mediation

To speak of the function of a method of conflict resolution seems, from all points of view, useless insofar as the function is obvious in its statement: it is the resolution of conflicts. Nevertheless, here the function in question must be understood in the sense of the particularity of this mode which distinguishes it from other traditional methods of conflict resolution such as the judicial process, arbitration, settlement, etc.

Thus, mediation, here under analysis, corresponds more to this palliative method of conflict resolution whose particularity is a free conciliation where the parties seriously show the desire to find a fair agreement, a fair solution to their dispute.

This is why it has more of a function of establishing communication between people or social groups. Therefore, mediation differs from the court process in that it requires the prior consent of the parties and, unlike the settlement, does not require any of them to accept the proposed solutions. Finally, unlike negotiation which brings the participants face to face, mediation is carried out by a third party accepted by the protagonists and from whom they expect neutrality and independence[3].

The objective of mediation is more to restore lasting and quality communication between the parties because, free of all the misunderstandings at the origin of the conflict, they can even after the dispute envisage better relations. Mediation is therefore the ideal procedure to resolve a conflict between two business partners who do not wish to break their partnership despite the dispute between them. And unlike the judge's solution, the mediator's solution does not have the effect of breaking the relations between the parties.

2 *Bonafe-Schmitt, J-P.*, Plaidoyer pour une sociologie de la médiation, Paris 1988, 3n°29, p. 21.

3 *Nkulu Mukubu Lunda Johnny,* la médiation du droit OHADA dans la sphère judiciaire congolaise, in OHADATA D-18–18*,* Lubumbashi 2018*,* p.6.

From all this, it is undeniable that in sub-Saharan Africa, mediation is an economical, effective and efficient solution in this period of increased confidence in judges and judicial solutions.

C. Commercial mediation as a medication for corrupt justice in sub-Saharan Africa

Presented in this way, mediation in sub-Saharan Africa is called upon to participate in a process of medication or improvement of the judicial system by serving as an emulation of traditional systems and by offering solutions more adapted to the needs of litigants.

Indeed, it must be admitted that in our lethargic judicial systems it is difficult to introduce new practices, such as mediation. But before holding lawyers and legislators to blame, it should be noted that mentalities first require a certain evolution.

Thus, within the meaning of the Uniform Act, the mediation provided by the law resulting from OHADA seems to encroach on the turf of the cases submitted to the judges, since it allows the parties to snatch their files from their hands when they believe that they can give them, with the help of a mediator, a better solution far from any corruption and harmful influence.

It is therefore obvious that there is friction as to its reception within the body of judicial actors. Indeed, resorting to mediation as another way of resolving conflicts augurs the affirmation of a crisis of confidence in the traditional justice system, which, although it is no longer reassuring, is intended to be the most efficient for the needs of litigants.

This already reveals to us that at this stage, mediation will have to impose itself in order to survive in such an environment and demonstrate through its solutions the undeniable advantages it offers. Moreover, it will be necessary to change the judicial mentality of African businessmen and women in order to adapt it to this new way of resolving disputes.

In addition, the current reversals show us that the interpretation and application of the rule of law by African judges risks bringing more conflicts than solutions to the problems of litigants.

Indeed, it is no longer to be hidden that the current regulation and practice of the law reveal that several mechanisms prevent the development or achievement of sound justice in the judicial process. This is the case with corruption[4], the unfortunate interpretation of laws by judges[5], etc.

All these procedural pitfalls can thus be circumvented by the mediation mechanism thanks to the simplicity of its procedures and above all by the good faith of the parties, who

4 According to the 2019 ranking of Transparency International, the main civil society organization fighting corruption, the DRC is ranked 161st out of 180 countries, comments collected on http://www.afrique.lalibre.be DRC: TSHISEKEDI on a crusade against corruption of July 12, 2019, accessed on August 27, 2019 at 5:07 p.m.

5 *MUKONGA SEFU Jacques*, circular relating to the prohibition of garnishment and precautionary seizure by the presidents of commercial courts: a late arbitration reinstalling legal insecurity, in Juriafrique, Lubumbashi September 2019, p.3.

are determined to find a fair, equitable and honest solution to their dispute and which serves as its basis.

D. Conclusion

All in all, mediation clearly appears to be a medication, a way of helping those who have gotten themselves into a bad situation together, who get bogged down in violence and lock themselves in conflict, to free themselves from it and to benefit from it[6] while sparing them the pangs of a discolored justice.

Moreover, since alternative dispute resolution methods are considered to improve the business climate since they advocate harmony rather than victory, this act is really part of OHADA's aim.

However, it could be argued that this method of conflict resolution is a bit timid in view of the current state of Africa, since there are currently very few mediation institutions that can serve this purpose, nor less than a precedent for the effectiveness of such a procedure.

And so, in a context such as that of sub-Saharan Africa, the mechanism of mediation does augur well for the beginning of a cure, but requires a certain popularization among litigants, a greater institutionalization as well as a legitimization, which, in this context, should come from the states through the production of texts giving force to this new mode of conflict resolution.

Book reviews

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6 Point 5 of the mediation charter of the National Mediation Centre in Paris.

ASSESSING THE ROLE OF ANTI CORRUPTION LEGAL SYSTEMS IN FOSTERING INVESTMENT IN UGANDA

Nyangoma Catherine Atwine*

ABSTRACT

Corruption remains a significant obstacle to investment in Uganda, despite the government's efforts to combat it. This study assesses the role of anti-corruption legal systems in fostering investment in Uganda, highlighting the definitions, types, and effects of corruption on investment. It also examines the anti-corruption measures taken by the government, including domestic, regional, and international instruments. The study found that anti-corruption legal systems can foster investment by reducing risks, criminalizing and sanctioning corruption, and ensuring redress for victims. However, more work needs to be done to address the root causes of corruption and ensure effective enforcement. The study recommends a multifaceted approach to combating corruption, including strengthening institutions, improving transparency and accountability, and promoting citizen engagement. By fostering a conducive investment environment, Uganda can attract more investment, promote economic growth, and achieve sustainable development.

A. INTRODUCTION

Corruption has been defined by the World Bank as the misuse of public office for private gain[1]. Transparency International has also defined it as the abuse of entrusted power for private gains[2]. However, in recent years, this definition has become debatable, as there have been major corruption cases in the private sector. Thus, in February 2006, the heads of the African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, European Investment Bank, Inter-American Development Bank, International Monetary Fund, and World Bank agreed on the need to standardize their definition of corruption They stated that a corrupt practice is the offering, giving, receiving, or soliciting, directly or indirectly, anything of value to improperly influence the actions of another

* The Author is holder of Bachelor of Laws (Hons) from Makerere University, pursuing a Postgraduate Diploma in Law (LDP) at the Law Development Centre, Mbarara – Uganda and an LL.M Candidate pursuing Masters of Laws in Regional Integration and East African Community Law at University of Dar es Salaam. Tel: +256776556025. Email: nyangomacatherinenc@gmail.com.

1 *World Bank*, Anti-Corruption Fact Sheet, February 19, 2020, available at https://www.worldbank.org/en/news/factsheet/2020/02/19/anticorruption-fact-sheet accessed on 28/06/2024.

2 *Transparency International*, What is Corruption?, n.d., available at https://www.transparency.org/en/what-is-corruption (accessed on 28th June, 2024).

party[3]. The Uganda Anti-Corruption Act of 2009 codified this as it defines corruption in terms of various manifestations, such as bribery, solicitations, extortion, embezzlement, diversion of public resources, causing financial loss, false/fraudulent accounting, forgery, illicit enrichment, influence peddling/conflict of interest, nepotism, and favoritism, among others[4]. There are various theories related to corruption, including political theory, economic theory, and social theory. The political theory states that corruption is a result of the non-accountable and non-democratic nature of the political machinery/leadership. The economic theory states that a public servant is an agent of the government employed to further its interest as the principle. It recognizes that when there is a conflict of interest, corruption occurs when the agent pursues his private interests at the expense of the public interest. On the other hand, the social theory alludes that corruption occurs when market forces are unable to efficiently allocate resources and ensure that resources are allocated to the highest bidder[5]. There are three types of corruption. (1) *Petty corruption,* which refers to the use of a public position for private gains in the course of performing routine public services by front-line elected and/or appointed officials, including the police, civil servants, customs officers, tax officials, etc. (2) *Grand corruption,* which occurs when the public policy-making process, its design and implementation, plus its agents—appointed/elected—are compromised (state capture). Grand corruption is most common in privatization, public sector procurement, and licensing processes. (3) *Systemic corruption, which* occurs when both petty and grand corruption exist. Systemic corruption is the greatest obstacle to development effectiveness since it involves venality in public service delivery and in public policy making while increasing the cost of doing business[6]. The Transparency International corruption perceptions index ranks 180 countries and territories around the globe by their perceived levels of public sector corruption, scoring them on a scale of 0 (highly corrupt) to 100 (very clean). In 2023, Uganda scored 26 points, which indicates that it is a highly corrupt country[7]

B. CORRUPTION AND INVESTMENT.

Investment is a macroeconomic variable that works as the engine for sustainable economic growth, economic development, sustainable development, and overall production level

3 *Thai Khi V.*, Measuring Losses to Public Procurement Corruption: The Uganda Case, in: eds. R. Gomez and Khi V. Thai, Public Procurement Reform: Lessons from Experience, 2008, p.1069.

4 The Anti-Corruption Act Cap. 116 of Uganda.

5 *Williams-Elegbe Sope*, Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification or Debarment Measures, Portland, 2012, p.9 – 12.

6 Section 2(2.4) *African Development Bank*, Guidelines for Preventing and Combating Corruption and Fraud in Bank Group Operations (2004) available at https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/15-EN-Guidelines_for_preventing_and_combating_corruption_and_fraud.pdf (accessed on 28th June, 2024).

7 *Transparency International*, 2023 Corruption Perceptions Index, available at https://www.transparency.org/en/cpi/2023 (accessed on 30th June 2024).

economy in the country[8]. The Inspector General of Government report on the cost of corruption reveals that Uganda loses approximately $18.5 billion in foreign direct investment (FDI) annually due to widespread corruption. This alarming trend discourages investors, undermining the country's economic growth and development.[9]. Corruption in Uganda increases business costs for foreign investors, who pay bribes to navigate complex processes. Lengthy registrations, licensing requirements, taxation issues, and bureaucratic red tape fuel this corruption[10]. Corruption affects the competitive environment in host economies and, in turn, affects FDI attraction. This is because it reduces the quality of competition and government intervention in the market. In turn, FDI is jeopardized due to the unfriendly environment and lack of protection by the host state[11]. Corruption protects domestic investments against FDI and, in turn, reduces FDI attraction in host countries. Corruption benefits domestic investors by giving them market priority and imposing higher costs on foreign investors. Foreign investors face increased expenses due to bribes and bureaucratic hurdles, while domestic investors, familiar with standard procedures, avoid these obstacles. This unfair advantage disadvantages FDI, creating an uneven playing field.[12]. Corruption increases the risk of doing business and decreases the confidence level of foreign investors[13]. This is because a country with poor governance and high corruption levels leaves investors with uncertainty about whether their investment will thrive. Such risks cause a loss of confidence in the state, hence reducing investment.

C. SCENARIOS

I. The Equity Bank Fraud incidence.

In April 2024, Ugandan police arrested Kenneth Onyango, Equity Bank Uganda's former Executive Director for Commercial Banking, amid investigations into alleged stock loans and agent float financing fraud. The scandal involves $16 million (62 billion Uganda shillings) in losses, mainly from unsecured loans to unqualified individuals. Several Equity Bank staff members were also arrested in connection with the alleged money laundering

8 *Zaki Najibulla.* The Impacts of Corruption on Attracting Foreign Direct Investment, EUREKA: Social and Humanities, no. 4, (2020), p.10.

9 *Fazekas, Mihály, Isabelle Adam, and Olena Nikulina*, Study on the Cost of Corruption in Uganda, Inspectorate of Government Uganda, Kampala, 2021, P.9.

10 *Najibullah*, P.12.

11 Ibid 9.

12 Ibid 9.

13 *Onyinye Udenze*, The Effect Of Corruption On Foreign Direct Investments In Developing Countries, The Park Place Economist, Vol. 22, 2014, p. 87–9. Available at: http://digitalcommons.iwu.edu/parkplace/vol22/iss1/17 (accessed on 30th June 2024).

and fraudulent accounting practices. The Bank of Uganda has ordered a forensic audit, reassuring depositors of their funds' safety.[14].

II. Witness Global Report.

In 2017, Witness Global investigated and made a report on corruption in the mining sector. An investigation into Uganda's Directorate of Geological Survey and Mines (DGSM) uncovered widespread corruption, revealing that obtaining licenses required bribing specific officials. Alarmingly, some staff had formed their own company to acquire licenses for third parties, creating a clear conflict of interest[15]. Corruption in Uganda's mining sector perpetuates unfair advantages, favoring well-connected companies over qualified ones, and ultimately exploiting citizens and the environment. This corruption also deters foreign investment and hinders the country's development[16]. The manifestation of this kind of corruption is seen in the case of *Nilefos Minerals Limited v Attorney General & Anor*, which concerns the exploration license for the Sukulu phosphate mining, awarded to the Chinese mining company Guangzhou Dong Song by the DGSM almost three months before the license to the previous owner, Nilefos Mineral Limited, expired. Both Nilefos and Frontier Exploration Ltd., which had tried to apply for a license at the same time as Guangzhou, claimed that there were irregularities and illegality in the licensing process, as partially confirmed by Justice Stephen Musota[17].

III. Canadian Investors fraud incident.

In 2023, an incident was reported to the State House Anti-Corruption Unit by Canadian investors, Tunji Johnson and Kent reported fraudulent activities at Uganda's Parliament building on March 16, 2022, resulting in a $50,000 loss (187 million Uganda shillings). The scam involved a solar energy project advertised by the President's office, National Resistance Movement party, and Nile Link Limited. Canadian company International PV

14 *Daily Monitor*, Former Equity Boss Linked to Bank Fraud Arrested in Uganda, The East African, April 12, 2024, available at https://www.theeastafrican.co.ke/tea/business/former-equity-boss-linked-to-bank-fraud-arrested-in- uganda-4588122 (accessed on 30th June 2024).

15 *Global Witness,* Undermined: How Corruption, Mismanagement and Political Influence Is Undermining Investment in Uganda's Mining Sector and Threatening People and Environment, Global Witness, 2017, P.2 available at file:///C:/Users/HP/Downloads/Undermined_briefing_paper.pdf accessed on 30th June 2024.

16 *Global Witness,* Uganda: Undermined, Global Witness available at https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/uganda-undermined/ (accessed on 30th June 2024).

17 *Nilefos Minerals Limited v Attorney General & Anor* (MISC. CAUSE No. 0184 OF 2014) [2016] UGHCCD

10 (29 February 2016).

Development Co. attempted to establish a Ugandan sister company for the project but discovered the licensing and establishment process was a sham, leading to financial losses.[18].

IV. African Panther Resources Uganda (APRU) incident,

African Panther AG's subsidiary, APRU, secured an exploration license in just three days, raising suspicions of irregularities. Former license holder First Mining Uganda alleged "underhand dealings" between APRU and government officials, but later dropped the complaint. Further fueling concerns, APRU underwent significant management and ownership changes around the licensing period, including transferring ownership to two inexperienced Londoners.[19].

V. Political interference and corrupt government technocrats approve or conceal contracts that should be annulled affects Investment.

In September 2019, President Museveni unexpectedly halted the tendering process for the Kampala-Jinja Expressway, a $1.2 billion public-private partnership project, and instead invited China Railway 17th Bureau Group Company (CR17th) to negotiate the contract. This move raised eyebrows, as CR17th's subsidiaries had previously been disqualified from the tendering process due to serious abuses of tender requirements. Despite this, President Museveni directed the Minister for Works to award the contract to CR17th, citing the company's availability of over $1 billion in funding. The sudden intervention sparked concerns about transparency, accountability, and the potential for corruption in Uganda's infrastructure development projects.[20]

18 *Dailly Monitor*, How Canadian Investors Were Conned by Ugandans at Parliament, The Citizen, June 30, 2024 available at https://www.thecitizen.co.tz/tanzania/news/east-africa-news/how-canadian-investors-were-conned-by-ugandans-at-parliament-4667118#story (accessed on 30th June 2024).

19 *Pasculli Lorenzo*, Foreign Investments, the Rule of Corrupted Law and Transnational Systemic Corruption in Uganda's Mineral Sector, in: ed.Rafael Leal-Arcas, International Trade, Investment and the Rule of Law, 84–109, Chisinau, 2020, p.95 – 6 available at https://www.researchgate.net/publication/344125975_Foreign_Investments_the_Rule_of_Corrupted_Law_and_Transnational_Systemic_Corruption_in_Uganda%27s_Mineral_Sector?enrichId=rgreq-30e839b444bcf1c54897543e3f69c502-xxx&enrichSource=Y292ZXJQYWdlOzM0NDEyNTk3NTtBUzo5MzIzOTU2MzMwODIzNjhAMTU5OTMxMTg1MDIxMw%3D%3D&el=1_x_2&_esc=publicationCoverPdf (accessed on 30th June 2024).

20 *F. Musisi*, Museveni Directs on Shs4 trillion Jinja Expressway Tender, Daily Monitor (Sept. 26, 2019), https://www.monitor.co.ug/News/National/Museveni-directs-on-Shs4-trillion-Jinja-Expressway-tender/688334-5287304-xwi8yt/index.html (accessed on 3rd September, 2024).

D. Anti-Corruption Measures

The measures or efforts taken by the government of Uganda to fight corruption that affects investment range from national laws and guidelines to international and multilateral binding instruments as follows[21].

I. Domestic Measures

The measures Uganda has taken to prevent corruption and thus promote investment are well established in the legal and institutional framework. Uganda has adequate laws to combat corruption and an interlocking web of anti-corruption institutions[22].

1. Legal Framework

Uganda has established a strong legal framework to support the fight against corruption, and most of the laws have been developed under the National Resistance Movement Government. The Laws include the Constitution of the Republic of Uganda (1995); the Inspectorate of Government Act, 2002; the Leadership Code Act, 2002; the National Audit Act, 2008; the Anti-Corruption Act, 2009; the Whistleblowers Protection Act, 2010; the Anti-Money Laundering Act, 2013; the Public Finance Management Act, 2015; the Penal Code Act; and the Access to Information Act. These laws support the detection, investigation, and prosecution of corruption crimes in Uganda.

2. Guidelines.

a. Zero Tolerance to Corruption Policy 2019[23].

This Policy envisions a "Developed**,** Corrupt Free Society". Uganda is committed to creating a corruption-free society through a multifaceted approach. The country aims to establish effective anti-corruption measures, strengthen institutions, enhance coordination among government agencies and civil society, and foster a culture of integrity and transparency. Encouraging public participation, especially among youth, and promoting individual commitment to reject corruption are also key objectives. Aligning with Vision 2040, Uganda

21 *Williams-Elegbe,* 2012, p.13.

22 *United States Department of State,* 2023 Investment Climate Statements: Uganda, Available at https://www.state.gov/reports/2023-investment-climate-statements/uganda/ (accessed on 30th June, 2024).

23 *Government of Uganda,* The Zero-Tolerance to Corruption Policy, 2019, Uganda, 2019. Available at https://www.igg.go.ug/media/files/publications/Zero_Tolerance_to_Corruption_Policy_ZTP_2019.pdf (accessed on 30th June 30, 2024).

seeks to transform into a modern, democratic nation, where accountability and transparency thrive, and corruption is eradicated.[24]

3. Institutional Framework

The government has established an elaborate institutional framework to ensure the efficient and effective utilization of public resources and to promote transparency and accountability. These institutions further prevent, prosecute and punish all acts of corruption in Uganda. The Institutions include the Inspectorate of Government, the Office of the Director of Public Prosecutions, the Office of the Auditor General, the Internal Auditor General, the Accountant General, the Criminal Investigations Directorate of the Uganda Police Force, the Anti-Corruption Division of the High Court, the Internal Security Organization, the State House Anti-Corruption Unit, the State House Health Monitoring Unit, the Public Procurement and Disposal of Public Assets Authority, the Financial Intelligence Authority, and others. The anti-corruption agencies are coordinated under the Inter Agency Forum, which is chaired by the Minister of State for Ethics and Integrity.[25]

II. Regional Measures.

1. East African Community (EAC).

Uganda is a founding member of the EAC.[26] The EAC is governed by the Fundamental Principals of the Community, which guarantee the rule of law, accountability, transparency and social justice.[27] To achieve this goal, the East African Community Protocol on Good Governance[28] requires states to establish measures to combat corruption and protect whistle blowers. It further requires states to formulate policies and enact laws that promote and provide a conducive environment for investment.[29]

24 *National Anti-Corruption Strategy (NACS) 2019/20–2023/2024,* Uganda, 2019., p.iv Available at https://www.igg.go.ug/media/files/publications/National_Anti-Corruption_Strategy_NACS_2019.pdf (accessed on 30th June 2024).

25 *Annex 1 of the Government of Uganda,* The Zero-Tolerance to Corruption Policy, 2019., Uganda p. 59. Available at https://www.igg.go.ug/media/files/publications/Zero_Tolerance_to_Corruption_Policy_ZTP_2019.pdf (accessed on 30th June 2024).

26 The Treaty Establishing the EAC was signed on 30th November 1999, came into force on 7th July 2000 following ratification by original subscribers that is Uganda, Kenya and Tanzania.

27 Article 6 (d), Treaty Establishing the East African Community.

28 East African Community Protocol on Good Governance, November 20, 2009.

29 Article 11(2)(c) of the East African Community Protocol on Good Governance, November 20, 2009.

2. The East African Association of Anti-Corruption Authorities (EAAACA) Public Awareness and Communication Strategy.

The anti-corruption initiative was established to galvanize public support in the fight against corruption, transforming attitudes and perceptions through education and awareness. Its objectives include mobilizing citizens to reject corruption, disseminating knowledge on its societal impact, and promoting a culture of integrity. Through public education and community engagement, the initiative aims to empower individuals to demand accountability, report corruption, and foster a corrupt-free society, ultimately improving governance and quality of life.[30] Through this platform a favorable environment for investment is created.

3. African Union (AU).

Uganda is a state party to the African Union. The AU enacted the African Union Convention on Preventing and Combating Corruption, which entered into force on 5th August 2006.[31] The African Union's anti-corruption convention represents a landmark commitment to combating corruption across the continent. By criminalizing corruption, promoting cooperation, and mandating legislative measures, this agreement seeks to eradicate the vice that hinders Africa's economic growth and development. Through its implementation, African nations can ensure accountability, transparency, and good governance, creating a conducive environment for investment, innovation, and prosperity. Effective enforcement of this convention holds the key to unlocking Africa's full potential.

II. International measures

1. United Nations Convention against Corruption (UNCAC)

Uganda signed and ratified the UNCAC.[32] The convention tackles corruption through four key pillars: prevention, criminalization, international cooperation, and asset recovery. By ratifying UNCAC, countries commit to maintaining a professional civil service, transparent procurement systems, and judicial integrity.[33]. This commitment fosters trust, confidence, and security among investors, familiar with governing laws promoting accountability and

30 East African Association of Anti-Corruption Authorities, Public Awareness and Communication Strategy. Kampala: East African Association of Anti-Corruption Authorities, 2014. Available at https://www.eaaaca.com/sites/default/files/media-documents/2018/05/EAAACA-Communication-and-public-awareness-STRATEGY-2014_0.pdf (accessed on 30th June 2024).

31 *African Union*, African Union Convention on Preventing and Combating Corruption. Maputo, Mozambique: African Union, July 11, 2003.

32 Uganda signed the convention on 9th December 2003 in Merida, Mexico and deposited its instruments of ratification with the Secretary-General on 9th September 2004.

33 *Williams-Elegbe, Sope*, 2012, p.23 – 4.

good governance. As a global standard, UNCAC helps nations combat corruption, promote economic development, and ensure stability, thus promoting investment.

2. International Financial Institutions (World Bank and IMF).

The World Bank plays a crucial role in understanding the nexus between poor governance, corruption, and economic growth. Research reveals that weak governance and corruption have far-reaching consequences, including lower literacy rates, higher infant mortality, and diminished benefits from (FDI). Moreover, corruption hinders local businesses from collaborating with multinational companies. Leveraging its expertise and data, the World Bank develops methodologies to design effective reform processes, enhancing the stability of a country's investment climate and fostering an environment conducive to sustainable economic growth and development.[34] The World Bank's assistance comes with strategic conditions, promoting good governance and investment-friendly policies in recipient countries. For nations like Uganda and across Africa, meeting these requirements unlocks benefits: improved business environments, increased foreign investment, and sustained economic growth.

J. How Anti-corruption systems foster Investment.

I. Reduce the risk of businesses colluding with or being extorted by dishonest officials.[35]

Effective rule enforcement employs a range of anti-corruption instruments to combat administrative corruption, including codes of conduct, robust human resource management, conflict of interest policies, whistleblower protection, proactive transparency, asset declarations, internal controls, and audits. These measures foster a culture of integrity, deter corrupt practices, ensure accountability, and build investor confidence in government and rule of law.[36]. As a result, investors are more likely to invest, driving investment growth in the country.

II. Criminalizing and sanctioning reduce private sector corruption.

Laws such as the Penal Code Act and Anti-Corruption Act criminalize various forms of corruption, including fraud, bribery, money laundering, embezzlement, and conflicts of

34 *Organization for Economic Co-operation and Development,* Corruption and Economic Growth, Issue Paper, G20 Anti-Corruption Working Group, 2019, P.35 available at https://www.oecd.org/g20/topics/anti-corruption/Issue-Paper-Corruption-and-Economic-Growth.pdf (accessed on 30th June 2024).

35 *Jenkins, Matthew,* Corruption and the Financing for Development Agenda, Transparency International, 2024. P.15 available at file:///C:/Users/HP/Downloads/Corruption-and-the-Financing-for-Development-agenda_PR.pdf (accessed on 30th June 2023).

36 Ibid 33.

interest. These statutes establish corruption as a punishable offense, serving as a deterrent to potential perpetrators. By enforcing these laws, governments can effectively reduce corruption, foster a culture of accountability, and bolster investor confidence in the rule of law and governance. This, in turn, creates a favorable business environment, encouraging domestic and foreign investment.[37]

III. Enforcement institutions ensure redress for victims of corruption, increasing investment.

Effective enforcement institutions, comprising the Anti-Corruption Court, Leadership Code Tribunal, Inspectorate of Government, and Director of Public Prosecution, provide critical redress for victims of corruption. Through rigorous investigations and prosecutions, these bodies hold perpetrators accountable, ensuring justice and upholding the rule of law. This robust framework safeguards investors' rights, fosters a secure business environment, and boosts confidence in government's anti-corruption efforts. Consequently, investors are attracted to the country thus driving increased investment.

K. RECOMMENDATIONS.

I. Digitalizing Services.

In Uganda, public servants often demand extra payments for services, undermining trust. To combat corruption, anti-corruption agencies should benchmark developed countries' best practices, leveraging advanced technology to minimize public servant-public contact. Digitalizing service delivery platforms, online payment and application systems, automated processes for permits and licenses, and public service portals can reduce corruption opportunities. This enhances transparency, efficiency, and public trust, attracting foreign investment and fostering economic growth. By adopting modern, transparent systems, Uganda can align with global standards, build a corruption-free reputation, and promote accountability, efficiency, and investment.

II. Improving legislative bans and ensures enforcement of sanctions against corrupt practices.

Corruption thrives in countries where it's normalized and tolerated, with low risks of detection and punishment. Lenient penalties further exacerbate the issue, allowing corrupt practices to flourish. To combat corruption effectively, governments must reassess measures such as monetary fines, which often lose deterrent value due to inflation. Adjusting fines to reflect current economic realities helps maintain punitive impact. Strengthening laws, increasing transparency and accountability, protecting whistleblowers, and ensuring swift

37 Ibid 33.

and severe punishment are crucial.[38] The law should be amended to ensure that those that embezzle fund pay all the money take ad also serve their sentence. This is because most of these criminals serve their jail term and return to enjoy the billions of monies stolen leaving investors in big financial losses. A combination of high detection likelihood, severe penalties, transparency, and public awareness can create an environment where corruption is no longer tolerated, and the rule of law prevails.

III. Improve protection of whistle blowers.

The law on the protection of whistle blowers does not provide for protection of persons who have disclosed their identity as whistleblowers.[39] There is a growing trend of investigative journalism and this has left whistle blowers exposed. The law further protects them from victimization and includes an establishment affected by disclosure.[40] The word establishment is very vague as the act does not define what establishments can amount to victimization of whistleblowers. Whistle blowers are not only discriminated or intimidated, some are tortured, killed, go missing among others especially for high profile cases. With this background there is need to protect whistle blowers which reduces corruption hence increasing investment.

IV. Strengthen the financial muscle of institutions.

Uganda's public servants face significant challenges, including meager salaries and inadequate resources, hindering effective investigations and law enforcement. This precarious situation fosters corruption, as civil servants seek illicit means to supplement their income. To combat corruption and attract investment, Uganda must bolster public institutions' financial capacity, ensure judicial independence, and allocate sufficient resources for investigations. By strengthening financial foundations, Uganda can reduce corruption incentives, foster transparency and accountability, enhance investor confidence, and drive economic growth. Fair compensation and adequate resources will empower public servants to uphold justice and enforce laws effectively, propelling Uganda's progress.

V. Instilling of moral values and rectifying the perception of corruption in society.

Corruption perpetuates in environments where it is socially accepted, and Uganda is no exception. The widespread normalization of corruption hinders efforts to combat it, necessitating a shift in societal attitudes. Empowering civil society and media, free from

38 *Stefan Ittner*., Fighting Corruption in Africa – A Comparative Study of Uganda and Botswana, PhD Thesis, Deutsche Hochschule für Verwaltungswissenschaften Speyer (German University of Administrative Sciences Speyer.), 2009, p.82.

39 Whistleblowers Protection Act Cap. 34, 2010, sec 2(d)(e).

40 Whistleblowers Protection Act Cap. 34, 2010, 9(2)(b).

interference and censorship, is crucial in educating the public about corruption's devastating consequences. By fostering awareness and promoting transparency, Uganda can reduce corruption's social acceptance, encourage citizen engagement, and create a conducive environment for investment. Unfettered civil society and media will expose corruption, advocate policy reforms, mobilize public support, and hold leaders accountable, ultimately transforming Uganda's governance landscape and driving sustainable development.

VI. Creation of custom-made anti-corruption measures.

It's important to note that most of the anti-corruption measures are tailored from those that were already in exitance especially in the developed countries. Whereas that is good, it's important for stake holders to study our society, the causes and level of corruption, and come up with measures that can solve the current situation. This will reduce cases of corruption and promote investment in Uganda

VII. Improving accountability and transparency.

There is need to have strong accountability systems where the different stake holders are held accountable of their acts, this builds the confidence of investors hence promoting investment.

L. CONCLUSION

Corruption remains a significant obstacle to investment in Uganda, with far-reaching consequences for economic growth and development. However, the government of Uganda has taken various measures to combat corruption, including the establishment of a strong legal framework and an interlocking web of anti-corruption institutions. These efforts have contributed to a reduction in corruption and an increase in investor confidence. Nevertheless, more work needs to be done to address the root causes of corruption and ensure that anti-corruption measures are effective and sustainable. Therefore, this study recommends a multi-faceted approach to combating corruption, including strengthening institutions, improving transparency and accountability, and promoting citizen engagement. By fostering a conducive investment environment, Uganda can attract more investment, promote economic growth, and achieve sustainable development.

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FOREIGN DIRECT INVESTMENT IN NIGERIA: CHALLENGES AND PROSPECTS

Ninette Nyalyen Ninyio*

Abstract

Foreign Direct Investment (FDI) in Nigeria represents a pivotal component of the nation's economic landscape, positioning it as the third host economy for FDI in Africa, trailing behind Egypt and Ethiopia. Despite encountering significant setbacks, such as negative FDI flows amounting to USD 187 million in 2022, primarily due to equity divestments, Nigeria continues to attract substantial investor interest, particularly in sectors like hydrocarbons, energy, and construction. Noteworthy greenfield projects have surged, with investments such as Airtel Nigeria's USD 731 million data centre in Lekki and Sun Africa's USD 1.8 billion solar power plant and battery storage facility exemplifying this trend.

Nigeria's strategic economic diversification efforts aim to reduce dependency on oil by fostering a competitive manufacturing sector and enhancing integration into global value chains. The consolidation of trade, industry, and investment under the Federal Ministry of Industry, Trade, and Investment underscores this coordinated approach. While Nigeria offers advantages like a partially privatized economy, favourable taxation, abundant natural resources, and low labour costs, challenges such as corruption, political instability, lack of transparency, security challenges, import restrictions, and inadequate infrastructure persist. Additionally, bureaucratic hurdles and an underdeveloped power sector impose further constraints on FDI potential.

The Nigerian Investment Promotion Commission (NIPC) plays a crucial role as a one-stop investment centre, authorized to negotiate special incentives for substantial investments. Despite the country's placement at 145th out of 180 economies on the 2023 Corruption Perception Index, 109th on the Global Innovation Index 2023, and 125th on the Index of Economic Freedom 2024, Nigeria remains a promising destination for foreign investors because of low labour costs, favourable taxation and a privatized economy. This article delves into the multifaceted challenges and prospects of FDI in Nigeria, offering a comprehensive analysis of the current investment climate and future outlook.

A. INTRODUCTION

Numerous nations, especially the Less Developed Countries (LDCs), are working assiduously to quicken their economic development and progress They are actively seeking for-

* Ninette Nyalyen Ninyio, Partner at Hogan Legal Practice, Nigeria, ninyioninette@gmail.com +2347034221380.

eign direct investments (FDI) because of this drive. Nigeria, classified as a lower middle income developing country[1] and other LDCs frequently struggle with economics issues including large foreign debt, high imports relative to exports, and inadequate domestic savings. They require external capital to fund current account deficits and expand production to overcome these difficulties and accelerate economic growth. In this situation, foreign direct investment (FDI) is vital because it closes the savings-to-investment gap and augments domestic deposits.[1] The total stock of FDI in Nigeria was estimated at USD 88. 2 billion at the end of 2022, constituting around 18.5 % of the country's GDP. Key sectors in Nigeria drawing FDI include oil and gas, telecommunications, manufacturing, real estate, and agriculture, with significant contributions from the UK, China, and the U.S. However, 2023 witnessed a slow start in FDI inflows due to political uncertainties and elevated production costs, compounded by currency devaluation losses faced by foreign-owned subsidiaries like Nestle, Guinness, Airtel Africa, and MTN Nigeria. Nonetheless, pro-market reforms implemented in the fourth quarter of 2023, such as the removal of fuel subsidies and exchange rate harmonization, spurred a rise in capital importation to USD 1.1 billion.

Nigeria continues to work actively to enhance its investment climate by implementing foreign investment-friendly policies and programs. These efforts include offering tax incentives, promoting exports, and making macroeconomic adjustments. The motivation behind attracting foreign investment stems from the numerous benefits it avails the country, such as new capital, technology, improved management practices, and access to markets. Foreign Direct Investment (FDI) is also recognized for its ability to enhance the efficiency of productive sectors through increased competition, stimulating economic progress, creating jobs, and fostering growth in the economy.

Despite the efforts made by Nigeria, it has encountered challenges that makes it less attractive to foreign investors. Factors such as heavy debt burdens, which erode confidence in developing countries, and low creditworthiness contribute to this. Additionally, factors like recession and ongoing macroeconomic and political instability further hinder the perception of Nigeria as viable investment destinations.

This paper also goes further to look at the prospects of FDI in Nigeria and recommends solutions to the challenges attributed to FDI in Nigeria.

B. WHAT IS FOREIGN DIRECT INVESTMENT

Foreign direct investment is a category of cross-border investment in which an investor resident in one economy establishes a lasting interest in and a significant degree of influ-

1 *Eric Metreau, Kathryn Elizabeth Young and Shwetha Grace Eapen*, World Bank Country Classifications by Income Level 2024–2025 https://blogs.worldbank.org/en/opendata/world-bank-country-classifications-by-income-level-for-2024-2025 Accessed 22 September 2024.

1 *Salako, H. A. and Adebusuyi, B. S.*, Determinants of Foreign Direct Investment (FDI) in Nigeria: an empirical investigation. Economic and Financial Review, 39(1) https://dc.cbn.gov.ng/efr/vol39/iss1/2/ Accessed 25 July 2024.

ence over an enterprise resident in another economy.[2] Ownership of 10 percent or more of the voting power in an enterprise in one economy by an investor in another economy is evidence of such a relationship.[3] FDI is a key element in international economic integration because it creates stable and long-lasting links between economies. FDI is also an important channel for the transfer of technology between countries, promotes international trade through access to foreign markets, and can be an important vehicle for economic development.

C. DIFFERENCE BETWEEN FOREIGN DIRECT INVESTMENT AND FOREIGN PORTFOLIO INVESTMENT (FPI)

As earlier highlighted, FDI is an investment made by a company or individual in one country into business interests located in another country,[4] While Foreign Portfolio Investment (FPI) refers to the investment made by individuals, financial institutions, or funds in financial assets such as stocks, bonds, and other securities of a foreign country. Unlike FDI, where investors seek to establish a significant degree of influence or control over a foreign business, FPI involves a more passive approach, with investors mainly focusing on financial returns rather than direct management or control.[5]

D. DETERMINANTS OF FOREIGN DIRECT INVESTMENT

Nigeria presents significant opportunities for Foreign Direct Investment (FDI) due to its strategic location, enormous market size, and wealth of natural resources. To completely understand these opportunities, one must consider the many factors that contribute to Nigeria's appeal as a location for foreign direct investment. These aspects comprise the policy-driven, infrastructure-driven, economic, and demographic elements that together influence the nation's investment environment.[6]

E. OVERVIEW OF FDI IN NIGERIA LEGAL AND REGULATORY FRAMEWORK FOR FDI IN NIGERIA

FDI plays a crucial role in the economic development of Nigeria, providing capital, technology transfer, and employment opportunities. Nigeria has established a comprehensive

2 *CFI,* Foreign Direct Investment https://corporatefinanceinstitute.com/resources/economics/foreign-direct-investment-fdi/ accessed 25 July 2024.

3 *OECD,* Foreign Direct Investment https://www.oecd-ilibrary.org/finance-and-investment/foreign-direct-investment-fdi/indicator-group/english_9a523b18-en accessed on 25 July 2024.

4 *Devendra Singh Negi,* What is the Difference Between FDI and FPI? https://www.forbes.com/advisor/in/investing/fdi-vs-fpi/ accessed 19 October 2024.

5 Ibid.

6 *United Nations Conference on Trade and Development*, Investment Policy Review- Nigeria https://unctad.org/system/files/official-document/diaepcb20081_en.pdf accessed on 28 June 2024.

regulatory and legal framework through its investment law, foreign exchange law, company law, technology transfer law, sector-specific regulations, as well as international agreements (alongside the general legal framework that applies to all businesses)[7] to attract and manage FDI, ensuring a conducive environment for foreign investors. The primary laws which control and regulate foreign investments on grounds of national security and public order in Nigeria include:

1. Nigerian Investment Promotion Commission (NIPC) Act

The NIPC Act is the cornerstone of Nigeria's investment framework. Enacted in 1995, it established the Nigerian Investment Promotion Commission[8], which serves as the primary agency for promoting and facilitating foreign investments in Nigeria. The NIPC Act guarantees foreign investors the same treatment as Nigerian nationals and ensures the repatriation of profits and dividends.[9] All businesses with foreign participation must register with the NIPC and obtain a certificate of registration, which requires proof of registration with the Corporate Affairs Commission (CAC). Notably, Section 31 of the NIPC Act restricts both domestic and foreign investment in certain business activities on a "negative list." These activities include the production of arms and ammunition, manufacture and trade of narcotics and psychotropic substances, and the production of military and paramilitary uniforms and equipment, including those for the Police, Customs, Immigration, and Prison Services. The Federal Executive Council may also designate additional items on this restricted list.

2. Companies and Allied Matters Act (CAMA)

CAMA regulates the incorporation, registration, operation, and winding up of companies in Nigeria. The Act establishes the Corporate Affairs Commission[10] which is the primary body responsible for incorporation of companies in Nigeria. The 2020 amendment to CAMA introduced significant reforms to improve the ease of doing business, including the establishment of single-member companies and the reduction of filing requirements.[11] Generally, any individual or company registered outside Nigeria and having the intention of carrying on business in Nigeria must be registered at the Corporate Affairs Commission (CAC), except the company is exempt by law. The company is permitted to have 100 %

7 *Olisa Agbakoba Legal*, Foreign Direct Investments in Nigeria https://oal.law/foreign-direct-investments-in-nigeria/ Accessed 21 October 2024.

8 Section 1, NIPC Act.

9 Nigerian Investment Promotion Commission Act (1995) CAP N117 LFN 2004 https://www.nipc.gov.ng/wp-content/uploads/2021/10/NIPC-ACT.pdf accessed 20 October 2024.

10 Section 1, Companies and Allied Matters Act, 2020.

11 Companies and Allied Matters Act (2020) https://www.cac.gov.ng/wp-content/uploads/2020/12/CAMA-NOTE-BOOK-FULL-VERSION.pdf accessed 20 October 2024.

foreign shareholders except it operates in specific sectors such as oil and gas, aviation and domestic coastal carriage, which require local ownership and control. There are also no restrictions in respect of the limits of foreign shareholding, in Nigerian registered/domiciled enterprises. A foreign entity must also have at least one (1) shareholder and Director, hence one can solely own a company, however *business Permit and expatriate quota* (also known as Combined Expatriate Residence Permit and Alien card) from the Ministry of Interior for foreign owners and expatriates is required when a newly incorporated company is entirely owned by foreigners using a Nigerian contact address. The shareholder's names, contact and residential addresses, phone numbers, email address, occupation, electronic signature(s) and government-issued means of identification must be presented to the CAC. Other requirements for registration may vary from one sector to another.

3. Foreign Exchange (Monitoring and Miscellaneous Provisions) Act

This Act governs the free flow of foreign exchange into and out of Nigeria, providing assurance to foreign investors regarding the ability to repatriate funds. It established the Autonomous Foreign Exchange Market and outlines the procedures for foreign exchange transactions.[12]

4. Industrial Development (Income Tax Relief) Act

This Act offers tax incentives to foreign investors, including pioneer status, which grants a tax holiday for up to five years for companies in certain industries. The goal is to attract investment into sectors deemed crucial for national development.[13]

5. Nigerian Export Promotion Council Act

This Act provides incentives for companies involved in export activities. Benefits include tax reliefs and access to export development funds, aiming to boost Nigeria's non-oil exports and diversify the economy.[14]

F. CHALLENGES OF FOREIGN DIRECT INVESTMENT IN NIGERIA

Nigeria has traditionally promoted foreign private investment through the provision of incentive packages in an effort to hasten growth and development. This is predicated on the

12 Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, 1995 https://nigeriatradeportal.fmiti.gov.ng/media/Nigeria%20Foreign%20Exchange%20(Monitoring%20and%20Miscellaneous%20Provisions)%20Act%201995.pdf accessed 20 October 2024.

13 Industrial Development (Income Tax Relief) Act, 1971 http://lawsofnigeria.placng.org/view2.php?sn=203 accessed 20 October 2024.

14 Nigerian Export Promotion Council Act, 1987 https://faolex.fao.org/docs/pdf/nig120580.pdf accessed 20 October 2024.

idea that foreign direct investment can help close the deficit in domestic resources. When foreign exchange is made available by FDI, the nation's ability to import should increase. FDI in Nigeria has faced and continues to face several challenges despite the country being one of Africa's largest economies with significant natural and human resources. Some of the key challenges include:

1. *Political Instability and Security Concerns:*

Political risk is a major factor impacting Foreign Direct Investment (FDI) inflows into Nigeria. The influence of political stability or conversely political risk on FDI flows have also been tested. Early studies of foreign investment decision process indicated that political instability was one of the main factors' investors cited in explaining decisions opposed to investment in Nigeria.[15]

Despite the country's large market size and economic potential, challenges such as political instability, regulatory unpredictability, and policy inconsistency have deterred investors. These factors create an environment of uncertainty, diminishing investors' confidence and increasing their perceived risk of investment. Inconsistent government policies, abrupt regulatory changes, and the prevalence of corruption in both public and private sectors also contribute to weak investor sentiment. Addressing these issues would involve strengthening the rule of law, ensuring consistent and transparent policies, and improving security conditions, which would go a long way in improving investor confidence. By prioritizing political and regulatory stability, Nigeria could better harness its economic potential and market attractiveness to become a more appealing FDI destination.[16]

2. *Economic Challenges:*

Nigeria's foreign investment inflows declined by 26.7 % to \$3.9 billion in 2023, down from \$5.3 billion in 2022, primarily due to political instability and rising production costs that dampened investor confidence during the first three quarters of 2023.[17] This decline significantly impacted foreign-owned subsidiaries like Nestle, Guinness, Airtel Africa, and MTN

15 Salako, H. A. and Adebusuyi, B. S., Determinants of Foreign Direct Investment (FDI) in Nigeria: an empirical investigation. Economic and Financial Review, 39(1) https://dc.cbn.gov.ng/efr/vol39/iss1/2/ Accessed 25 July 2024.

16 *Danjuma Iyaji,* Insurgency, Political Risk, and Foreign Direct Investment Inflows in Nigeria: A Sectorial Analysis, CBN Journal of Applied Statistics (12)(2)(27) https://dc.cbn.gov.ng/cgi/viewcontent.cgi?article=1204&context=jas#:~:text=The%20study%20found%20that%20FDI,of%20the%20economy%20to%20FDI. Accessed 25 October 2024.

17 *NESG,* Foreign Investment Inflows into Nigeria weakens in 2023 https://www.nesgroup.org/blog/Foreign-Investment-Inflows-into-Nigeria-weakens-in-2023 Accessed 25 July 2024.

Nigeria, leading to over N900 billion in losses tied to currency devaluation.[18] However, the implementation of pro-market reforms, such as fuel subsidy removal and exchange rate harmonization, reversed this trend by the fourth quarter of 2023, as capital importation reached \$1.1 billion.[19] This improvement in Q4 of 2023 was largely driven by the Central Bank's efforts to clear foreign exchange backlogs, fostering a rise in Foreign Direct Investment (FDI) to \$184 million, compared to \$84.2 million in Q4 of 2022. As a result, FDI's share of total investment inflows rose to 16.9 %, while Foreign Portfolio Investment (FPI) increased by 8.6 % year-on-year, though other investment types, primarily foreign loans, saw a decline. The broader fall in FDI in the second quarter of 2024 down to \$29.83m[20] reflects adversely on business environment leading to significant divestments by major multinational companies, including Shell, GlaxoSmithKline, Procter & Gamble, and others. This exodus is anticipated to negatively impact Nigeria's manufacturing sector, which has seen limited growth, and exacerbate contraction in the oil and gas sector, which has been struggling since 2020. The shortage of foreign capital also pressures foreign exchange availability, risking further depreciation, highlighting the need for targeted government strategies to attract foreign capital inflows.[21]

Nigeria has experienced significant challenges in retaining foreign direct investment (FDI) as fluctuations in exchange rates prompt investors to turn to other markets. The impact of exchange rate volatility on FDI has generated diverse perspectives among researchers; some propose that it positively influences FDI, while others argue that it has a detrimental effect. Foreign investors face substantial financial risks due to sunk costs and political uncertainties which make them harder to attract. Despite efforts to enhance FDI inflows through various policy measures, these initiatives have shown limited success. Although the government has introduced incentives to encourage investment, foreign investors remain hesitant to commit further capital. Issues such as inadequate infrastructure, general insecurity, sectarian violence, armed conflict in the Delta region, and systemic indiscipline persist, impacting investor confidence. Furthermore, the state of the Nigerian stock market has also discouraged numerous investors from entering the country.[22]

18 *Segun Odunewu*, Airtel, MTN, others accumulate over N900bn forex loses to naira devaluation https://blueprint.ng/airtel-mtn-others-accumulate-over-n900bn-forex-loses-to-naira-devaluation/ Accessed 26 September 2024.

19 *NESG,* Foreign Investment Inflows into Nigeria weakens in 2023 https://www.nesgroup.org/blog/Foreign-Investment-Inflows-into-Nigeria-weakens-in-2023 Accessed 25 July 2024.

20 *Sami Tunji,* FDI crashes to record low of \$29.8m https://punchng.com/fdi-crashes-to-record-low-of-29-8m/#:~:text=Foreign%20Direct%20Investment%20into%20Nigeria,findings%20by%20The%20PUNCH%20showed. Accessed 29 October 2024.

21 *NESG,* Foreign Investment Inflows into Nigeria weakens in 2023 https://www.nesgroup.org/blog/Foreign-Investment-Inflows-into-Nigeria-weakens-in-2023 Accessed 25 July 2024.

22 *Temitope Omole*, Foreign direct investment (FDI) in Nigeria: Opportunities, challenges and way forward, International Journal of Law Volume 7, Issue 5, 2021, Page No. 116–121 https://www.lawjournals.org/assets/archives/2021/vol7issue5/7-5-34-892.pdf Accessed on 27 October 2024.

3. *Infrastructure Deficiency*

The true position of Nigeria's overall progress or otherwise remains a topic of considerable debate among analysts. What is indisputable, however, is Nigeria's position as one of Africa's largest economies, despite its growth indicators appearing unfavourable. During the 1970s and 1980s, Nigeria attracted substantial foreign direct investment (FDI) due to its rich natural resources, large consumer market, and strategic geographic location. Yet, a persistent infrastructure gap has created major obstacles for attracting and sustaining foreign investment. Nigeria's infrastructure, which includes its energy supply, transportation networks, communication systems, and water and sanitation facilities, remains inadequate, thus impeding economic growth and limiting FDI inflows.[23]

A particularly critical challenge to FDI in Nigeria is the epileptic electricity supply. Frequent power outages and insufficient electrical infrastructure drive up business operational costs, decrease productivity, and reduce competitiveness. This unreliable energy supply has prompted foreign investors to explore costly alternative energy sources, impacting profitability and overall investment feasibility. Additionally, Nigeria's transportation infrastructure continues to deter foreign investment; poor road networks, congested ports, and limited access to quality transport services have escalated logistics costs and slowed the flow of goods and services. These deficiencies create logistical bottlenecks, affecting the ability of investors to efficiently distribute products and raw materials.[24]

Nigeria's communication infrastructure also poses barriers to FDI. Limited reliable internet and telecommunications services restrict business operations, impair communication with global partners, and impede market access. This deficiency impacts not only multinational corporations but also constrains the growth of small and medium-sized enterprises aiming for expansion. Inadequate water and sanitation infrastructure further complicate the business landscape by posing health risks and operational challenges. A lack of clean water and sanitation not only affects employee welfare and community health, but also raises concerns about business continuity and sustainability.

In addition to infrastructure deficiencies, complex regulatory frameworks, bureaucratic delays, and corruption, diminish investor confidence in Nigeria's business environment, discouraging long-term commitments.

Nevertheless, opportunities exist to address these challenges and attract more FDI by strategically investing in infrastructure, especially in the power, transport, communication, and water sectors. Public-private partnerships (PPPs) offer a vital approach to mobilizing resources and expertise to bridge Nigeria's infrastructure gap. With private sector participation, the government can expedite infrastructure projects, fostering a more attractive investment environment and enhancing economic competitiveness.

23 *John Idumange*, Implications of Nigeria's Infrastructure Gap on Foreign Direct Investment https://www.modernghana.com/news/1305757/implications-of-nigerias-infrastructure-gap-on.html Accessed on 27 October 2024.

24 Ibid.

Infrastructure improvements promise multiple benefits: boosting productivity, lowering operational costs, and creating a conducive business environment for foreign investors. Investments in renewable energy, such as solar and wind, could alleviate power shortages and reduce Nigeria's dependence on fossil fuels. Sustainable infrastructure initiatives not only meet immediate infrastructure needs, but also support environmental conservation and climate resilience. Upgraded roads, expanded ports, and enhanced rail and air transport systems would increase Nigeria's connectivity, facilitating trade and investment flows and supporting the growth of export-oriented industries. Developing digital infrastructure—by expanding broadband access and bolstering cybersecurity—would foster innovation, entrepreneurship, and digital transformation, critical to economic growth and attracting technology-driven investment.

Investments in water and sanitation infrastructure are essential for public health, improved living standards, and sustainable development. Access to clean water and proper sanitation is fundamental for business continuity, employee welfare, and community resilience. Although Nigeria's infrastructure gap presents significant challenges to FDI, it also offers avenues for sustainable development and economic transformation. By prioritizing infrastructure investment, promoting public-private partnerships, and improving the business environment, Nigeria can reposition itself as a competitive destination for FDI in Africa. The current administration has a unique opportunity to address the infrastructure gap, harnessing Nigeria's economic potential and fostering inclusive growth for the benefit of all stakeholders. Having lagged behind for decades, Nigeria must adapt to the rapid industrialization and globalization shaping the modern economy.

G. PROSPECTS OF FOREIGN DIRECT INVESTMENT IN NIGERIA

Foreign Direct Investment (FDI) in Nigeria holds substantial prospects given the nation's abundant natural resources, large market size, and strategic location. However, to fully grasp these prospects, one must consider the multifaceted dimensions that make Nigeria an attractive destination for FDI. These dimensions include the economic, demographic, infrastructural, and policy-driven factors that collectively shape the investment landscape in the country.

1. Economic Potential:

Nigeria boasts one of the largest economies in Africa, primarily driven by its oil and gas sector. The country is richly endowed with natural resources, including petroleum, natural gas, and minerals, which have historically attracted significant FDI.[25]Beyond the extractive industries, Nigeria's agricultural sector offers considerable opportunities. The country's vast

25 *Salako, H. A. and Adebusuyi, B. S.,* Determinants of Foreign Direct Investment (FDI) in Nigeria: an empirical investigation. Economic and Financial Review, 39(1) https://dc.cbn.gov.ng/efr/vol39/iss1/2/ Accessed 25 July 2024.

arable land, favourable climate, and a large workforce present potential for agribusiness investments, which can contribute to food security and export revenues.

Moreover, Nigeria's manufacturing sector is gradually gaining traction. The government's emphasis on diversifying the economy away from oil dependence has led to policies encouraging the development of industries such as food and beverages, textiles, and chemicals. The presence of a large domestic market, combined with regional market access through the Economic Community of West African States (ECOWAS), enhances the appeal of manufacturing investments.[26]

2. *Policy and Regulatory Environment:*

The Nigerian government has implemented various reforms to create a more conducive environment for FDI. These reforms include the establishment of the NIPC, which serves as a one-stop agency for investors, providing information, support, and facilitation services.[27] The government has also introduced tax incentives such as pioneer status, streamlined business registration processes, and implemented measures to protect investor rights.

The Economic Recovery and Growth Plan (ERGP) and the subsequent National Development Plan are strategic frameworks aimed at promoting economic diversification, improving infrastructure, and enhancing the business environment.[28] These plans underscore the government's commitment to creating a stable and attractive investment climate.

3. *Demographic Dividend:*

Nigeria's population, estimated to be over 200 million, is the largest in Africa and is characterized by a youthful demographic. This youthful population represents both a large labour force and a significant consumer base, which are critical drivers for economic growth and investment. The increasing urbanization rate further amplifies the prospects for investments in infrastructure, real estate, and consumer goods.[29] For Nigeria to effectively benefit from FDI using its demographic advantage, there needs to be a demographic transition.

The demographic transition, which involves moving from high birth and death rates to lower ones, is crucial for economic growth and poverty reduction in Nigeria. As birth

26 Ibid.

27 *Ministry of Foreign Affairs*, Investment https://foreignaffairs.gov.ng/nigeria/investment/ Accessed 28 October 2024.

28 *Onyeka Ugwueze*, The Economic Recovery and Growth Plan (ERGP) as a Remedy to Nigeria's Economic Recession: An Introspection. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4333756#:~:text=The%20Economic%20Recovery%20and%20Growth%20Plan%20(ERGP)%20is%20a%20medium,build%20a%20globally%20competitive%20economy. Accessed 10 September 2024.

29 *World Bank Group*, Nigeria's Demographic Dividend? Policy Note in Support of Nigeria's ERGP 2017–2020 https://documents1.worldbank.org/curated/pt/767341550814839218/pdf/Nigeria-Demographic-Dividend-Policy-Note.pdf Accessed 10 September 2024.

rates decline, the proportion of working-age individuals in the population increases relative to dependents, creating a demographic dividend for accelerated economic growth if these workers are productively employed. This shift can equally boost productivity, household incomes, and savings, driving down poverty rates in Nigeria. Additionally, with fewer dependents, families can invest more in health, education, and skill development, enhancing human capital and enabling a skilled workforce that attracts investment, fosters innovation, and ultimately contributes to a sustainable economy. However, realizing these benefits depends on effective policies in health, education, and job creation to harness the potential of a younger, growing workforce.[30]

4. *Strategic Location and Regional Integration*

Nigeria's strategic location in West Africa positions it as a gateway to regional markets. The country's membership in ECOWAS and the African Continental Free Trade Area (AfCFTA) provides investors with access to a broader market of over 1.2 billion people. This regional integration enhances Nigeria's attractiveness as a hub for regional trade and investment.

5. *Infrastructural Developments*

In recent years, Nigeria has made strides in improving its infrastructure, which is vital for attracting FDI. The government has initiated several projects aimed at upgrading transportation networks, energy supply, and digital infrastructure. The development of the Lekki Free Trade Zone which offers tax incentives and infrastructure support, the construction of new ports, and investments in renewable energy are examples of initiatives that enhance the country's investment attractiveness.

Worthy of mention is the fact that the digital economy in Nigeria is burgeoning, with significant investments in telecommunications and fintech sectors. The widespread adoption of mobile technology, artificial intelligence systems and the internet has catalysed growth in e-commerce, digital payments, and tech startups, creating a vibrant ecosystem for innovation and investment.

30 Ibid.

H. CASE STUDIES OF SUCCESSFUL FDI PROJECTS IN NIGERIA AND THE FACTORS THAT CONTRIBUTED TO THEIR SUCCESS:

1. Dangote Refinery and Petrochemical Project

The Dangote Refinery, a $12 billion investment by the Dangote Group, is set to be the largest single-train refinery in the world. It aims to address Nigeria's dependence on imported refined petroleum products.[31]

Factors Contributing to its Success:

a. **Strategic Location:** Situated in the Lekki Free Trade Zone, which offers tax incentives and infrastructure support.
b. **Government Support:** Strong support from the Nigerian government in terms of policies and incentives.
c. **Local Expertise:** Leveraging local expertise and workforce to minimize costs and enhance project relevance. Over 30, 000 Nigerians were employed among the skilled work force during the construction of the Refinery.[32]
d. **Market Demand:** High local and regional demand for refined products ensures market stability.
e. **Strong Leadership:** Visionary leadership and management by Aliko Dangote, with a clear long-term vision.

2. Lafarge Africa Cement Plant[33]

Lafarge Africa, part of the global LafargeHolcim Group, invested heavily in expanding and modernizing its cement production capacity in Nigeria.

Factors Contributing to its Success:

a. **Robust Market:** Growing demand for cement driven by Nigeria's infrastructure development needs.
b. **Technological Innovation:** Implementation of modern, efficient production technologies to reduce costs and improve product quality.
c. **Local Partnerships:** Strong partnerships with local suppliers and distributors.

31 *NESG,* Dangote Refineries and Petrochemical Company: Nigeria's Transformative Leap in Energy Independence https://www.nesgroup.org/blog/Dangote-Refineries-and-Petrochemical-Company:-Nigeria%27s-Transformative-Leap-in-Energy-Independence Accessed 25 July 2024.

32 *Africa Check,* Dangote refinery says reports of exclusion of Nigerian locals are 'malicious' https://africacheck.org/fact-checks/meta-programme-fact-checks/dangote-refinery-says-reports-exclusion-nigerian-locals-are Accessed 30 October 2024.

33 *Business Hilights,* Cement backward integration attracted $6bn FDI in 2002—Lafarge https://businesshilights.com.ng/2017/10/13/cement-backward-integration-attracted-6bn-fdi-in-2002-lafarge/ Accessed 28 October 2024.

d. **Sustainability Focus:** Commitment to sustainable practices and community development.
e. **Regulatory Environment:** Favourable government policies supporting infrastructure and housing developments.

3. Indorama Eleme Petrochemicals Limited (IEPL)[34]

Indorama acquired the Eleme Petrochemicals plant in Port Harcourt during the privatization exercise in 2006. The company invested over $3 billion in expanding and upgrading the facility.

Factors Contributing to its Success:

a. **Privatization Benefits:** Acquisition through a transparent privatization process.
b. **Investment in Modernization:** Significant investment in modernizing the plant to enhance efficiency and output.
c. **Export Potential:** Focus on both local supply and export markets.
d. **Corporate Governance:** Strong corporate governance and adherence to international best practices.
e. **Community Engagement:** Proactive community engagement and corporate social responsibility initiatives.

4. Heineken's Nigerian Breweries

Heineken has been a long-term investor in Nigeria through its subsidiary, Nigerian Breweries. Continuous investments have been made in expanding production capacity and product range.

Factors Contributing to its Success:

a. **Brand Loyalty:** Strong brand recognition and loyalty among Nigerian consumers.
b. **Market Insights:** Deep understanding of the local market and consumer preferences.
c. **Innovation:** Introduction of new products tailored to local tastes and preferences.
d. **Distribution Network:** Extensive and efficient distribution network across the country.
e. **Economic Resilience:** Ability to navigate economic challenges and currency fluctuations.

5. MTN Nigeria

MTN, a South African telecommunications company, entered the Nigerian market in 2001 and has since become the largest mobile network operator in the country.

34 *BPE,* Eleme Petrochemical Limited https://www.bpe.gov.ng/eleme-petrochemical-limited/ Accessed 28 October 2024.

Factors Contributing to its Success:

a. **Early Market Entry:** Strategic early entry into the market during the liberalization of the telecom sector.
b. **Network Expansion:** Extensive investment in network infrastructure and coverage.
c. **Customer Focus:** Strong focus on customer service and innovative offerings.
d. **Regulatory Compliance:** Adherence to regulatory requirements and active engagement with government stakeholders.
e. **Brand Strength:** Effective marketing and brand positioning as a reliable service provider.

I. Recommendations for improving the investment climate in Nigeria and attracting more FDI.

Improving the investment climate in Nigeria to attract more Foreign Direct Investment (FDI) requires a multifaceted approach. This includes:

1. Policy and Regulatory Reforms:

To foster a more conducive environment for business, policy and regulatory reforms should focus on further simplifying regulations to streamline business operations, minimizing bureaucratic hurdles, and establishing transparent and consistent regulatory frameworks. Strengthening the legal framework is also essential to protect investor rights, enforce contracts, and expedite commercial dispute resolution by addressing judicial inefficiencies and reducing corruption. Additionally, enhancing transparency and reinforcing institutions are critical for building investor confidence. Public-private partnerships, along with collaboration with international development organizations, can further help bridge infrastructural and developmental gaps.

2. Infrastructure Development

Investing in essential infrastructure such as roads, ports, railways, and airports is crucial to enable the efficient movement of goods and services, supporting economic growth. Additionally, improving the energy supply by addressing power challenges through investment in the energy sector, promoting renewable energy sources, and fostering private sector involvement in power generation and distribution is vital for sustained development and stability.

3. Economic Stability

To achieve economic stability, it is essential to maintain macroeconomic steadiness through stable policies, effective inflation control, and a stable currency, all of which contribute to a predictable investment climate. Additionally, diversifying the economy by reducing dependence on oil and fostering growth in sectors like agriculture, manufacturing, and services will help build a more resilient and adaptable economic structure.

4. *Ease of Doing Business*

Enhancing ease of doing business involves optimizing the one-stop shop for investors to efficiently manage all regulatory and administrative requirements, reducing the time and cost associated with starting a business. Additionally, access to finance for businesses, particularly SMEs, should be improved by promoting financial inclusion and developing strong capital markets to support growth and sustainability.

5. *Human Capital Development*

Human capital development can be enhanced by investing in quality education and vocational training to create a skilled workforce aligned with the demands of modern industries and meet up with the demands of foreign investment. Additionally, fostering innovation and research and development (R&D) is essential; this can be achieved through grants, tax incentives, and collaborative partnerships between industry and academia to support ongoing advancements.

6. *Transparency and Good Governance*

Promoting transparency and good governance in Nigeria which is a key factor directly contributory to the volume or otherwise of foreign investment, requires robust anti-corruption measures to ensure accountability in both government and business practices. Additionally, fostering high standards of corporate governance and ethical business conduct is essential for building and maintaining foreign investor confidence.

7. *Sector-Specific Incentives*

Sector-specific incentives for foreign investment include offering targeted tax benefits, subsidies, and grants to stimulate investment in critical sectors like technology, agriculture, and renewable energy. Additionally, the development and promotion of existing Special Economic Zones (SEZs), with favorable policies and robust infrastructure, can further attract foreign investors.

8. *Trade and Investment Promotion*

To enhance trade and investment promotion, it is essential to engage in trade agreements that facilitate market access and reduce barriers for Nigerian products. Additionally, strengthening investment promotion agencies will play a crucial role in actively marketing

Nigeria as an appealing investment destination while offering valuable support to potential investors.

9. Political and Social Stability

To ensure political and social stability, it is essential to address security challenges by strengthening law enforcement and enhancing national security, thereby creating a safe business environment that protects investments. Additionally, fostering social cohesion and tackling underlying social issues will contribute to a stable and peaceful society, further encouraging investment opportunities.

J. Conclusion

The prospects for Foreign Direct Investment in Nigeria are robust, underpinned by the country's economic potential, demographic advantages, infrastructural developments, and favourable policy environment. By continuing to address existing challenges and leveraging its strategic advantages, Nigeria can position itself as a leading destination for FDI in Africa. The sustained inflow of FDI will not only spur economic growth but also contribute to the country's broader development objectives, including job creation, poverty reduction, and technological advancement.

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9. Companies and Allied Matters Act (2020) https://www.cac.gov.ng/wp-content/uploads/2020/12/CAMA-NOTE-BOOK-FULL-VERSION.pdf accessed 20 October 2024.
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23. *Africa Check,* Dangote refinery says reports of exclusion of Nigerian locals are 'malicious' https://africacheck.org/fact-checks/meta-programme-fact-checks/dangote-refinery-says-reports-exclusion-nigerian-locals-are Accessed 30 October 2024.
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THE IMPACT OF MONEY LAUNDERING AND ILLICIT FINANCIAL FLOWS ON INVESTMENT IN KENYA

Naomi Gichuki*

Abstract

Financial crime, in particular money laundering and illicit financial flows are a thriving economy whose value is in the billions of dollars, with robust markets and demand across the world. This paper seeks to identify and assess the impact that money laundering and illicit financial flows have had on Kenya's investment landscape. The paper was premised on findings from desk research of literature written concerning money laundering as an emerging from of transnational and financial crime, as well as from findings of studies conducted by government agencies and other institutions on the risk, prevalence and challenges around anti-money laundering in Kenya. The paper also examines Kenya's legal framework on money laundering and its overall anti-money laundering strategies, and further draws on the researcher's experience as a practitioner in the criminal justice system and expert on transnational organised crime and its occurrence in East Africa.

The research sets out a contextual background which illustrates the measures taken to combat money laundering from the international level, to the national level through the different international instruments ratified and domestic laws enacted by Kenya. The paper additionally discusses at length the country's current standing internationally with regard to efforts made to combat money laundering, the different ways in which money laundering and illicit financial flows manifest in Kenya's economy, and the various factors that have served as enablers for money laundering and illicit financial flows, both within and outside of the legal framework. Key findings in this regard include the presence of a strong cash-based economy, the proliferation of mobile money transactions in Kenya, corruption and low political goodwill, advances in technology which are not matched by tandem advances in the legal framework, overall weaknesses in the investigative and prosecutorial roles that are unable to adequately address the occurrence of money laundering as well as poor coordination of efforts by regulatory agencies to combat money laundering.

The study discusses the implications and impacts of money laundering on Kenya's investment landscape in detail, and proposes various measures which if implemented, would go a long way in reducing the prevalence of money laundering and illicit financial

* Naomi Gichuki is an Advocate of the High Court, legal consultant and law lecturer based in Nairobi Kenya. The author has research interests in human rights, rule of law, transnational organised crime, administration of the criminal justice system and regional integration. She can be reached on email via gichukinyambura@gmail.com.

flows and by extension, the far reaching impacts on investment, governance and the rule of law.

A. INTRODUCTION

Kenya is a Partner State of the East African Community (EAC), with a population of approximately 54M people. It is the leading economy in the economic bloc that is comprised of Burundi, the Democratic Republic of Congo, Kenya, Rwanda, South Sudan, the United Republic of Tanzania, Uganda and the Republic of Somalia. The nation enjoys a vast array of natural resources, an expansive road and railway network and a strategic geographical positioning along the East African Coast, making it a gateway into other regions of the world including Europe, the Middle East, Asia and other African states.[1] Kenya's present economic ranking is that of lower middle income country.[2] The country's strategic location in addition to being geographically beneficial has also made the country, and more so the capital Nairobi, a regional hub attracting genuine and nefarious investments both internally and from external or foreign investors.

Advances in technology and globalization have not only revolutionized how business is done, but have also had a hand in enabling particular forms of transnational and financial crimes. According to Nasdaq's Global Financial Crime Report of 2024, which examined the state of financial crime and its impact on the integrity of the global financial system, it was reported that the money laundering economy was valued at trillions of dollars. This was fueled by the demand from other forms of organised crime to have their proceeds laundered and infused into the legitimate economies of different regions. In particular, transnational organised crime in form of drug trafficking, fraud and human trafficking were singled out as major criminal markets responsible for powering the proliferation of money laundering.[3]

Money laundering is defined in various ways, but is basically a process by which large amounts of money obtained from the conduct of crime is given the appearance of having originated from a legitimate source, and when done successfully, allows criminal entities to not only retain control over their proceeds of crime, but also provide a legitimate cover for the source of their income.[4] Money laundering is the method of hiding, mixing and

1 Ministry of Foreign Affairs. Government of Kenya. https://mfa.go.ke/country-profile. Accessed on 27th October, 2024.

2 The World Bank Group. *Doing Business 2020.* At p.4.

3 Nasdaq. *Global Financial Crime Report. Insights at the Intersection of Financial Crime Data & Real Survivor Stories.* https://www.nasdaq.com/global-financial-crime-report Accessed on 25th October, 2024.

4 *Vandana Ajay Kumar*. Money Laundering; Concept, Significance and its Impact, European Journal of Business and Management. Vol 4, No. 2, 2012, p. 113.

disguising the proceeds of criminal activities using legitimate institutions and systems in order to obscure the true source of these proceeds.[5]

The United Nations Convention Against Transnational Organised Crime, approved and signed in Palermo in the year 2000, criminalizes the laundering of proceeds of crime vide Article 6 which requires each State Party to adopt, in accordance with fundamental principles of its domestic law,

a. such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
   (i) the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
   (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;
b. Subject to the basic concepts of its legal system:
   (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
   (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

Money laundering is by nature process based, seeing that at the heart of it is the integration of proceeds of crime into legitimate economies by creating as much distance as possible between the proceeds and the criminal entities and activities generating these proceeds. As such, there laundering process will embody three main phases namely;

a. Placement – moving funds from direct association with the crime.[6]

This occurs when the illegal money is received introduced into legitimate financial systems (such as banks) in order to give it the appearance of legitimacy.[7] This initial stage has a two-pronged intention namely to dispense with the criminal actor holding the illegally obtained funds, and to introduce the money into legitimate financial systems.[8] It is a sensitive stage because introducing large amounts of illegally obtained finances can easily

5 USAID. *Introduction to Money Laundering.*

6 United Nations Office on Drugs and Crime. *Infiltration of Organised Crime in Business and Government.* Module 4. https://www.unodc.org/e4j/en/organized-crime/module-4/key-issues/money-laundering.html. Accessed on October 25th, 2024.

7 *Peyto Tollasken*. Negative Economic Impacts of Money Laundering in Kenya, Thailand and France. Mathematics and Computer Science Capstones 51, 2023. p.4.

8 UNODC, note 6.

rouse suspicion and leave the criminal actors vulnerable to detection and subsequent legal action.

b. Layering – moving funds internationally.[9]

This is the most complex part of the money laundering process, and is also known as structuring. This stage is designed to create distance between criminal actors and illegally obtained finances by moving the money around constantly through investments in different kinds of assets.[10] It is also takes place through complex financial transactions crafted to conceal audit and deli-link the money from the criminal activity that generated it in the first place.[11]

c. Integration – availing the proceeds of crime in a legitimate way.

This is the third and final component of the money laundering process and involves returning the proceeds of crime to criminal actors through what appears to be a legitimate source. Having been placed and layered, the money is now fully integrated into a legitimate financial system and can therefore be used in and for other legitimate purposes.[12]

Money laundering tends to be, more often than not, transnational in nature, being used to finance both national and transnational activities that are illicit. Illicit Financial Flows (IFFs) constitute illicit finances that cross borders, and are defined broadly as all cross-border financial transfers which contravene international or domestic laws.[13] The World Bank referred to IFFs as the cross-border movement of capital associated with illegal activity or more explicitly, money that is illegally earned, transferred or used that crosses borders.[14]

In 2016, the United Nations in its world Economic Situation and Prospects report states that;

> *There is no agreed definition of the concept of illicit financial flows, but it is generally used to convey three different sources of Illicit Financial Flows: the proceeds of commercial tax evasion, revenues from criminal activities and public corruption.*[15]

From the foregoing, it is evident that money and capital have an attribute of mobility, and a unilateral approach to money laundering would not be effective without international

9 UNODC, note 6.

10 Tollasken. Note 7, p.4.

11 UNODC, note 6.

12 UNODC., note 6.

13 *Peter Chowla & Tatiana Falcao*. Illicit Financial Flows: Concepts and Scope. Inter-Agency Task Force on Financing for Development. December, 2016., p 5.

14 Chowla & Falcao, note *13,* p. 6.

15 Chowla & Falcao, note *13,* p. 8.

cooperation, or other form of framework that allows law enforcement agencies to exchange information both at national and international levels to successfully, investigate and prosecute criminal activities that translate into money-laundering. This is the premise upon which the United Nations Convention Against Transnational Organised Crime seeks to establish uniformity in formulation of domestic regulatory and supervisory measures to combat money laundering.[16]

B. BACKGROUND TO THE RESEARCH

Kenya conducted a National Risk Assessment (NRA) exercise in 2019, aimed at detailing the country's specific risk (a combination of threats and vulnerabilities) profile and corresponding strategy and action plan to mitigate against the identified risk areas.[17] In the context of the assessment, threats referred to the scale, volume and characteristics of the proceeds of crime and/or terrorist financing. As such, the assessment addressed internal threats, to mean proceeds of crime generated within the jurisdiction, as well as external threats, to refer to proceeds from other jurisdictions. With regard to vulnerabilities, the assessment focused on weaknesses and gaps in legislation, regulation and overall structures at national and sectoral levels.[18]

Kenya's overall money laundering threat was assessed as medium, with the country's money laundering vulnerability being assessed as medium high. Various industries were assessed on the basis of the nature of contribution they make to the country's economy, and in light of their impact on the country's anti-money laundering regime. In particular, the banking sector was identified as the leading sector in terms of impact on national money laundering vulnerability, due to the key role played by the banking sector in the nation's economy. Other sectors that were assessed include the legal profession, motor vehicle dealers, SACCOs, money remittance providers, money network operators and the real estate sector.[19]

Global initiatives to establish standards and best practices to combat and control money laundering have been developed over the years, with the most prominent international organizations being the Financial Action Task Force (FATF), the Basel Committee on Banking Supervision and the Wolfsberg Principles.[20] The FATF is at the forefront globally in tackling money laundering, terrorist and proliferation financing. The FATF was established in 1989 after the UN Drug Convention of 1988, and has a wide membership drawn from major financial centres in Europe, Asia and North America, with nine regional FATF-style

16 Article7.

17 *Ministry of Planning*. Money Laundering and Terrorism Financing National Risk Assessment Report. October 2021.

18 Ministry of Planning, note 17, executive summary.

19 Ministry of Planning, note 17.

20 USAID, note 5.

regional bodies across the world. The FATF developed 40 recommendations adopted in February 2012 and regularly updated since, which constitute international standards on combating money laundering and the financing of terrorism and proliferation. The guidelines set standards which countries should implement through their legal and administrative frameworks adapted to their specific context.

One of the strategies used by the FATF to promote compliance with the recommendations is to identify jurisdictions with weak anti-money laundering and terrorist financing frameworks through one of two lists – the black list which details high-risk jurisdictions with serious deficiencies to counter money laundering, terrorist and proliferation financing; and the grey list which details jurisdictions under increased monitoring and that are required to work in close collaboration with the FATF in order to address deficiencies in their respective anti-money laundering regimes within an agreed time frame.[21]

Kenya recently made it back to the grey list in February 2024, having made an unfortunate come-back after a 10-year absence from the list. Kenya's addition to the grey list was attributable to different factors including; the absence of a clear strategy for the prosecution of money laundering offences; inadequate investigation and prosecution for terrorist financing offences; a large, unregulated and unsupervised Non-Profit Organisations landscape; low level of recovery in relation to crimes of fraud, forgery and drug-related offences; poor beneficial ownership disclosure framework; the absence of a regulatory framework or prohibition against virtual assets and virtual asset service providers and poor supervisory frameworks in relation to designated non-financial businesses and professions that play a key role in the economy and that can be conduits for money laundering activities.[22]

The country remains a major corridor for Illicit Financial Flows in different forms including money laundering, a fact attributable in part, to its high score as far as financial secrecy is concerned. A 2018 report by the Tax Justice Network ranked Kenya as the most secretive jurisdiction in Africa, with a secrecy score of 80 %.[23] Opaque banking systems, tax havens (secrecy jurisdictions), hedge funds and private equity funds are some of the major drivers of illicit financial flows, including money laundering, on a global scale.[24] The country's last ranking placed the secrecy score at 67 % as of 2023, which even though is a step in the right direction, still demonstrates a high propensity towards being complicit in helping individuals to hi their finances from the rule of law.[25]

21 USAID, note 5.

22 Tran*sparency International*. Greylisting of Kenya by Financial Action Task Force Calls for Urgent Reforms to Combat Financial Crime. Press Release dated 7th March, 2024.

23 *Tiberius Barasa*. Illicit Financial Flows in Kenya: Mapping the Literature and Synthesis of Evidence. Partnership for African Social and Governance Research (PASGR), 2018, p. 17.

24 Barasa note 23, p. 16.

25 Tax Justice Network. https://fsi.taxjustice.net/country-detail/#country=KE&period=22 Accessed on 24th October, 2024.

C. MONEY LAUNDERING AND ILLICIT FINANCIAL FLOWS IN KENYA

Illicit financial flows have been described as multidimensional and transnational in their character, and even likened conceptually, to migration, on account of having countries of origin, transit locations and countries of final destination.[26] Money laundering also often entails 'cleaning' the proceeds of organised criminal activity, which is also most times transnational in its very nature. Internationally, legal standards construct money laundering as being;[27]

a. The conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action.
b. The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity.
c. The acquisition, possession, or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity.

In Kenya, the legal framework around anti-money laundering is anchored in two key laws;

a. The Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009 (POCAMLA)
b. The Anti-Money Laundering and Combating of Terrorism Financing Law (Amendment) Act, 2023.

The Proceeds of Crime and Anti-Money Laundering Act provides for the offence of money laundering and introduces measures for combating the offence, and for identification, tracing, freezing, seizure and confiscation of the proceeds of crime and for connected purposes.[28] The Act defines various terms that are relevant to the anti-money laundering framework including designated non-financial businesses or professions, financial institutions, proceeds of crime, monetary instruments, property and supervisory body.

The Act defines money laundering in the following ways;

A person who knows or who ought reasonably to have known that property is or forms part of the proceeds of crime and[29]—

26 United Nations Conference on Trade and Development. *Tackling Illicit Financial Flows for Sustainable Development in Africa.* Economic Development in Africa Report 2020. United Nations, Geneva, 2020.

27 Mike Levi and Melvin Soudijn. *Understanding the Laundering of Organized Crime Money.* The University of Chicago. March 2020. At p. 7.

28 Proceeds of Crime and Anti-Money Laundering Act – Long Title.

29 Section 3.

a. enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether that agreement, arrangement or transaction is legally enforceable or not; or
b. performs any other act in connection with such property, whether it is performed independently or with any other person, whose effect is to—
   i. conceal or disguise the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or
   ii. enable or assist any person who has committed or commits an offence, whether in Kenya or elsewhere to avoid prosecution; or
   iii. remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, commits an offence.

The Act also criminalizes the acquisition, possession or use of proceeds of crime and provides that;[30] a person who —

a. acquires
b. uses; or
c. has possession of,

property and who, at the time of acquisition, use or possession of such property, knows or ought reasonably to have known that it is or forms part of the proceeds of a crime committed by him or by another person, commits an offence.

The third category of offence defined by the Act as an offence of money laundering is in relation to financial promotion of an offence. More specifically, the act stipulates that a person who, knowingly transports, transmits, transfers or receives or attempts to transport, transmit, transfer or receive a monetary instrument or anything of value to another person, with intent to commit an offence, that person commits an offence.[31] Other offences in the act include failure to report suspicion regarding proceeds of crime;[32] tipping off individuals as to the contents of a report made in compliance with the requirements for reporting institutions to monitor and report all complex, unusual, suspicious, large or similar transactions as the case may be;[33] misrepresentation;[34] malicious reporting;[35] failure to comply with the provisions of the act;[36] and hindering lawful performance of duties by authorized officers under the act,[37] among others.

30 Section 4.
31 Section 7.
32 Section 5.
33 Section 8 as read together with Section 44.
34 Section 9.
35 Section 10.
36 Section 11.
37 Section 15.

The Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act as enacted in 2023 amended various laws relating to anti-money laundering and combating of terrorism financing and proliferation financing. The act also introduced measures pertaining to detection and prevention of money laundering and terrorism financing such as enhanced due diligence, reporting obligations by various institutions both within the financial sector and by designated non-financial businesses or professions, a widened scope of activities that constitute money laundering activities as well as increased penalties in respect of non-compliance by relevant institutions and individuals.

Key highlights include the requirement by limited liability companies and limited liability partnerships to disclose beneficial ownership information as well as an enhanced mandate for various regulators including the Central Bank of Kenya, which has been given authority to;[38]

a. vet proposed significant shareholders, beneficial owners, directors and senior officers of reporting institutions;
b. supervise, monitor and ensure compliance with the provisions of the act including having the power to impose monetary, civil or administrative sanctions for non-compliance with the relevant legal requirements;
c. conduct onsite inspections and offline surveillance;
d. compel the production of any relevant documents or information required for the discharge of its supervisory mandate under POCAMLA;
e. issue regulations, guidelines, directions, rules or instructions for anti-money laundering; and
f. undertake consolidated supervision of a reporting institution in its group.

The architecture of this act connotes an awareness of the interconnectivity between money laundering and terrorism financing. beyond terrorism, the centrality of money laundering to the operations and sustenance of organised criminal groups cannot be overlooked. This position is echoed by the UK's National Crime Agency (NCA) which flagged money laundering as being the enabling factor behind most forms of organised crimes, with the end result of this being the furtherance of these groups' criminal activities and successful concealment of their assets,[39] especially because organised crime is highly lucrative and proceeds received would need to be given the appearance of legitimacy. Criminal networks in particular operate by setting up multi-layered, multi-jurisdictional structures to hide the real ownership of funds.[40]

The laundering of proceeds of crimes as described in Section 1 clearly illustrates the involvement of different actors across different sectors including those that are not strictly

38 Central Bank of Kenya Act. Section 51A.

39 Tom Keatinge. *Money Laundering: The Beating Heart of Organised Crime.* Royal United Services Institute. 2020. Available on https://www.rusi.org/explore-our-research/publications/commentary/money-laundering-beating-heart-organised-crime Accessed on 29th October, 2024.

40 *Chowla & Falcao*, note 13, p. 7.

financial institutions. In Kenya. the Proceeds of Crime and Anti-Money Laundering Act designates them as designated non-financial businesses or professions,[41] and include casinos, real estate agents, accountants, non-governmental organizations, advocates and other independent legal practitioners as well as trust and company service providers.[42] Money laundering will encapsulate the wide array of actors because of the nature of movement of illicit financial flows wherein monies can be moved; to evade anti-money laundering measures; because they have a criminal origin or have a criminal destination (such as corruption, conflict financing or even bribery) or they belong to entities that are subject to international sanctions under various bodies such as the UN security council.[43]

There are various forms of illicit financial flows and manifestations of money laundering in Kenya. Generally, money can be transferred to accounts held in the names of nominees, to shell holding companies or even to offshore banks with strict secrecy laws. A 2017 report on Kenya established that there was a connection between political influence and illicit capital outflows.[44] An interesting finding from the report was the direct correlation between the size of government (measured by the amount of final government consumption of goods and services) and capital flight from the nation,[45]with capital flight being effected through purchase of goods and services by the government.[46]

Money laundering and illicit financial flows from Kenya take place in different ways including through abusive transfer pricing, mis-invoicing of services, using unequal contracts in order to avoid tax, trade mispricing, illegal export of foreign exchange,[47] grand corruption, investments in real estate as well as other businesses that generate income including establishments centered on hospitality (such as hotels), cross-border trade and through transactions in legitimate financial systems. Other proceeds-generating predicate offences that pose a significant money laundering threat in Kenya include fraud and forgery, cybercrime offences, economic crimes (corruption, bribery) as well as environmental and wildlife crimes.[48]

There are various enablers that have created a thriving environment for money laundering to take root in Kenya. From weaknesses in the legal framework to challenges with enforcement by relevant agencies, the enabling factors are diverse and set out in summary as follows;

41 Section 2.

42 Section 2.

43 *Chowla & Falcao*, note 13, p. 5.

44 *Emmanuel Letete and Mare Sarr*. Illicit Financial Flows and Political Institutions in Kenya. African Development Bank Group. Working Paper Series No. 275. July 2017, p. 4.

45 *Letete & Sarr*, note 44, at p. 22.

46 *Letete & Sarr*, note 44, at p. 22.

47 *Chowla & Falcao*, note 13, p. 9.

48 *Chowla & Falcao,* p. 19.

a. law enforcement authorities demonstrate an understanding of the key threats around money laundering, but despite that, there is limited understanding of the magnitude of these threats, as well as the various loopholes that criminal entities exploit in order to carry out their money laundering activities. In addition, there is a limited appreciation of the risks posed by proceeds of crime that stem from foreign predicate offences.[49]
b. despite certain sectors being already earmarked as high-risk in respect of money laundering activities, the country had not put in place enhanced measures in order to address the money laundering risks posed by these sectors.[50] Some of these non-financial high-risk sectors include the legal profession, the accountancy profession, motor vehicle dealers, SACCOs, money remittance providers, money network operators, the real estate sector, the gaming industry, dealers in precious stones and metals.[51]
c. There is a focus by prosecuting and investigative agencies on predicate offences (i.e. underlying criminal activities that serve as the foundation for money laundering. In most cases these take the form of other organised crimes such as drug trafficking, human trafficking, fraud, corruption or terrorist financing), as opposed to focusing on investigating and prosecuting money laundering as an offence.[52]
d. Despite the establishment of an independent Financial Reporting Centre under POCAMLA, there is limited use of intelligence from this center by law enforcement agencies that would be helpful in identifying and investigating potential money laundering. In addition, there is an inclination by law enforcement agencies towards using intelligence from the reporting center to pursue predicate offences and proceeds of crime, but not to investigate and prosecute money laundering as an offence.[53] As a result of this imbalance, the capacity of Kenyan courts to adjudicate money laundering has not been adequately put to test.[54]
e. Despite the geographical positioning of Kenya, there has not been adequate focus on detecting and curtailing cross-border movement of money, neither has there been concerted effort to pursue criminal proceeds in foreign countries.[55] Kenya's geographical ownership renders the country's financial sector particularly vulnerable since the country attracts both well-intentioned investors as well as those with criminal intentions.[56]

49 *Eastern and Southern Africa Anti-Money Laundering Group.* Anti-Money Laundering and Counter-Terrorist Financing Measures. Kenya Mutual Evaluation Report. ESAAM. September 2022, p.37.

50 *ESAAM,* note 49, p. 37.

51 *Ministry of Planning*. Money Laundering and Terrorism Financing National Risk Assessment Report. October 2021*,* p. 82–101.

52 *ESAAM*, note 49, p.37.

53 *ESAAM*, note 49, p.48.

54 *ESAAM,* note 49, p. 49.

55 *ESAAM,* note 49 p. 50.

56 *Barasa*, note 23, p. 144.

f. Legal persons such as corporations are often abused for money laundering, but law enforcement authorities demonstrate a low understanding of the extent to which these entities are used to carry out money laundering.[57] This is further complicated by the poor reporting framework with regard to requiring disclosure of beneficial ownership information especially from limited liability partnerships and trusts, which are currently not required to file information on beneficial ownership.
g. Weak inter-agency cooperation and collaboration between financial sector regulations, financial institutions and law enforcement agencies in combating money laundering.[58]
h. Challenges in distinguishing between proceeds of legitimate business transactions and illegitimate monetary transactions by various actors, both in the financial and non-financial sectors.[59]
i. Failure to have well established 'know-you-customer' frameworks in the financial sector.[60] The failure to have systems that facilitate the proper and actual identification of customers carrying out financial transactions promotes the kind of secrecy that enables money laundering to thrive.

The above summary is not an exhaustive one, but paints a fairly accurate picture of the enabling factors that have entrenched money laundering in Kenya. The next section looks into the impact of money laundering not only on the economy, but also on other critical areas that are relevant to the Kenya's growth and development as a nation.

D. THE NEXUS BETWEEN MONEY LAUNDERING, ILLICIT FINANCIAL FLOWS & INVESTMENT

Kenya's strategic geographical location, infrastructure network through airports, railways and road connectivity as well as sea ports connecting the country to other regions globally. Based on recent 'ease of doing business' standings, Kenya has been reported to have a favorable legislative and regulatory environment that makes it attractive to investors. Steady economic growth, the presence of a highly skilled work force, high internet penetration and a refined and vibrant financial system, which when taken together, make Kenya the most attractive investment destination in the region.

Money laundering is wrongly perceived to be a victimless crime, yet the truth of the matter is that the ramifications of money laundering are often felt not only in the economy of a nation, but pose a threat to governments and to rule of law generally. According to a 2024 report done on global financial crime, it was established that there is an "inherent connection between the integrity of finance and the stability of the financial system – with

57 *Barasa,* note 23, p. 144.

58 *Barasa,* note 23, p.144.

59 Peyton Tollaksen. *The Negative Economic Impacts of Money Laundering in Kenya, Thailand and France.* Mathematics and Computer Science Capstones. 2023, p 6.

60 *Tollaksen,* note 59, p. 6.

increasingly complex and international criminal activity being a factor that significantly undermines cross-border financial strength."[61]

There are various effects of money laundering and illicit financial flows that Kenya's economy and investment climate generally are exposed to, and these include:

a. The sustainability and growth of legitimate financial institutions is compromised and at risk. The development of parallel systems and money laundering avenues means that legitimate financial institutions are at risk of losing out, whereas emerging and less equipped financial institutions, find themselves at risk of being completely stifled and displaced by illegal operators engaged in money laundering activities.
b. Kenya's heavily cash-based economy facilitates the circulation of illicit financial flows which also negatively affects trust in legitimate financial institutions, as well as in their ability to detect and report in a timely manner, any activities that are potentially within a money laundering cycle or phase. Illicit financial flows generally, also drain resources from the country, which negatively impacts economic growth.
c. The presence of criminal actors with significant volumes of money generated from criminal activities and which is injected into legitimate businesses and markets can potentially turn the balance of economic power from legitimate entities to criminal actors who are not subject to any kind of social or even political accountability and oversight.
d. Investments set up to clean the proceeds of criminal activities undermine legitimate businesses and can easily force these legitimate businesses out of the market on the basis of unfair competition and business practices attributable to access to large volumes of proceeds of crime which are not subject to legitimate regulatory processes such as taxation. A direct consequence is this, is exposing legitimate businesses to heavier taxation by government due to loss of revenues.
e. Money laundering is often used to fund terrorism and the operations of organised crime. This poses the risk of governments, especially those in developing countries losing control of their economic policies especially where the proceeds of crime exceed government budgets. This can also fuel the emergence and growth of rogue criminal entities that offer services parallel to government (e.g. security) and by so doing, erode rule of law and confidence in government entities to deliver on social contract.
f. Large volumes of illicit financial flows and proceeds of crime circulating in an economy can distort economic growth, as does investment of proceeds of crime into ventures that do not necessarily benefit the growth and development of the nation generally. Proceeds of crime have been known to sustain abnormally lavish lifestyles through seemingly legitimate existing sectors (such as casinos and clubs) that may not necessarily benefit the moral, social and financial well-being of the nation.

61 NASDAQ. *Global Financial Crime Report. Insights at the Intersection of Financial Crime Data and Real Survivor Stories,* 2024, p.3.

g. Innovative ways of engaging in money laundering are on the increase, including the use of digital currencies and proliferation of mobile money and electronic transactions. The pace of innovation in advancing the conduct of crime, and especially money laundering continues to create an increasingly difficult environment for legitimate financial institutions to operate in, which further exposes vulnerable actors in the financial sector to stringent regulatory requirements that can deter them from fully and actively participating in legitimate business.
h. Kenya's addition to FATF's grey list raises questions on the country's integrity and goodwill to deliberately have in place processes, systems, procedures and controls designed to prevent money laundering in the country. The negative impact on a country's trust also lowers Kenya's credibility as an investment hub.
i. Declines and reduced foreign aid as a result of being on the FATF grey list places Kenya at risk of reduced capital flows into the country. In addition, being in the grey list also places Kenya on the spotlight, with increased scrutiny by international financial institutions occasioning delays in ordinary legitimate business transactions and higher transaction costs.
j. Stringent measures as part of the country's anti-money laundering framework imposes higher costs on financial institutions to ensure that they are compliant with the legal and regulatory requirements imposed by recent amendments to the anti-money laundering regime in the country. These compliance attempts by individuals and institutions, though done in good faith, also increase the cost of doing business in Kenya, which cost is transferred to the consumer, and can serve to deter investment, both from within and outside the country.

From the foregoing, it is possible to derive an impression about the far-reaching impacts of money laundering not only on the financial sector but to the country's overall investment climate and economic standing. There are many lessons that can be derived from the present study. The final section of this paper sets out these lessons and proposes various recommendations that can be deployed to address the money laundering crisis on Kenya and effectively strengthen the responses of various law enforcement agencies, regulators and private institutions towards preventing and/or mitigating the adverse effects of money laundering.

E. KEY LESSONS, CONCLUSIONS & RECOMMENDATIONS

The following are highlights of the key lessons drawn from the research;

a. Kenya has a robust legal framework for anti-money laundering. The Proceeds of Crime and Anti-Money Laundering Act expressly criminalizes money laundering and lays out an elaborate framework not only for the investigation of money laundering offences through the Financial Reporting Centre, but also the raft of orders that can be issued by a court in respect of properties and money that are the proceeds of crime. The Anti-Money Laundering and Combating of Terrorism Financing Law (Amendment)

Act, 2023 also serves to buttress the regulatory role played by different agencies in the anti-money laundering framework.

b. Technology has contributed to the evolution of criminal activity and how it is carried out, with money laundering not being exempted from this. Unfortunately, the law is still playing catch-up and has not put in place measures to curtail and/or prevent the use of technology to conduct money laundering or facilitate movement of illicit finances across different territories. The use of cryptocurrency in particular, remains an unregulated arena in Kenya.
c. Certain industries, though not traditional financial industries in the strict sense, have a significant bearing on Kenya's overall money laundering risk assessment. These industries are used to channel large amounts of money and as a result, may also knowingly or otherwise be used as money laundering channels.
d. A lot of emphasis is placed on investigating and prosecuting predicate offences without investing the same effort towards following the money and prosecuting money laundering as a stand-alone offence. More often than not, money laundering continues to go undetected and unpunished even when the predicate offences bear an obvious transnational inclination.
e. The impacts of money laundering affect not only the economy of the nation, but also bear significant risk of erosion of the country's governance and rule of law landscape collectively.

From the foregoing, the following recommendations are proposed as part of measures that can be taken at various levels, in order to strengthen state responses to the occurrence of money laundering in the country;

a. Genuine and sustained political goodwill to fight money laundering and illicit financial flows, whose prevalence is enhanced by corrupt and unaccountable leadership regimes. Illicit financial flows and money laundering often take the form of corrupt dealings and bribery, and thrive in environments where accountability for government expenditure is not adhered to.
b. Stricter implementation and enforcement of existing legislation, particularly the Anti-Money Laundering and Combating of Terrorism Financing Law (Amendment) Act, 2023 which introduced more stringent regulatory measures not only for the financial sector and its institutions, but also for the non-financial businesses and professions that contribute significantly to the country's money laundering risk.
c. Structured and deliberate coordination and cooperation between law enforcement agencies involved in investigating, prosecuting and adjudicating money laundering offences should be prioritized. This cooperation and coordination should also be extended to relevant private sector actors in order to avoid disjointed and ineffective responses by the relevant agencies.
d. Strengthening the capacity of institutions and agencies to investigate money laundering and illicit financial flows. This should go hand-in-hand with equipping the same

agencies to detect and ascertain the volumes and conduits of illicit financial flows in order to form the basis for meaningfully pursuing proceeds of crime, and more so, from predicate offences that fuel money laundering. In addition, financial investigations should run parallel to investigations of crimes that are transnational and/or organised in nature.

e. Strengthening legal and policy frameworks and linking them to both regional and global frameworks centered on anti-money laundering.
f. Leveraging technology to detect and investigate money laundering.

Though not exhaustive, the recommendations also suggest additional areas of research, which, if explored further, present the opportunity for lessons that would go a long way in strengthening state responses towards addressing the money laundering vice in Kenya.

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