

**FRAMEWORK FOR OBLIGATIONS REGARDING ENVIRONMENTAL AND  
HUMAN RIGHTS PROTECTION IN NIGERIA'S BILATERAL INVESTMENT  
TREATIES**

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## **ABSTRACT**

This thesis explores the potential of imposing obligations relating to environmental and human rights protection on International Oil Companies (IOCs) in Nigeria's Bilateral Investment Treaties (BITs) for the protection of the environment and the human rights of Nigeria's Niger Delta people. While the thesis does not discount the importance of improving Nigeria's domestic laws to address environmental concerns which adversely impact human rights of the Niger Delta communities, it argues that Nigeria's BITs could be explored to enhance the accountability of IOCs in their operations in the oil and gas sector in Nigeria.

This research makes a significant contribution to knowledge by analyzing how IOCs' environmental and human rights obligations could be enforced. It argues that the enforcement of these obligations could take one of two directions. First, it argues that they could be enforced by the Nigerian government in arbitral tribunals under the International Center for the Settlement of Investment Disputes system. Second, it analyzes how the impacted Niger Delta communities could enforce these obligations in IOCs' home states. It also examines the practicability of the enforcement mechanisms and provides useful insight into how the legal difficulties facing these mechanisms could be solved.

In addition to a review of Nigeria's domestic laws, the thesis analyzes international mechanisms for regulating the impact of IOCs' operations on the environment and human rights. Specifically, it reviews international norms, principles, codes and guidelines that seek to regulate IOCs. It argues that the current approach of these international instruments has failed to effectively curb IOCs' violations of environmental and human rights standards in their operations in the Niger Delta. Given the ineffectiveness of these mechanisms in mitigating the environmental and human rights impacts of oil and gas development in the Niger Delta, the thesis turns its attention to BITs. It examines the adverse effects of some clauses in some of Nigeria's BITs on the protection of the environment and human rights. In spite of the adverse impacts of these BIT clauses, the thesis argues that BITs present opportunities for mitigating environmental and human rights impacts of oil and gas development. By imposing environmental and human rights obligations on IOCs in BITs, these instruments complement efforts that are made domestically by providing a different perspective that should be explored.

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## **DEDICATION**

I dedicate this thesis to my future wife and lovely kids.

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# CHAPTER ONE: GENERAL INTRODUCTION AND BACKGROUND OF STUDY

## 1.1 General Introduction

The United Nations Conference on Trade and Development (UNCTAD) has long acknowledged the need to address the adverse effects of foreign direct investment (FDI) on the environment and human rights<sup>1</sup> as there are clear indications that parts of the operations of Transnational Corporations (TNCs) especially in developing countries violate human rights.<sup>2</sup> Similarly, in Nigeria, some of the activities of the International Oil Corporations (IOCs)<sup>3</sup> cause environmental hazards as well as have detrimental effects on human rights that manifest in various forms, either directly or indirectly.<sup>4</sup>

Broadly, human rights violations involved in the operations of the oil and gas (O&G) sector in Nigeria's Niger Delta communities are twofold. First, human rights violations arise as a result of government's use of violence to quell the protests of the members of the host communities against the unrestrained activities of IOCs that damage their environment.<sup>5</sup> Instances of the use of military and police force by the Nigerian government with the complicity of the IOCs to deal with the protesters that result in violations of human rights are well documented.<sup>6</sup>

Second, environmental degradation causes grave human rights violations.<sup>7</sup> The bulk of human rights violations in the Niger Delta region stem from environmental pollution from oil spills and gas flaring.<sup>8</sup> Environmental pollution, which dates back to 1956 when oil was discovered in

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<sup>1</sup> UNCTAD, "World Investment Report 2015: Reforming International Investment Governance 2015" (2015) at 126 online (pdf): <[unctad.org/en/PublicationsLibrary/wir2015\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf)> at 126.

<sup>2</sup> Jun Zhao, "Human Rights Accountability of Transnational Corporations: A Potential Response from Bilateral Investment Treaties" (2015) 8 J East Asian & Intl L 47 at 48.

<sup>3</sup> In this thesis, the acronyms TNC and IOC are often used interchangeably despite that generally, the former encompasses all multinational companies, while the latter is more specific and refers to oil companies whose operations are multinational in scope. The subtle definitional difference does not affect their usage in this thesis. Although most literature analyzed in this work use the term TNC perhaps for its broader scope, this thesis prefers the term IOC since it specifically captures transnational corporations that operate in Nigeria's oil and gas sector.

<sup>4</sup> Ifeanyi Onwuazombe, "Human Rights Abuse and Violations in Nigeria: A Case Study of the Oil-Producing Nigeria Communities in the Niger Delta Region" (2017) 22 Annual Survey Intl & Comparative L 115 at 118 [Onwuazombe].

<sup>5</sup> Martin-Joe Ezeudu, "Revisiting corporate violations of human rights in Nigeria's Niger Delta region: Canvassing the potential role of the International Criminal Court" (2011) African Human Rights LJ 23 at 30 [Ezeudu].

<sup>6</sup> Onwuazombe, *supra* note 4.

<sup>7</sup> Ezeudu, *supra* note 5 at 29.

<sup>8</sup> Human Rights Council, *Cases of Environmental Human Rights Violations by Shell in Nigeria's Niger Delta*, UNGAOR, 26<sup>th</sup> Sess. UN Doc A/HRC/26/NGO/100, June 2014. This is a joint written statement to the United Nations General Assembly which was submitted by the Europe-Third World Centre (CETIM), a non-governmental

commercial quantity in Nigeria, violates civil and political rights as well as economic and social rights.<sup>9</sup> There is a strong connection between environmental pollution and human rights, as an array of human rights depends on a healthy environment. Constant oil spills and gas flaring threaten the right to life and the dignity of the human person, which are guaranteed in the constitution of Nigeria.<sup>10</sup>

The right to life which is recognized by almost all international human rights treaties was initially aimed at prohibiting arbitrary killing by government or misuse of political power but has also been acknowledged to address environmental concerns which threaten the right to life directly or indirectly,<sup>11</sup> and this view has been judicially recognized by a Nigerian court.<sup>12</sup> In *Jonah Gbemre v. Shell Petroleum Development Company of Nigeria Limited*, a Nigerian court held that the right to life includes the right to be free from pollution such as gas flaring that endangers life.<sup>13</sup> A United Nations (UN) Secretary-General's report recognized that environmental degradation is one of the threats to life.<sup>14</sup> Similarly, the UN Human Rights Committee's recent interpretation of the right to life under Article 6 of the *International Covenant on Civil and Political Rights*<sup>15</sup> is extensive and clarifies that environmental pollution constitutes one of the most "serious threats to the ability of present and future generations to enjoy the right to life."<sup>16</sup> Accordingly, states "must preserve the environment and protect it

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organization in general consultative status, and the Environmental Rights Action / Friends of the Earth Nigeria, a nongovernmental organization in special consultative status that highlights in detail how gas flaring and oil spills have continually violated human rights of the Niger Delta such as right to life. See also Wafaa Taleb, "Environmental-related Human Rights Violations in the Niger Delta in Nigeria" (2017) 4 Intl J Humanities & Cultural Studies 355 at 367 [Taleb].

<sup>9</sup> By civil and political, and economic, social and cultural rights, this thesis refers to human rights that are listed in the *International Covenant on Civil and Political Rights*, 16 December 1966, GA Res 2200 (XXI), (entered into force 23 March 1976) (ICCPR) and *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, GA Res 2200 (XXI), (entered into force 3 January 1976) (ICESCR) respectively.

<sup>10</sup> Onwuazombe, *supra* note 4. See also S. D. Kamga & O. O. Ajoku "Reflections on How to Address Human Rights by Extractive Sector in Africa: A Comparative Analysis of Nigeria and South Africa" (2014) online (pdf): <file:///C:/Users/user/Downloads/103252-277674-1-PB.pdf>.

<sup>11</sup> David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law & Policy* 3<sup>rd</sup>ed (New York: Foundation Press, 2017) 1378 [Hunter, Salzman & Zaelke].

<sup>12</sup> *Jonah Gbemre v. Shell Petroleum Development Company of Nigeria Limited*, Unreported, Suit No. FHC/B/CS53/05 [Gbemre v SPDC].

<sup>13</sup> *Ibid.*

<sup>14</sup> *Report of the UN Secretary-General's High Level Panel on Threats, Challenges and Change*, UNGAOR, 59<sup>th</sup> Sess, UN Doc A/59/565 (2004) at 25.

<sup>15</sup> *International Covenant on Civil and Political Rights*, *supra* note 9.

<sup>16</sup> *General Comments No 36 on the International Covenant on Civil and Political Right*, UNHRC 124<sup>th</sup> Session, UN Doc CCPR/C/CG//36 (2018) at 62 [General Comment No 36].

against harm [and] pollution... caused by public and private actors” to fulfill their obligation to respect and protect the right to life.<sup>17</sup>

Apart from the right to life, economic and social rights such as human rights to a healthy environment, health, and adequate standard of living, including rights to water and food that are protected under international human rights treaties are also violated. Nigeria is a party to human rights treaties that provide for these rights and by which Nigeria has an international obligation to respect, fulfill and protect its citizens against violations by private actors, which include IOCs.<sup>18</sup> The UN Committee on Economic, Social and Cultural Rights acknowledges that corporate activities adversely impact economic, social and cultural rights<sup>19</sup> and clarifies the obligations of states, including Nigeria, in addressing corporate operations that negatively affect these rights.<sup>20</sup> The specific obligations that are required from states are to respect, fulfill and protect the human rights of their citizens in the context of business activities and they apply to both violations of economic, social and cultural rights within states’ territory and outside their territory in situations where states can exercise control.<sup>21</sup> States are required to take appropriate measures to prevent human rights violations outside their territory by businesses that are domiciled in their territory regardless of whether the relevant businesses are incorporated under their laws.<sup>22</sup>

The apparent link between environmental degradation and human rights has been widely acknowledged.<sup>23</sup> International law jurisprudence recognizes that the environment is “a vital part of contemporary human rights doctrine,”<sup>24</sup> and “a *sine qua non* for numerous human rights”<sup>25</sup>

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<sup>17</sup> *Ibid.*

<sup>18</sup> *International Covenant on Civil and Political Rights*, *supra* note 9, Article 6 on the right to life. *International Covenant on Economic, Social and Cultural Rights*, *supra* note 9, Articles 11 and 12 on the rights to adequate standard of living and health. *African Charter on Human and Peoples’ Rights in Nigeria*, CAB/LEG/67/3 rev. 5 (entered into force October 21, 1986) (African Charter), Article 24 on the right to a healthy environment.

<sup>19</sup> *General Comment No 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UNESCR, 61<sup>st</sup> Session UN Doc E/C.12/GC/24, (2017) para 1 [General Comment 24].

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*, para 10.

<sup>22</sup> *Ibid.*, para 26.

<sup>23</sup> Giuliana Ziccardi Capaldo, “A Human Right to a Healthy Environment” (2015) *The Global Community Yearbook of Intl L & Jurisprudence* at 3.

<sup>24</sup> *Gabcikovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 88 at 91.

<sup>25</sup> *Ibid.*

such as right to life and right to health.<sup>26</sup> The issue that has remained unresolved, however, is to determine the most suitable perspective within international law from which human rights violations as a result of environmental degradation can be addressed. Indeed, it is observed that human rights and environmental protection are fundamentally interdependent so that a healthy environment is essential for the enjoyment of human rights, and conversely, protecting human rights is a necessary effort towards the protection of the environment.<sup>27</sup> The idea of addressing questions of environmental pollution through the lens of human rights is a marked departure from the traditional approach to environmental protection<sup>28</sup> that solely focuses on the improvement of environmental protection laws.

## 1.2 Recognizing Regulatory Lapses in International Law and Nigeria's Domestic Law

Concerning the violations of human rights as have been highlighted above, it is regrettable that while the African Commission on Human and Peoples' Rights (the African Commission) has pronounced that the lack of strong environmental regulatory measures by the Nigerian government, and its involvement in providing security forces against the Niger Delta people violate the human rights of the latter,<sup>29</sup> there seems to be no serious efforts by the Nigerian government to put an end to the environmental concerns and the consequent human rights violations.<sup>30</sup>

Chapter 2 of this thesis lays out some of the gaps in Nigeria's laws that regulate environmental pollution caused by IOCs. Scholars have cited lapses in Nigeria's laws as the primary reason for these violations and have suggested that the government should improve its laws to protect the environment and human rights of host communities of the Niger Delta.<sup>31</sup> That is not all. The

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<sup>26</sup> *Ibid.*

<sup>27</sup> John H. Knox & Ramin Pejan, *Introduction to the Human Right to a Healthy Environment* (Cambridge: Cambridge University Press, 2018) at 201.

<sup>28</sup> Nickie Vlavianos, "The Intersection of Human Rights Law and Environmental Law" (Paper delivered at a Symposium on Environment in the Courtroom: Key Environmental Concepts and the Unique Nature of Environmental Damage at University of Calgary, 23 – 24 March 2012) at 1, online (pdf): [cirl.ca/files/cirl/nickie\\_vlavianos-en.pdf](http://cirl.ca/files/cirl/nickie_vlavianos-en.pdf).

<sup>29</sup> *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria* (2001) Communication 155/96, [SERAC v Nigeria].

<sup>30</sup> By the use of the phrase "serious efforts," this thesis does not suggest that there are no ongoing legislative and policy-based efforts to tackle environmental pollutions in Nigeria, but rather implies that the steps that have been taken have not been particularly effective.

<sup>31</sup> Ogwezzy Michael, "Violation of Human Rights in Nigeria: An Appraisal of the Activities of the Transnational Oil Corporations in the Niger Delta Region" (2013) 2 *Christ U L J* 1 at 16.

ineffectiveness of Nigeria's environmental regulatory agencies and the deficiency in Nigeria's judicial process represent other lapses<sup>32</sup> and need to be addressed. However, being a Third World country, the Nigerian government appears to concentrate more on the economic value of the investments of the IOCs than on the negative impacts of their activities on the host communities. This means that Nigeria, as a Third World country, may be reticent to impose measures that will constrain IOCs concerning human rights violations to retain IOCs' investments.<sup>33</sup>

The argument about regulatory lapses, however, does not necessarily suggest that there are no existing laws that regulate the activities of IOCs in Nigeria. The laws either need improvement or political will to enforce them, and the Nigerian government seems to currently lack the latter. Additionally, the economic influence of the TNCs over developing countries could be overwhelming. As a result, it has been argued that TNCs can "capture" the regulatory mechanisms in these countries.<sup>34</sup> Oshionebo unequivocally makes this claim in respect of Nigeria's O&G sector and thus states as follows:

As well, TNCs often use their economic clout to control and manipulate the exercise of sovereign powers by host developing countries. For example, [oil] and gas TNCs have used their financial power to thwart the enactment of a new petroleum law in Nigeria, thereby hindering the ability of the Nigerian government to exercise sovereign control over its territory. Moreover, in an instance where TNCs capture the governments of host states, the government's ability to exercise its sovereign powers is severely compromised, particularly in relation to matters relating to the economic interests of TNCs.<sup>35</sup>

While this thesis acknowledges that Nigeria's weak governance is of significant concern, it also claims that international law has a major role to play. However, international law does not recognize the liabilities of IOCs that are involved in environmental degradation and human rights violations. IOCs do not bear obligations relating to environmental and human rights protection under international law and therefore are not liable for the breach of these obligations. The

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<sup>32</sup> Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study*, (Toronto: University of Toronto Press, 2009) at 71 – 7 [Oshionebo, *Regulating Transnational Corporations*].

<sup>33</sup> Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (Oxon: Routledge, 2014) at 181 [Simons & Macklin].

<sup>34</sup> *Ibid* at 421. "Regulatory capture" entails that the regulatory agency of the government is used as "a tool of the regulated, governed by the commercial interests of the parties it regulates, rather than the public interest". See Tracy Cohen, "Rethinking (Reluctant) Capture: South African Telecommunications and the Impact of Regulation" (2003) 47 *J of African L* 65 at 73.

<sup>35</sup> Evaristus Oshionebo, "Corporations and Nations: Power Imbalance in the Extractive Sector" (2018) 77 *American J of Economics & Sociology* 419 at 433 [Oshionebo, *Corporations and Nations*].

extensive discussion in chapter 3 regarding the content of extant international instruments regulating corporations' operations shows the weakness of international law in addressing IOCs' activities that violate human rights as well as degrade the environment. Therefore, since holding IOCs liable is generally not the approach of international law, they operate under no real risk.

However, the UN Human Rights Council through the UN Intergovernmental Working Group on TNCs is currently negotiating the *Legally Binding Instrument to Regulate, under International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises* (the Zero Draft Treaty).<sup>36</sup> A more detailed discussion of the content and the prospects of the successful negotiation of the *Zero Draft Treaty* are contained in section 3.3.6 of chapter 3. The *Zero Draft Treaty* provides for the rights of the affected individuals and communities that include access to justice, compensation, restitution and environmental remediation.<sup>37</sup> While it provides for civil and criminal liability of TNCs that violate human rights, the states bear the responsibility to ensure that their domestic laws offer an appropriate system of legal liability.<sup>38</sup> The *Zero Draft Treaty* also stipulates the jurisdiction of states' courts in respect of violations of human rights and environmental degradation caused by TNCs.<sup>39</sup> However, it does not impose direct obligations on TNCs. Indeed, much of the obligations articulated in the *Zero Draft Treaty* are imposed on states to ensure that TNCs do not degrade the environment and violate human rights.<sup>40</sup> Since the passage of time will determine the success of the *Zero Draft Treaty* in addressing IOCs' pollution of the environment and violation of human rights, the premise of this thesis is that the existing legal frameworks – international and domestic – are not sufficient by themselves to protect the host communities.

This thesis, therefore, investigates the potential value of placing direct obligations regarding environmental protection and human rights on IOCs in Nigeria's Bilateral Investment Treaties (BITs). Specifically, this thesis argues that Nigeria's BITs should be amended to ensure the protection of the host communities' environment and human rights by holding IOCs liable for

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<sup>36</sup> *Legally Binding Instrument to Regulate, In International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, Revised Draft 16.7.2019, online (pdf): [ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG\\_RevisedDraft\\_LBI.pdf](http://ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf) (Zero Draft Treaty)

<sup>37</sup> *Ibid*, Article 4.

<sup>38</sup> *Ibid*, Article 6.

<sup>39</sup> *Ibid*, Article 7

<sup>40</sup> *Ibid*, see Articles 4 – 8, 10, 11 and 12.

their misconduct, which leads to environmental pollution and flagrant abuse of human rights. This thesis focuses on the formulation of future BITs as well as the renegotiation of those that are in force between the government of Nigeria and the home states of the IOCs that operate in the O&G sector in Nigeria.<sup>41</sup> What informs the selection of these BITs for this research is that the major IOCs such as Shell Petroleum Development Company (SPDC) and Agip in Nigeria are protected by their provisions.

Ensuring that the IOCs are held responsible for environmental degradation and human rights violations in international law is the primary concern of this thesis. By articulating and imposing direct obligations which are related to the environment and human rights on IOCs in Nigeria's BITs, this thesis presents a practical mechanism for holding IOCs accountable for the apparent abuse of the environment and human rights of the Niger Delta communities under international law without contradicting any established international law. As has been argued, imposing obligations on IOCs in BITs will give room for an enforcement mechanism that is treaty-based.<sup>42</sup> Therefore, this thesis argues that the obligations regarding environmental and human rights protection should be enforced through either of two ways.

First, this thesis argues that the Nigerian government can enforce these BIT obligations against IOCs before an investment tribunal under the auspices of the International Center for Settlement of Investment Disputes (ICSID).<sup>43</sup> Although the dominant practice is for investors to institute claims before investment tribunals, the extensive review of the jurisdiction of investment tribunals constituted under the ICSID Convention in section 4.3.1 of chapter four shows that the Nigerian government can enforce obligations relating to environmental and human rights protection before an investment tribunal. However, as part of the requirements under Article 25 of the ICSID Convention, the written consent of IOCs to the jurisdiction of an investment

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<sup>41</sup> *The Agreement between the Government of the Federal Republic of Nigeria and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments*, 11 December 1990, No 66 (entered into force 11 December 1990) [Nigeria – UK BIT], the *Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of Netherlands and the Federal Republic of Nigeria*, 2 November 1992 (entered into force 1 February 1994) [Nigeria – Netherlands BIT] and the *Agreement between the Government of the Italian Republic and the Government of the Federal Republic of Nigeria*, 27 September 2000 (entered into force 22 August 2005) [Nigeria – Italy BIT].

<sup>42</sup> Penelope Simons, "International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights" (2012) 3 J Human Rights & Environment 5 at 18 [Simons].

<sup>43</sup> *Convention on the Settlement of Investment Disputes between States and Nationals of other states*, (entered into force 14 October 1966) 575 UNTS 159; 4 ILM 532 (1965) (ICSID Convention).

tribunal must be obtained by the Nigerian government.<sup>44</sup> In this regard, the thesis argues that the Nigerian government should renegotiate its investment contracts, such as the oil mining lease, to include the consent of IOCs to the jurisdiction of the investment tribunals under the ICSID Convention.<sup>45</sup> Furthermore, this thesis argues that as presently constituted, all Nigeria's relevant BITs do not confer standing on the Nigerian government to arbitrate against IOCs before investment tribunals.<sup>46</sup> Therefore, there is also a need for the Nigerian government to amend the dispute resolution clause in its BITs to expressly confer a right to arbitrate before investment tribunals on host states.

Secondly, the thesis argues that the obligations regarding environmental and human rights protection in Nigeria's BITs could be enforced by the Niger Delta communities against IOCs in their home states' courts. While the jurisdiction of home states' courts for the violation of human rights outside states' territory has remained controversial, this thesis argues that the Niger Delta people can enforce a breach of IOCs' BIT obligations in their home states' courts. Authors have argued that it is too early to suggest that a home state's court has jurisdiction over human rights and environmental abuses outside the state's territory,<sup>47</sup> others contend that home states' courts could exercise concurrent jurisdiction with the host states' courts, especially when an IOC is involved in human rights violations in the extractive industries.<sup>48</sup> As noted by Odumosu-Ayanu, establishing the jurisdiction of a home state is an arduous task<sup>49</sup> owing to the complicated rules of international law and the reluctant disposition of home states towards assuming extra-territorial jurisdiction, especially where there is no legal basis.

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<sup>44</sup> *Ibid*, Article 25 of the ICSID Convention provides for three other requirements which are discussed in detail in section 4.3.1 of chapter 4 of this thesis.

<sup>45</sup> Investment contracts are agreements between the Nigerian government and IOCs containing the terms and conditions for IOCs operations in the O&G sector, including exploration and production activities. See section 4.3.1 of chapter 4 for detail on other types of investment contracts that are used in Nigeria's O&G sector.

<sup>46</sup> While the Nigeria – UK BIT, *supra* note 41, Article 8 confers a right to arbitrate on both investors and the Nigerian government, while the Nigeria – Italy BIT, *supra* note 41, Article 8 and the Nigeria – Netherlands BIT, *supra* note 41, Article 9 do not confer the right to arbitrate on the Nigerian government.

<sup>47</sup> Olivier De Schutter, *International Human Rights Law* (Cambridge: Cambridge University Press, 2010) at 162 [De Schutter]. See also Jolyon Ford, "Business and Human Rights: Bridging the Governance Gap" (September 2015), at 19, [online](http://www.chathamhouse.org/sites/default/files/field/field_document/20150922BusinessHumanRightsFordV2.pdf) (pdf): [chathamhouse.org/sites/default/files/field/field\\_document/20150922BusinessHumanRightsFordV2.pdf](http://www.chathamhouse.org/sites/default/files/field/field_document/20150922BusinessHumanRightsFordV2.pdf) [Ford].

<sup>48</sup> Sara Seck, "Home State Responsibility and Local Communities: The Case of Global Mining" (2008) 11 *Yale Human Rights & Development J* 1 at 18 [Seck].

<sup>49</sup> Iboronke Odumosu-Ayanu, "Governments, Investors and Local Communities: Analysis of Multi-actor Investment Framework" (2014) 15 *Melbourne J Int'l L* 1 at 20 [Odumosu-Ayanu, Government, Investors and Local Communities].



For instance, the United States' *Alien Tort Claims Act* (ATCA),<sup>50</sup> which had for several decades allowed United States of America (US) courts to assume jurisdiction over allegations regarding an investor that has a connection with the US,<sup>51</sup> has been significantly eviscerated by the US Supreme Court in 2013 – in a case that involved human rights violation by an IOC that operates in Nigeria – when it held that only behaviours that concern the US could be challenged under the statute.<sup>52</sup> There is no doubt that providing a basis for the victims of environmental pollution and human rights violations to pursue a legal remedy in the home states of the IOCs would be an essential possibility for holding IOCs accountable,<sup>53</sup> and providing obligations relating to the environment and human rights in BITs offers a basis for home state responsibility.

In the light of this controversy, this thesis argues that the relevant Nigeria BITs should be amended to also include IOCs' civil liability in their home states that can be relied upon by the impacted Niger Delta communities. This thesis argues that such an amendment, which should give a right to the impacted host communities to make claims for the liability of IOCs in their home states, is relevant as it provides an actual basis for the IOCs' home states' courts to exercise extraterritorial jurisdiction. This approach is consistent with the General Comment No 15 on the right to water of the Committee on Economic, Social and Cultural Rights [CESCR] that “steps should be taken by states parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries.”<sup>54</sup>

### 1.3 Reforms in Nigeria's Bilateral Investment Treaties

Since imposing obligations regarding environmental and human rights protection on IOCs involves the amendment of relevant Nigeria's BITs, this thesis proposes that some BIT clauses such as the clause regarding expropriation and the Fair and Equitable Treatment (FET) clause should be amended and expunged respectively. Besides, the need to improve and effectively enforce Nigeria's domestic laws regarding environmental pollution may be undermined by the content of these clauses. Generally, BITs impose obligations on host states such as Nigeria

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<sup>50</sup> *Alien Tort Claims Act*, 28 U.S.C. 1350 1789 [ATCA].

<sup>51</sup> James Gathi & Ibironke Odumosu-Ayanu, “The Turn to Contractual Responsibility in the Global Extractive Industry” (2015) 1 *Bus & Human Rights J* 69 at 74 [Gathi & Odumosu-Ayanu].

<sup>52</sup> *Kiobel v Royal Dutch Petroleum Company* [2013] 133 SC at 1659. See also, Gathi & Odumosu-Ayanu, *ibid*.

<sup>53</sup> Gathi & Odumosu-Ayanu, *ibid* at 76.

<sup>54</sup> *General Comment 15, the right to water, (Articles. 11 and 12 ICESCR)*, CESCR, UN Doc No E/C.12/2002/11 (2002), at para 33 [General Comment No 15].

regarding standards of treatment to ensure that they do not unduly impede the rights of a foreign investor.<sup>55</sup> The traditional purpose for the investment protection clauses found in BITs such as the clause regarding expropriation and the FET clause is to improve economic ties between two state parties, with the ultimate goal of advancing economic development in the states.<sup>56</sup> These clauses boost the confidence of IOCs by protecting their investments and thereby attracting a significant amount of investment in the O&G sector. As a result of the nature of these BITs, an investor is often considered to be in an advantaged position as it is permitted to initiate a claim against a host government for a breach of standards of protection in a BIT by activating the investor-state dispute settlement (ISDS) mechanism in BITs.

As explored in detail in chapter 3 of this thesis, several authors have suggested that BITs are structured to protect the interests of the investors such as the IOCs in Nigeria without striking a balance between the interests of the investors, states and the public<sup>57</sup> and this is precisely the case with Nigeria's BITs under inquiry. For instance, the provision against expropriation which is present in all the BITs under investigation in this thesis requires that in taking measures that either directly or indirectly affect the economic interest of foreign investors, including IOCs, the Nigerian government must ensure that such measures are taken for a public purpose (or interest), not discriminatory and are accompanied by adequate and just compensation.<sup>58</sup> However, given the fact that traditional BITs such as Nigeria's BITs do not provide a guide for the interpretation of clauses, it leaves ISDS tribunals with broad discretion, which may be detrimental to the host state's regulatory measure<sup>59</sup> and public interest. The extensive meaning of an expropriation clause, which prohibits not only an act of the government that explicitly deprives an investor of its assets but also an act that has a severe financial implication on investment,<sup>60</sup> makes it

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<sup>55</sup> Rodulf Dolzer & Christoph Schreuer, *Principles of International Investment Law* 2<sup>nd</sup> ed. (Oxford, United Kingdom: Oxford University Press, 2012) at 13.

<sup>56</sup> David Collins, *An Introduction to International Investment Law* (Cambridge: University Printing Press, 2017) at 35 [Collins].

<sup>57</sup> Tarcisio Gazzini, "Bilateral Investment Treaties" in Tarcisio Gazzini & Eric De Brabandere, ed, *International Investment Law: The Sources of Rights and Obligations* (The Netherlands: Koninklijke Brill NV, 2012) at 105 [Gazzini]. See also Collins, *ibid* at 105.

<sup>58</sup> Nigeria – UK BIT, *supra* note 41, Article 5, Nigeria – Netherlands BIT, *supra* note 41, Article 6 and Nigeria – Italy BIT, *supra* note 41, Article 5.

<sup>59</sup> Prabhash Ranjan & Pushkar Anand, "The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction" (2017) *Northwestern J Intl L* at 33.

<sup>60</sup> *Metalclad Corporations v United Mexican States*, (2000) Case No ARB (AF)/97/1 at 103 (International Centre for Settlement of Investment Disputes) (Arbitrators: Professor Sir Elihu Lauterpacht, Mr Benjamin R. Civiletti and Mr José Luis Siqueiros) [*Metalclad Corporations v United Mexican States*].

challenging to have a right balance between the interests of states and investors in BITs. A tribunal held that once an expropriation clause has been breached, the investor is entitled to compensation even when the measures taken by the government are for a public purpose such as environmental protection.<sup>61</sup>

Awarding compensation on the grounds of expropriation despite a measure being taken for a public purpose may discourage host governments from taking regulatory actions for a public purpose.<sup>62</sup> The practice of some arbitral tribunals to neglect the impact of public purpose in their examination of an expropriation clause is partly attributed to the fact that most traditional BITs, including Nigeria's BITs, do not provide for environmental protection<sup>63</sup> and human rights. Therefore, in the context of public purpose, which includes environmental and human rights protection, the clause regarding expropriation in Nigeria's BITs potentially inhibits the government's ability to protect the environment and human rights.<sup>64</sup> Therefore, the thesis argues that the clause regarding expropriation should be amended to expressly provide that environmental regulatory measures taken by the Nigerian government do not amount to expropriation under the relevant Nigeria's BITs.

Similarly, the thesis argues in chapter 3 that the FET standard of treatment for investors, including IOCs, in Nigeria's BITs should be deleted as it could affect Nigeria's domestic efforts towards environmental measures. This is because the FET clause compels the Nigerian government to protect the reasonable expectation of IOCs, and this reasonable expectation could be that the legal regime contained in investment contracts between the Nigerian government and

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<sup>61</sup> *Compania Del Desarrollo De Santa Elena, S. A. v The Republic of Costa Rica* (2000), FILJ 169 at 192 paras 72 – 73 (International Centre for Settlement of Investment Disputes) (Arbitrators: L. Yves Fortier, Professor Sir Elihu Lauterpacht, Professor Prosper Weil) [*De Santa Elena v The Republic of Costa Rica*].

<sup>62</sup> Vicki Been, "NAFTA's Investment Protections and the Division of Authority for Land Use and Environmental Controls" (2002) 20 *Pace Environment L Rev* 19 at 21 [Been].

<sup>63</sup> Qiang Ren, *Public Interests in International Investment Law: Balancing Protection for Investor and Environment* (Newcastle: Cambridge Scholars Publishing, 2018) at 124 [Ren].

<sup>64</sup> To further strengthen the argument for a possibility of IOCs' threat to make claims under any standards for treatment for IOCs in Nigeria's BITs, which could potentially inhibit the federal government of Nigeria from taking regulatory actions, this thesis refers to the report of The Centre for Research on Multinational Corporations [The Report]. The Report titled: "Shell put Nigeria under Pressure with ISDS Process to obtain Oil Field OPL 245" (2 February 2019) online: <[isds.bilaterals.org/?shell-put-nigeria-under-pressure](https://isds.bilaterals.org/?shell-put-nigeria-under-pressure)> claims that Shell secured a concession by threatening to sue the Nigerian government for compensation by activating the investor-to-state dispute settlement clause in Nigeria's BIT with Netherlands.

an IOC should not change.<sup>65</sup> According to Oshionebo, a new law that intends to impose an additional obligation on an IOC may be regarded as a breach of the FET clause.<sup>66</sup> On this basis, the thesis argues that since IOCs have been flaring gas since 1956 when oil exploration began in Nigeria, insisting that IOCs should utilize gas instead of flaring gas may be considered a violation of the reasonable expectation of IOCs by an investment tribunal. This is so because it is far cheaper to flare gas than to utilize it. The broad interpretation of the FET clause, as discussed in detail in chapter 3, necessitates the argument of this thesis that it should be expunged from Nigeria's BITs. The arguments of this thesis for the clause regarding expropriation to be amended and the FET clause expunged fit into the recommendation of the UN Committee on Economic, Social and Cultural Rights that states should take into consideration the negative human rights impacts of BIT clauses when negotiating them.<sup>67</sup>

#### 1.4 Research Questions

This thesis extends to answer the following research questions:

- i. What value could imposing obligations relating to human rights and the environment on IOCs in Nigeria's BITs offer to the quest to hold IOCs accountable for the violation of these obligations?
- ii. Are there any legal impediments to imposing enforceable obligations relating to human rights and the environment on IOCs in BITs?

#### 1.5 Literature Review

This section reviews literature that analyzes international and domestic laws regulating foreign investment in Nigeria's O&G sector and its impacts on the environment and human rights of the Niger Delta communities. This review analyzes the following:

- i. The lack of recognition of the human right to a healthy environment in Nigeria's constitution and by the United Nations.
- ii. The human rights impacts of the operations of the IOCs in Nigeria's Niger Delta;

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<sup>65</sup> Evaristus Oshionebo, "Stabilization Clauses in Natural Resources Extraction Contracts: Legal, Economic and Social Implications for Developing Countries" (2010) 1 *Asper Rev Intl Bus & Trade L* 1 at 27 [Oshionebo, Stabilization Clause].

<sup>66</sup> Evaristus Oshionebo, *Corporations and Nations*, *supra* note 35 at 429

<sup>67</sup> General Comment 24, *supra* note 19, para 13.

- iii. The regulatory lapses in Nigeria's O&G sector;
- iv. International law's regulatory failure;
- v. The potential adverse impact of BIT clauses on Nigeria's environmental regulation; and
- vi. The potential enforcement value of having obligations regarding environmental protection and human rights in Nigeria's BITs.

Literature has identified several violations of human rights of the Niger Delta communities by IOCs in the O&G sector<sup>68</sup> despite Nigeria being obligated under international and regional human rights treaties to protect their human rights.<sup>69</sup> Almost all the IOCs that have operated in Nigeria for more than five decades have either directly or indirectly violated the human rights of the Niger Delta communities.<sup>70</sup>

There is a growing debate on whether environmental human rights are protected under the constitution of the Federal Republic of Nigeria (Nigerian constitution) as it does not provide for a human right to a healthy environment.<sup>71</sup> Commenting on section 20 of the Nigerian constitution that recognizes that the government shall "protect and improve the environment," Ogbodo argues that the purpose of the section is to ensure a clean and safe environment for Nigerians.<sup>72</sup> Abdulkadir argues that Nigeria's domestication of the *African Charter*,<sup>73</sup> which contains the right to a healthy environment, entails that the right to a healthy environment is an integral part of Nigerian human rights law.<sup>74</sup> Adejunwo-Osho writes that the Nigerian judiciary

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<sup>68</sup> See generally T. C. Emejuru, "Human Rights and Environment: Whither Nigeria?" (2015) 35 J L Policy & Globalization 19 [Emejuru]. See also Onwuazombe, *supra* note 4.

<sup>69</sup> Examples of the treaties are: the ICESR, *supra* note 9 and the *African Charter* *supra* note 18.

<sup>70</sup> Onwuazombe, *supra* note 4 at 7.

<sup>71</sup> *Constitution of the Federal Republic of Nigeria*, 1999 (as amended) Cap 24, Laws of the Federation of Nigeria 2000 [Nigerian Constitution].

<sup>72</sup> Gozie Ogbodo "Environmental Protection in Nigeria: Two Decades after Koko Incidence" (2010) 15 Annual Survey Intl & Comparative L 1 at 18 [Ogbodo]. Note that while section 20 of the Nigerian constitution, *ibid*, provides that the government should "protect and improve the environment," section 6 (6) (c) of the Nigerian constitution provides for the "injusticiability" of environmental protection under section 20. This means that an aggrieved person cannot invoke or rely on section 20 of the Nigerian constitution to prove a breach of human rights to a healthy environment by a government authority or any person in Nigeria. This is the basis upon which an argument has been made that international treaties that provide for human rights to healthy environment are inconsistent with the constitution of the Federal Republic of Nigeria and are void to the extent of their inconsistencies.

<sup>73</sup> *African Charter*, *supra* note 18.

<sup>74</sup> Abdulkadir Bolaji Abdulkadir, "The Rights to Healthful Environment in Nigeria: A Review of Alternative Pathways to Environmental Justice to Nigeria" (2014) 3 J Sustainable Development L & Policy 118 at 126 [Abdulkadir]. The *African Charter*, *ibid*, is domesticated in Nigeria through the the *African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act*, Cap A9, Laws of the Federation of Nigeria, 2004. The

has been hesitant to make orders compelling companies whose operations degrade the environment to desist from such actions.<sup>75</sup> He further argues that environmental degradation hurts the “quality of life, the enjoyment of life,” other “fundamental human rights and, ultimately,” affects the attainment of sustainable development.<sup>76</sup>

Although Boyd’s study shows that about 177 countries recognize the right to a healthy environment in their legislation,<sup>77</sup> there is no multilateral treaty that recognizes the right to a healthy environment as a stand-alone human right. Boyd argues that although international law has a role to play in addressing violations of human rights, the reality is that almost all the actions required to protect the human right to a healthy environment are done at the domestic level.<sup>78</sup> However, there is an ongoing debate for its recognition by the United Nations.<sup>79</sup> Knox argues that the recognition of the right to a healthy environment by the UN would ensure that there is a consistent and clear development of human rights norms regarding environmental protection.<sup>80</sup> He further argues that, among others, the “recognition of the right to a healthy environment by the United Nations would not only make this right universal in application but would also serve as a catalyst for the implementation of stronger measures to effectively respect, fulfill and promote this right.”<sup>81</sup>

Emphasizing the importance of the right to life, Emejuru writes that the right to life being the most important of all human rights implies the right to live without the harmful “invasion of pollution, environmental degradation and ecological imbalances.”<sup>82</sup> Agarwal argued that the

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domestication of the African Charter through this Act of Nigeria’s National Assembly means that Nigerians have a right to enforce the provisions of the African Charter in Nigerian courts

<sup>75</sup> Oluwatoyin Adejonwo-Osho, “The Evolution of Human Rights Approaches to Environmental Protection in Nigeria” (last visited 28 November 2019) at 11, online (pdf): <[www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCsQFjAB&url=http%3A%2F%2Fwww.iucnael.org%2Fen%2Fdocuments%2Fdoc\\_download%2F70-adejonwo-osho-the-evolution-of-human-rights-approaches-to-environmental-protection-in-nigeria-.html&ei=hraCT-zpE8GcOveF6ewG&usq=AFQjCNGlif407uqs1m0mi02MScwdZEUKcA&sig2=MhonQaop1X0TwdXk3s\\_mWA](http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCsQFjAB&url=http%3A%2F%2Fwww.iucnael.org%2Fen%2Fdocuments%2Fdoc_download%2F70-adejonwo-osho-the-evolution-of-human-rights-approaches-to-environmental-protection-in-nigeria-.html&ei=hraCT-zpE8GcOveF6ewG&usq=AFQjCNGlif407uqs1m0mi02MScwdZEUKcA&sig2=MhonQaop1X0TwdXk3s_mWA)> 11 [Adejonwo-Osho].

<sup>76</sup> *Ibid* at 3.

<sup>77</sup> David R Boyd, “The Constitutional Right to a Healthy Environment” (2012) 54 *Science & Policy for Sustainable Development* 3 at 4.

<sup>78</sup> *Ibid* at 5.

<sup>79</sup> See the United Nations General Assembly, *Report of the Special Rapporteur on the Issue of Human Rights Obligation Relation to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UNGAOR, 73<sup>rd</sup> Sess, Supp No 74, UN Doc A/73/188 1(2018) 1 [Report of the Special Rapporteur on Issues of Human Rights].

<sup>80</sup> *Ibid* at 14, para 39.

<sup>81</sup> *Ibid* at 18, para 54.

<sup>82</sup> Emejuru, *supra* note 68 at 23.

discharge of effluents into the atmosphere and oil spills considerably affect the quality of human life.<sup>83</sup> Similarly, Addo pointed out that the right to life, which prohibits the termination of life or threat to do so, means that corporations should ensure that the working environment is safe and secure.<sup>84</sup> Abdulkadir argues that this case shows that citizens of Nigeria and other countries that have domesticated the *African Charter* can rely on the provisions of the right to life, and the general satisfactory environment as stipulated in the *African Charter* to avert environmental pollution.<sup>85</sup>

Apart from the right to a healthy environment and the right to life, economic and social rights such as human rights to water, food and health are also violated by environmental pollution. Ahmed writes that acid rain resulting from gas flaring pollutes drinkable rainwater.<sup>86</sup> Regarding the right to food, Onwuazombe argues that the increasing pollution of the environment contaminates farmlands and rivers, and therefore affects farm produce due to the increased level of soil acidity.<sup>87</sup> He further highlights that other human rights such as rights to dignity and worth of the human person, right to means of livelihood, subsistence and employment, and right to development, among others, are linked to the activities of the IOCs in the host communities of the Niger Delta.<sup>88</sup>

Onwuazombe argues that gas flaring pollutes the air, emits particulates and other substances that can cause cancer and other deadly diseases into the air and that the judiciary has affirmed that it threatens the right to life of the Niger Delta communities.<sup>89</sup> Adewale and Mustapha are of the opinion that emissions of sulphur and nitrous oxide, along with atmospheric conditions, are likely to lead to acid rain.<sup>90</sup> Further stressing the health implications of gas flaring, Taleb laments that dermal exposure to the hydrocarbons in the air can lead to skin redness, oedema dermatitis,

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<sup>83</sup> H. O. Agarwal, *International law and Human Rights* (Allahada: Central Law Publications, 2000) 670 cited in Emejuru, *ibid* at 111.

<sup>84</sup> Micheal Addo, "Human Rights and Transnational Corporation – An Introduction" in Micheal Addo, ed, *Human Rights Standards and the Responsibility of Transnational Corporations* (Netherlands: Kluwer Law International, 1999) 28.

<sup>85</sup> Abdulkadir, *supra* note 74 at 128.

<sup>86</sup> Farah Hiral Ahmed, "Human Rights Violation: Niger Delta Region" (last visited 28 November 2019) Online: <[www.academia.edu/7327379/Human\\_Rights\\_Violation\\_Niger\\_Delta\\_Region](http://www.academia.edu/7327379/Human_Rights_Violation_Niger_Delta_Region)> at 3 [Ahmed].

<sup>87</sup> Onwuazombe, *supra* note 4 at 147.

<sup>88</sup> *Ibid*.

<sup>89</sup> *Ibid* at 18.

<sup>90</sup> Omoniyi Omotayo Adewale & Ubale Mustapha, "The Impact of Gas Flaring in Nigeria" (2015) 3 Intl J Science, Technology & Society 40 at 44.

rashes, and blisters, that inhaling hydrocarbons can cause watery, red, and itchy eyes, coughing, throat irritation, shortness of breath, headache and confusion, and ingestion of hydrocarbons can lead to nausea and diarrhea.<sup>91</sup> Further, gas flaring also disrupts wildlife in the region, as Hutchful explains.<sup>92</sup> A closely related activity of IOCs that raises human rights concerns in the Niger Delta region is oil spillage. Taleb argues that oil spills in the Niger Delta result from leaks in the dilapidated pipelines that run from oil wells to refineries and from blow-outs and uncontrolled discharges of oil from oil wells.<sup>93</sup> The leaks pollute the water bodies. In adding his voice, Eaton expressed the view that water pollution by petroleum products constitutes one of the most severe challenges in the Niger Delta region.<sup>94</sup>

Mohammed identifies the *Associated Gas Re-injection Act (AGRA)*<sup>95</sup> as the first significant framework that specifically combats associated gas flaring in Nigeria.<sup>96</sup> Regarding the provision of the AGRA that permits gas flaring in Nigeria in exceptional circumstances,<sup>97</sup> Omorogbe observed several years ago that the provision on exceptional circumstances for gas flaring in the AGRA had automatically exempted 86 out of 155 oilfields from the provision that prohibits gas flaring.<sup>98</sup> She further argues that the objective of the AGRA to combat gas flaring proved to be unrealistic for reasons including the insistence of the IOCs on their inability to meet the deadline.<sup>99</sup> Eze and Eze identify the lack of institutional framework as a significant challenge to ensuring the prevention of pollution under the AGRA.<sup>100</sup>

As regards oil spills, one of the major regulations that regulate oil spillage is the *Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN)* issued by the

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<sup>91</sup> Taleb, *supra* note 8 at 364.

<sup>92</sup> Eboe Hutchful, “Disarmament and Development: An African View” (1985) 16 IDS Bull 61-67 cited in Uwem Udok & Enobong Bassey, “Gas Flaring in Nigeria: Problems and Prospects” (2017) 5 Global J of Politics & L Research 16 at 25 [Udok & Bassey].

<sup>93</sup> Taleb, *supra* note 8 at 361.

<sup>94</sup> Joshua P. Eaton, “The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment” (1997) 15 Boston U. Int’l LJ 261 at 267 [Eaton].

<sup>95</sup> *Associated Gas Re-Injection Act* 1984, Cap A 25, Laws of the Federation of Nigeria 2004 [AGRA].

<sup>96</sup> Jamilu Ibn Mohammed, “Comparing Nigeria’s Legal Framework for Combating Gas Flaring with that of Norway-Lessons for Nigeria” (2016) 2 Intl JL Rev 1252 at 1253 [Mohammed].

<sup>97</sup> *AGRA*, *supra* note 95, s. 3.

<sup>98</sup> Yinka Omorogbe, *Oil and Gas in Nigeria Simplified* (Lagos: Malthouse Press, 2003) 59 [Omorogbe].

<sup>99</sup> *Ibid.*

<sup>100</sup> Amaka Eze & Ted Eze, “A Survey of the Legal Framework for the Control of Oil and Gas Pollution from some selected Countries” (2014) 31 JL Policy & Globalization 2.



Department of Petroleum Resources (DPR).<sup>101</sup> Commenting on EGASPIN's requirement for a self-regulated mechanism for oil companies,<sup>102</sup> Oshionebo argues that the reason why the guidelines require self-regulation is that detecting the presence of the oil-related wastes requires some depth of scientific knowledge as well as necessary laboratory equipment, which the DPR does not possess.<sup>103</sup> As Oshionebo argues, the major drawback of another law that regulates environmental pollution in Nigeria – the *National Environmental Standards and Regulation Enforcement Agency (Establishment) Act* (NESREA Act)<sup>104</sup> – is that dangerous substances are only prohibited from being released into the atmosphere, land and water under the NESREA Act if they are of “harmful quantities,” and according to him, it follows that “unharmful” quantities of such substances are permitted to be discharged.<sup>105</sup> He further argues that such provision could be dangerous to public health if the quantity is incorrectly determined by NESREA to be “unharmful” when, in fact, it is harmful.<sup>106</sup>

The literature demonstrates that Nigeria has laws that were designed to prevent environmental pollution and human rights violations. However, Oshionebo argues that the debacle in Nigeria's O&G sector is as a result of the deficiencies in the statutes and regulations and the lack of enforcement mechanisms.<sup>107</sup> Ruggie suggests that one of the regulatory deficiencies that affect human rights is states' lack of capacity.<sup>108</sup> Accordingly, he argues that the failure of states to either adopt appropriate legislation or enforce their laws is because they do not have the means to do so, or they fear the negative implications of doing so in the global market which is competitive or because their leaders place their private gains above the public good.<sup>109</sup>

It is also important to note there have been efforts by international organizations to encourage businesses to respect human rights of host communities. In this regard, Odumosu-Ayanu notes that no agreement has yet been reached by the international community with regards to foreign

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<sup>101</sup> *Environmental Guidelines and Standards for the Petroleum Industry in Nigeria* (EGASPIN), 2002 [EGASPIN].

<sup>102</sup> *Ibid*, at 23 – 5, Table II 8 and at 53 – 9, Table III – 2. See also Article 4 of the EGASPIN, *Ibid*, at 56 – 7.

<sup>103</sup> Oshionebo, *Regulating Transnational Corporations*, *supra* note 32 at 56.

<sup>104</sup> *National Environmental Standards and Regulation Enforcement Agency (Establishment) Act* 2007, Laws of the Federation of Nigeria 2004, cap N16 [NESREA Act].

<sup>105</sup> Oshionebo, *Regulating Transnational Corporations*, *supra* note 32 at 57.

<sup>106</sup> *Ibid*.

<sup>107</sup> *Ibid* at 60.

<sup>108</sup> John Ruggie, “3<sup>rd</sup> Responsible Investment Forum Key Note Address” (12 January 2009) online (pdf):[www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-address-to-Responsible-Invest-Forum-12-Jan-2009.pdf](http://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-address-to-Responsible-Invest-Forum-12-Jan-2009.pdf)>.

<sup>109</sup> *Ibid*.

investors' obligations in host communities.<sup>110</sup> Globally, one of the attempts to engage the business community to respect human rights is through the *United Nations Global Compact* (UNGC).<sup>111</sup> Sethi and Scherpes note that the UNGC was the inspiration of the former United Nations (UN) Secretary-General Kofi Annan as he challenged the international business community to enact a Global Compact between the UN and non-state actors to advance human rights, promote good labour conditions, and ensure that the environment is protected.<sup>112</sup> Despite its mission, Knight and Smith note that the UNGC has been subject to extensive criticisms from social activists, academics, and observers.<sup>113</sup> Some of these criticisms, according to Knight and Smith, include the argument that the UNGC favours TNCs, involves self-regulation and voluntary participation of TNCs.<sup>114</sup>

The most recent of the initiatives of the UN on the relationship between business and human rights is the United Nations Guiding Principles on Business and Human Rights (UNGPs) which are built upon three pillars proposed by Ruggie in his protect, respect and remedy framework.<sup>115</sup> Commenting on the duty of states to protect human rights in the context of business, Ruggie states that the UNGPs are standard conduct for states to protect human rights, and therefore, states are not *per se* responsible for violations of human rights by private actors.<sup>116</sup> Abe argues that the UNGPs appeal to the moral sentiments of IOCs to take responsibility to respect human rights.<sup>117</sup> In the words of Davitti, the responsibility to respect human rights is in reality 'a do no harm' responsibility.<sup>118</sup> In contrast, Muchlinski argues that the responsibility to respect human rights does not imply the exclusion of binding legal duties on corporations as nothing precludes a

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<sup>110</sup> Odumosu-Ayanu, *Governments, Investors and Local Communities*, *supra* note 49 at 20.

<sup>111</sup> United Nations Global Compact, (2000) online: [globalcompact.ca/about/ungc-10-principles/](http://globalcompact.ca/about/ungc-10-principles/) [UNGC]

<sup>112</sup> Prakash Sethi & Donald Scherpes, "United Nations Global Compact: The Promise-Performance Gap" (2014) *J Bus Ethics* 193 at 198.

<sup>113</sup> Graham Knight & Jackie Smith, "The Global Compact and Its Critics: Activism, Power Relations, and Corporate Social Responsibility" (2008) online: <https://www.scribd.com/document/17030875/2008-The-Global-Compact-and-its-critics> at 2.

<sup>114</sup> *Ibid* at 3 – 4.

<sup>115</sup> United Nations Guiding Principles on Business and Human Rights, (2011) at 1, online (pdf): [www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr\\_eN.pdf](http://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf) at 1 [UNGP].

<sup>115</sup> *Ibid* at GPs 11 and 25.

<sup>116</sup> *Ibid* at GP 1, commentary 1.

<sup>117</sup> Oyeniyi Abe, "The Feasibility of Implementing the United Nations Guiding Principles on Business and Human Rights in the Extractive Industry in Nigeria" (2016) 7 *J Sustainable Development L & Policy* 137 at 148 [Abe].

<sup>118</sup> Daria Davitti, "Refining the Protect, Respect and Remedy Framework for Business and Human Rights and its Guiding Principles" (2016) 16 *Human Rights L Rev* 55 at 69 [Davitti].

state from imposing human rights obligations on private actors that operate within or outside its jurisdiction.<sup>119</sup>

Commenting on the *Guidelines for Multinational Enterprises* (the Guidelines),<sup>120</sup> Reinert, Reinert, and Debebe identify that there have been at least two improved versions, the latest being that of 2011 that recognizes human rights considerations.<sup>121</sup> Simons and Macklin also identify that the 2011 version of the Guidelines dedicates a chapter to human rights issues.<sup>122</sup> At the international level, all the initiatives that are targeted towards human rights protection in the context of business are not binding on the IOCs, but there are more general and core international human rights treaties that are binding on states.<sup>123</sup> However, Weiss explained that such nonbinding instruments might be an initial step that leads to the negotiation of binding agreements and that some legally binding instruments that provide for human rights obligations began as soft instruments.<sup>124</sup> However, this thesis argues in chapter 3 that the status of the international norms, codes, guidelines, and principles as soft laws is one major cause of violations of human rights by IOCs.

There is an ongoing effort by the UN Human Rights Council to draft a binding instrument to ensure that the operations of the TNCs as they relate to human rights are regulated. This is to be achieved through the *Zero Draft Treaty*, which is being negotiated.<sup>125</sup> Jabarin and Abdollah are of the opinion that the *Zero Draft Treaty* provides a “potential alternative avenue for individuals and communities that are affected by corporate violations of human rights.<sup>126</sup> Commenting on Article 15 that requires states to “take all necessary legislative, administrative or other action...to

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<sup>119</sup> Peter Muchlinski, “Implementing the UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation” (2012) 22 *Bus Ethics Q* 145 at 148.

<sup>120</sup> Organization for Economic Co-operation and Development, “OECD Guidelines for Multinational Enterprises” (2008) at 14, online (pdf): [www.oecd.org/investment/mne/1922428.pdf](http://www.oecd.org/investment/mne/1922428.pdf).

<sup>121</sup> Kenneth A. Reinert, Oda T. Reinert & Gelaye Debebe, “The New OECD Guidelines for Multinational Enterprises: Better but not Enough” (2016) 26 *Development in Practice* 816 at 818.

<sup>122</sup> Simons & Macklin, *supra* note 33 at 102. For the 2011 edition see Organization for Economic Co-operation and Development, “OECD Guidelines for Multinational Enterprises 2011 Edition” (2011) at 31, online (pdf): [www.oecd.org/daf/inv/mne/48004323.pdf](http://www.oecd.org/daf/inv/mne/48004323.pdf). [OECD Guidelines 2011].

<sup>123</sup> These international human rights treaties include: the ICESCR, *supra* note 9. I refer to them as ‘general’ because they are not specifically related to the human rights violated by foreign investors in the course of their business activities.

<sup>124</sup> Edith Brown Weiss, “The President’s Message” (1995) *American Society Intl L Newsletter* cited in John Currie, *et al*, *International Law, Doctrine, Practice, and Theory* (Toronto, Irwin Law, 2014) 152 [Currie, et al].

<sup>125</sup> *Zero Draft Treaty*, *supra* note 36.

<sup>126</sup> Shawan Jabarin & Al-HqMaha Abdollah, “The Zero Draft Treaty: Is it Sufficient to Address Corporate Abuses in Conflicted Areas” (October 2018), at 4, online (pdf): [www.business-humanrights.org/sites/default/files/documents/Zero%20Draft%20Blog%20Compilation\\_Final\\_0.pdf](http://www.business-humanrights.org/sites/default/files/documents/Zero%20Draft%20Blog%20Compilation_Final_0.pdf).

ensure effective implementation of the [Zero Draft Treaty],” Smart questions why the *Zero Draft Treaty* limits its implementation to the national level.<sup>127</sup> He argues that since the *Zero Draft Treaty* acknowledges that violations of human rights by corporations are globally predominant, there is no reason why it should not provide a remedy at the international level as a combination of both national and global mechanisms would be more effective in ensuring corporate accountability.<sup>128</sup> He further argues that the *Zero Draft Treaty* should create a direct human rights obligation on TNCs instead of establishing direct obligations of state parties.<sup>129</sup>

Some writers have argued that the provisions of BITs could have an impact on the protection of the environment and human rights of host communities. The investor-state dispute settlement mechanism in Nigeria's BITs can also have an impact on human rights protection. Although Cordes, Johnson & Szoke-Burke argue that investment tribunals tend to avoid addressing the conflicting obligations that a state has under human rights and investment treaties, Kube & Petersmann argue that a host state can rely on its human rights obligation in a counterclaim to defend a denial of protection.<sup>130</sup>

On the one hand, Cordes, Johnson & Szoke-Burke argue that where host states or an *amicus curiae* make submissions requesting that host states' human rights obligations should be taken into consideration by investment tribunals while assessing host states' possible liabilities to a foreign investor, it seems tribunals have tended to dismiss such arguments. On the other hand, Sheffer argues that the language used in a BIT determines whether a tribunal will address environmental protection and human rights violations so that where the BIT specifies that only an investment dispute can be arbitrated by states parties, the tribunal cannot assume jurisdiction over other issues.<sup>131</sup> For Sheffer, tribunals only refer to human rights issues when the human rights of the investor are at stake.<sup>132</sup> In analyzing the Niger Delta situation, Ejims appears to

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<sup>127</sup> Sebastian Smart, “The Draft Binding Treaty on Business and Human Rights: An Analysis” 9 June 2019 online: <[gp-digital.org/is-the-bhr-zero-draft-good-for-human-rights/](http://gp-digital.org/is-the-bhr-zero-draft-good-for-human-rights/)>

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> Kaitlin Cordes, Lise Johnson & Sam Szoke-Burke, “Land Dilemmas: Grievances, Human Rights and Investor Protections” (March 2016) at 18, online (pdf): <[ccsi.columbia.edu/files/2016/03/CCSI\\_Land-deal-dilemmas.pdf](http://ccsi.columbia.edu/files/2016/03/CCSI_Land-deal-dilemmas.pdf)> [Cordes, Johnson & Szoke-Burke] and Vivian Kube & E. U. Petersmann, “Human Rights Law in International Investment Arbitration” (2016) 11 *Asian J WTO and Intl Health L & Policy* 65 at 80 [Kube & Petersmann].

<sup>131</sup> Megan Wells Scheffer, “Bilateral Investment Treaties: A Friend or Foe to Human Rights” (2011) 39 *Denver J Intl L & Policy* 483 at 494.

<sup>132</sup> *Ibid.*

agree with Sheffer's argument when he argues that in practice, the question remains whether human rights of the host communities could be given due consideration by investment tribunals in their decision making.<sup>133</sup>

A BIT provision that may impede the protection of the environment and human rights is the provision against expropriation. Indeed, Ren's work demonstrates how BIT provisions could have negative impacts on environmental and human rights protection.<sup>134</sup> Undoubtedly, Nigeria's BITs prohibit the government from taking measures that may amount to either direct or indirect expropriation unless they are taken for a public purpose, among other conditions. However, Waincymer argues that the lack of articulation of the content of direct and indirect expropriation by BITs, including Nigeria's BITs, expands the list of measures that could amount to either direct or indirect expropriation that require compensation.<sup>135</sup> While stating that in practice, tribunals have awarded compensation over actions that were taken for a public purpose, Ren argues strongly that legitimate public purpose should be interpreted to reduce compensation.<sup>136</sup> Concerning compensation, Been argues that host states are deterred from taking steps that protect the environment due to the possibility of paying huge compensation.<sup>137</sup> This is because, as Waincymer argues, an investor may easily allege that any form of regulatory behaviour by a government has a negative implication on its business and therefore amounts to indirect expropriation that requires compensation.<sup>138</sup> Further, Waincymer argues that developed countries that are rich and disposed to paying compensation may not have problems with the regulation of TNCs even if investment tribunals expand the scope of expropriation, unlike the case for developing nations whose inability to pay compensation may have the effect of regulatory chill.<sup>139</sup>

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<sup>133</sup> Okechukwu Ejims, "The Impact of Nigerian International Petroleum Contracts on Environmental and Human Rights of Indigenous Communities" (2013) 21.3 African J Intl & Comparative L 345 at 362 [Ejims].

<sup>134</sup> Ren, *supra* note 63.

<sup>135</sup> Jeff Waincymer, *Balancing Property Rights and Human Rights in Expropriation* (Oxford: Oxford University Press, 2009) 293 [Waincymer].

<sup>136</sup> Ren, *supra* note 63 at 116.

<sup>137</sup> Been, *supra* note 62 at 21.

<sup>138</sup> Waincymer, *supra* note 135 at 286.

<sup>139</sup> *Ibid* at 295.

Mann states that earlier BITs focused only on investors' rights and that reference to social issues such as environmental protection [and human rights] in BITs were made post-1990.<sup>140</sup> Odumosu-Ayanu marks that most treaties do not place obligations on foreign investors.<sup>141</sup> While Tienhaara expressed that modern treaties incorporate clauses that deal with human rights and environmental issues,<sup>142</sup> Odumosu-Ayanu bemoans that such incorporations do not stipulate enforceable human and environmental rights in favour of local communities as they provide for foreign investors.<sup>143</sup>

The literature analyzed so far demonstrates that a high premium is placed on investment protection while the environment and human rights of host communities are neglected. The current state of Nigeria's BITs does not guarantee the protection of the environment and human rights of host communities, as they are mostly skewed to favour foreign investors.

Commenting on the lack of corporations' BIT obligations, Dumberry and Aubin argue that there is nothing that limits the state parties' power from making the provision for commitments towards human rights a condition for the enjoyment of investment protection by investors under BITs.<sup>144</sup> Beyond suggesting that there is a growing consensus among authors that BITs should incorporate human rights obligations, Dumberry and Aubin examined how states should draft their BITs to incorporate an obligation regarding human rights protection.<sup>145</sup> The work of Dumberry and Aubin examined where human rights obligations should be located in BITs, the type of language that human rights obligations should be drafted with, the international human rights instruments that should be referred to in BITs and the appropriate enforcement mechanisms that could be adopted by states.<sup>146</sup> Further, Choudhury argues that it is sensible to

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<sup>140</sup> Howard Mann, 'International Investment Agreements, Business and Human Rights: Key Issues and Opportunities' (February, 2008) at 9 – 10, online (pdf): [iisd.org/pdf/2008/ia\\_business\\_human\\_rights.pdf](http://iisd.org/pdf/2008/ia_business_human_rights.pdf).

<sup>141</sup> Odumosu-Ayanu, *Governments, Investors and Local Communities*, *supra* note 49 at 21.

<sup>142</sup> Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge University Press, 2009) 83-94 cited in Odumosu-Ayanu, *Governments, Investors and Local Communities*, *Ibid*.

<sup>143</sup> Odumosu-Ayanu, *Governments, Investors and Local Communities*, *Ibid*.

<sup>144</sup> Patrick Dumberry & G Dumas-Aubin, "A Few Pragmatic Observations on How BITs should be Modified to Incorporate Human Rights Obligations" (2014) 11 *Transnational Dispute Management* 1 at 15 [Dumberry & Dumas-Aubin].

<sup>145</sup> *Ibid* at 3.

<sup>146</sup> *Ibid* at 4 – 17.

incorporate obligations on investors in BITs because BITs also create enforceable rights for investors.<sup>147</sup>

Regarding the enforcement of human rights obligations, Dumberry and Aubin argue that it is meaningless to set up direct human rights obligations in BITs without considering effective means of enforcing it.<sup>148</sup> As Vazquez argues, it would “not enhance human rights, but trivialize international law.”<sup>149</sup> However, Choudhury argues that direct enforcement of the human rights obligations against corporations by states before investment tribunals may be problematic as obtaining the consent of corporations to trigger the jurisdiction of arbitral tribunals will be difficult.<sup>150</sup> Therefore, Choudhury argues that one of the viable means of enforcing human rights obligations is for states to initiate counterclaims against corporations that violate human right obligations stipulated in BITs. Alternatively, Choudhury argues that states could obtain the consent of corporations by obtaining the consent of corporations through an investment agreement.<sup>151</sup> Simons reiterates that one of the ways to address the asymmetrical provisions of the BITs is to include human rights obligations in the BITs.<sup>152</sup> She further argues that making such incorporation in BITs will address some challenges that confront host states in their efforts to regulate the conduct of investors because it will give room for an enforcement mechanism that is treaty-based.<sup>153</sup> Krajewski added his voice to this argument as he argues that such imposition in BITs will clearly show the legal basis for investors’ obligation.<sup>154</sup> However, he argues that a mere reference to the human rights obligations of corporations in BITs remains insufficient unless its elements are clearly articulated.<sup>155</sup>

It appears that authors in the field of international investment law have observed no impediments to the objective of this thesis to impose obligations on IOCs in BITs. As Ruggie notes, innovative solutions still have a role to play in human rights concerns, and there could be a

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<sup>147</sup> Barnali Choudhury, “Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements” (2017) 38 U Pennsylvania J Intl L 425 at 476 [Choudhury].

<sup>148</sup> Dumberry & Dumas-Aubin, *supra* note 144 at 12.

<sup>149</sup> Carlos M. Vázquez, “Direct vs. Indirect Obligations of Corporations under International Law” (2005) 43 Columbia J Transnational L 927 at 958 cited in Dumberry & Dumas-Aubin, *ibid* at 12.

<sup>150</sup> Choudhury, *supra* 147 at 479.

<sup>151</sup> *Ibid.*

<sup>152</sup> Simons, *supra* note 42 at 18.

<sup>153</sup> *Ibid.*

<sup>154</sup> Markus Krajewski, “Human Rights in International Investment Law: Recent Trends in Arbitration and Treaty-making Practice” (2018) Soc Science Research Network Working Paper No 15556-5068 [Krajewski].

<sup>155</sup> *Ibid.*

further evolution of laws at the international level as it relates to human rights and business that may form part of these solutions.<sup>156</sup> Commenting on the investment tribunal's decision in *Urbaser S. A. v the Argentine Republic* (the Urbaser Case) that corporations could have human rights obligations,<sup>157</sup> Krajewski argues that the tribunal in *Urbaser Case* did not engage in the debate of whether a corporation's human rights obligation can be rooted in BITs and therefore did not connect with the broader academic arguments.<sup>158</sup> However, Krajewski argues that the nature of human rights obligation that corporations could have under BITs is for corporations to abstain from activities that violate human rights.<sup>159</sup>

Given that this thesis partly argues that the obligations imposed on IOCs could be enforced in their home states, a review of scholars' views on this is necessary. Home state jurisdiction over human rights violations by companies outside its territory has remained controversial under international human rights law. Seck argues that a home state could regulate a TNC's behaviour on the justification of either the nationality or territoriality principles of international law.<sup>160</sup> She further contends that home states could exercise concurrent jurisdiction with the host states, especially when a TNC is involved in human rights violations in the extractive industries.<sup>161</sup> Ford opines that although there is a likelihood that support would continue to grow for a home state's duty to regulate a corporation's human rights violations abroad, it appears early to suggest that such duty already exists.<sup>162</sup> De Schutter argues that apart from a gross abuse of human rights that amounts to an international crime, an apparent obligation is yet to crystalize for home states to provide a remedy for environmental and human rights abuses that are committed abroad.<sup>163</sup> Against this background, having an obligation relating to the environment and human rights in BITs as this thesis proposes provides an actual basis for IOCs' home states' extraterritorial jurisdiction to crystalize.

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<sup>156</sup> UNHRCOR, "Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises" (2008) UN Doc A/HRC/8/5 at para 69.

<sup>157</sup> *Urbaser S. A. v the Argentine Republic*, (2016) Case No: ARB/07/26 para 1193 (International Centre for Settlement of Investment Disputes) (Arbitrators: Professor Andreas Bucher, Professor Pedro J. Martínez-Fraga, Professor Campbell McLachlan QC) [*Urbaser v Argentina*].

<sup>158</sup> Krajewski, *supra* note 154.

<sup>159</sup> *Ibid.*

<sup>160</sup> Seck, *supra* note 48 at 16.

<sup>161</sup> *Ibid* at 18.

<sup>162</sup> Ford, *supra* note 47 at 19.

<sup>163</sup> De Schutter, *supra* note 47 at 162.



While several authors have identified the need to place obligations on TNCs in BITs, only a few have undertaken an analysis of its practical relevance for the host communities. Analyzing the potentials and relevance of imposing BIT obligations relating to the environment and human rights on IOCs is the major contribution of this thesis. The gap in the literature that this thesis fills is to examine how IOCs could be held accountable for environmental degradation and violations of human rights of the Niger Delta host communities under Nigeria's BITs. This is as a result of a combination of challenges that the literature highlights, namely: the persistent violations of human rights of the Niger Delta people, the failure of Nigeria's domestic laws to protect the human rights of the Niger Delta communities and the nonbinding status of the international initiatives that are meant to regulate IOCs' activities that pollute the environment and violate human rights. Thus, the thesis investigates the feasibility of imposing obligations on IOCs in renegotiated and subsequent BITs concluded by Nigeria.

#### 1.6 Significance of Research

This thesis makes an essential contribution to an increasing quest among scholars to analyze IOCs' accountability for the pollution of the environment and the violation of the human rights of host communities. The mainstream argument which this thesis agrees with is that the Nigerian government should improve the protection of the environment and human rights of the Niger Delta communities through effective domestic regulation. As this thesis recognizes in section 1.2 of chapter one, Nigeria's domestic laws should be strengthened. Notwithstanding this recognition, this thesis focuses on international law, which is not within domestic confines, for its separate importance in the quest to address environmental and human rights concerns in the context of the business of IOCs in the Niger Delta communities. One significant importance of focusing on international law is to address the impact of BITs standard of treatment on the domestic regulation of the environment. In section 3.3.1 of chapter three, this thesis demonstrates that current BIT clauses such as the expropriation clause and the FET clause could have a regulatory effect on the measures that the Nigerian government could adopt to address environmental degradation and human rights violation. Therefore, addressing human rights violations and environmental degradation through international law as proposed by this thesis provides an avenue to address the impact of the regulatory chill that could be caused by these BIT clauses in order to ensure a more effective domestic regulation.

Moreover, a focus on international law provides an opportunity to assess and explore how the environment and human rights could be protected under international law. Specifically, this thesis considers the value that BITs could offer apart from the protection of IOCs' investments.<sup>164</sup> It contributes to the developing corpus of literature in international economic law regarding imposing obligations on corporations in BITs. For instance, authors such as Dumberry,<sup>165</sup> Simons,<sup>166</sup> Choudhury,<sup>167</sup> and Krajewski<sup>168</sup> have suggested that BITs could play an essential role in addressing issues that relate to environmental protection and human rights in the operations of IOCs. The core contribution of this thesis to existing literature draws from the views of these authors but applies them in the context of the O&G sector in Nigeria.

### 1.7 Methodology for Research

This thesis adopts a doctrinal approach to research and critically assesses domestic laws and international law instruments. It analyzes the rules of international law regarding foreign investment in Nigeria's O&G sector as well as their implications on host communities of the Niger Delta. Mainly, the analysis involves the environmental and human rights issues that are implicated as a result of the nature of Nigeria's BITs. The thesis also assesses the regulation of IOCs under Nigeria's domestic environmental laws and analyzes scholarly literature about their suitability. It also includes a critical assessment of treaties and soft law instruments and scholarly publications that examine the content and scope of these instruments.

The analysis extends to how BITs could be explored for the protection of the environment and human rights of the impacted communities. Further, it analyzes how international law generally and, in particular, the home states will respond to incorporating obligations relating to environmental protection and human rights in BITs. Considering that the central purpose of this thesis is to enhance the protection of Niger Delta communities from environmental harm and human rights violations, the thesis also analyzes the potential adverse impacts of some BIT provisions on Nigeria's efforts to curb these problems.

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<sup>164</sup> Nathalie Bernasconi-Osterwalder, et al, "Harnessing Investment for Sustainable Development: Inclusion of Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements" (9 January 2018) at 6, online (pdf) : <[iisd.org/sites/default/files/meterial/harnessing-investment-sustainable-development.pdf](https://iisd.org/sites/default/files/meterial/harnessing-investment-sustainable-development.pdf)> [Bernasconi-Osterwalder, et al].

<sup>165</sup> Dumberry & Dumas-Aubin, *supra* note 144 at 3.

<sup>166</sup> Simons, *supra* note 42 at 18.

<sup>167</sup> Choudhury, *supra* note 147 at 430.

<sup>168</sup> Krajewski, Human Rights *supra* note 158.

In undertaking these analyses, the thesis relies on primary sources such as statutes, BITs and other international law instruments, and judicial decisions. Secondary sources such as books, journal articles, newspaper articles and international organizations' reports also form central sources for the thesis' analysis.

## 1.8 Thesis Structure

The thesis is divided into four chapters. This chapter is the introductory chapter, which outlines the literature review, relevance of the study and methodological approach of the research. Chapter two analyzes the extent of the environmental issues that bedevil the Niger Delta people and the laws that regulate the O&G sector in Nigeria. It also examines the environmental and human rights implications of the operations of the IOCs in the O&G sector in Nigeria. It further justifies the argument of this thesis that it is necessary to impose BIT obligations on IOCs. In chapter three, the thesis examines international regulations relating to corporate misconduct. Chapter three also examines some of Nigeria's BIT clauses and their implications for environmental protection and environment-related human rights protection in Nigeria. Finally, it proposes the renegotiation of Nigeria's BITs to incorporate obligations that relate to environmental protection and human rights in Nigeria and discusses the location of these obligations in BITs. Chapter four examines the potential challenges that could face the Nigerian government and the home countries of the IOCs as they renegotiate the relevant BITs to incorporate obligations relating to environmental protection and human rights as proposed by this thesis. It further examines two enforcement mechanisms for the obligations imposed on IOCs. First, it argues that the Nigerian government may enforce these obligations before arbitral tribunals. Secondly, it evaluates the possibility of the Niger Delta communities relying on these BIT obligations to bring a direct claim against IOCs for a breach of their obligations regarding human rights and environmental protection in their home states.

## **CHAPTER TWO: ENVIRONMENTAL AND HUMAN RIGHTS IMPLICATIONS OF IOCs' OPERATIONS: JUSTIFYING INTERNATIONALIZATION OF OBLIGATIONS THROUGH BITS**

### **2.1 Introduction**

This chapter examines environmental issues such as oil spillage and gas flaring caused by IOCs in the Niger Delta communities and the human rights implications of the activities of the IOCs in Nigeria's O&G sector. The chapter is divided into three main parts. The first part analyzes the environmental concerns, that is, the incidences of oil spillage and gas flaring in Nigeria. In particular, it identifies that incidences of oil spillage and gas flaring have been in existence in the Niger Delta communities since 1956 when oil was discovered in Nigeria, and have continued unabated. It further evaluates major Nigerian laws that regulate environmental pollution.

Second, the chapter analyzes the adverse human rights implications of the activities of the IOCs in the Niger Delta communities. In its analysis, it examines the jurisprudence of Nigeria's courts and Africa's regional bodies. This part of the chapter evaluates the human rights implications of environmental degradation, as well as human rights violations that involve the Nigerian government with the complicity of IOCs.

The chapter argues that the current domestic laws appear not to effectively control the operations of the IOCs in Nigeria as the IOCs' activities continue to raise both environmental and human rights concerns. The chapter concludes by justifying the central argument of this thesis for the imposition of obligations relating to environmental and human rights protection on IOCs in Nigeria's BITS.

## 2.2 Environmental Concerns in Nigeria's Oil and Gas Sector

In Nigeria, almost all produced O&G resources are extracted from the Niger Delta region.<sup>169</sup> As a result of the failure of the IOCs to adopt the standard practice in the exploration and production of O&G, there have been continued oil spills and gas flaring, resulting in environmental pollution.

### 2.2.1 Oil Spillage

The issue of oil spillage dates back to the period when oil exploration started in the Niger Delta and has continued to date. Nigeria has no reliable reporting system of oil spills in the Niger Delta area.<sup>170</sup> However, between 1970 and 1983, the volume of oil that was spilled is approximately 1,711,354 barrels.<sup>171</sup> The records of the Department of Petroleum Resources (DPR) show that between the periods of 2010 and 2017,<sup>172</sup> there were over 4,500 oil spill incidences, and in 2018, Shell alone admitted a total of 148 oil spills incidences.<sup>173</sup> This figure does not include minor spills and may not necessarily represent the actual state of affairs. Indeed, several years of oil spill occurrences in the Niger Delta region dwarf the Gulf of Mexico oil spill that occurred in Louisiana, the United States of America, in 2010, which attracted significant attention around the globe.<sup>174</sup>

There are two broad causes of oil spills: the poor maintenance of oil pipelines and third-party intervention. IOCs had earlier admitted that their infrastructure needed work and that corrosion was responsible for most of the oil spills.<sup>175</sup> However, in recent times, IOCs attribute almost all the oil spill occurrences to third-party intervention, otherwise known as an act of sabotage by

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<sup>169</sup> Section 30 of the *Niger Delta Development Act*, Cap N86, Laws of the Federation of Nigeria, 2004, states that the Niger Delta region of Nigeria includes 9 states in Nigeria: Abia, Akwa-Ibom, Bayelsa, Cross River, Delta Edo, Imo, Ondo and Rivers States

<sup>170</sup> Chinedu Enegeide & Chukwuma Chukwuemeka, "Oil Spillage and Heavy Metals Toxicity Risk in the Niger Delta, Nigeria" (2018) 8 J Health & Pollution 1 at 4.

<sup>171</sup> Joseph Effiong, "Oil and Gas Industry in Nigeria: The Paradox of the Black Gold" (2010) 18 Environmental & Soc Justice: An Intl Perspective Research in Soc Problems & Public Policy 323 at 331.

<sup>172</sup> Department of Petroleum Resources, "2017 Nigeria Oil and Gas Industry Annual Report" (2017) at 100, online (pdf) : <[dpr.gov.ng/wp-content/uploads/2018/10/2017-NOGIAR-WEB.pdf](http://dpr.gov.ng/wp-content/uploads/2018/10/2017-NOGIAR-WEB.pdf)>.

<sup>173</sup> Shell Nigeria, "Oil Spill Data", (November 2018) online: <[shell.com.ng/sustainability/environment/oil-spills.html](http://shell.com.ng/sustainability/environment/oil-spills.html)>.

<sup>174</sup> Ezeudu, *supra* note 5 at 29.

<sup>175</sup> Amnesty International, "Petroleum, Pollution and Poverty in the Niger Delta" (2009) Online: <<http://www.amnesty.eu/static/documents/2009/Nigeria0609Report.pdf> at 15 >.

individuals in the Niger Delta in an attempt to circumvent liability for compensation.<sup>176</sup> While some of the oil spills may have been caused by acts of sabotage, IOCs should at least be expected to bear liability for their failure to safeguard their oil pipelines from malicious damage by third parties.

### 2.2.2 Gas Flaring

Environmental pollution in the Niger Delta is also attributed to gas flaring. Similar to oil spills, gas flaring is as old as oil exploration in Nigeria.<sup>177</sup> Continuous gas flaring in the Niger Delta region has contributed significantly to the release of greenhouse gases into the air, and acid rain.<sup>178</sup> In Nigeria, oil companies flare over 313 million standard cubic feet of gas yearly, and as a result, emit 16.5 million tons of carbon dioxide.<sup>179</sup> This figure makes Nigeria the seventh-highest “gas flarer” in the world.<sup>180</sup> Sadly, some flare sites are located within human settlement areas in the Niger Delta community, burn 24 hours a day and have burnt for more than forty years.<sup>181</sup>

As fairly described, the attitude of IOCs in the Niger Delta is that of “go to Rome and behave like the Romans”<sup>182</sup> as IOCs do not flare gas at the rate they do in Nigeria in other countries that have a stronger regulatory approach. Eaton argues that many of Shell’s operations in Nigeria would be illegal in other parts of the world.<sup>183</sup> The burning of associated gas is hugely wasteful and environmentally damaging.<sup>184</sup> It is a consensus that the only viable way to end gas flaring as

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<sup>176</sup> *Ibid.* A third party act ranges from theft of oil to deliberate vandalism of oil pipelines in order to attract compensation from IOCs. Section 11 (5) of the *Oil Pipeline Act*, Cap 338, Laws of the Federal Republic of Nigeria, 1990, provides that an oil company shall be liable to pay compensation where a person suffers injury as a consequence of any breakage of or leakage from the pipeline or an ancillary installation. However, the payment of such compensation will not apply if the damage is as a result of the default of the person or on account of the malicious act of a third party. This principle was demonstrated by the court in *Anthony Atubin v Shell BP* Suit No: UHC/43/73 OF 21/11/74.

<sup>177</sup> Taleb, *supra* note 8 at 363.

<sup>178</sup> Oladele Osibanjo, “Industrial Pollution Management in Nigeria, in *Environmental Consciousness for Nigeria National Development*” cited in Eaton, *supra* note 70 at 269.

<sup>179</sup> Yomi Kazeem, “A Legal Loophole has Enabled years of Environmental Damage by Global Oil Companies in Nigeria” (30 January 2018) online: [qz.com/africa/1192558/nigeria-gas-flaring-oil-biz-escapes-tough-fines-for-environmental-damage/](http://qz.com/africa/1192558/nigeria-gas-flaring-oil-biz-escapes-tough-fines-for-environmental-damage/).

<sup>180</sup> The World Bank, “Nigeria’s Flaring Reduction Target: 2020” (10 March 2017) online: [worldbank.org/en/news/feature/2017/03/10/nigerias-flaring-reduction-target-2020](http://worldbank.org/en/news/feature/2017/03/10/nigerias-flaring-reduction-target-2020).

<sup>181</sup> Taleb, *supra* note 8 at 363.

<sup>182</sup> Ezeudu, *supra* note 5 at 39.

<sup>183</sup> Eaton, *supra* note 94 at 283.

<sup>184</sup> Amnesty International, *Petroleum, Pollution, and Poverty* *supra* note 177 at 18.

it is obtainable in other parts of the world is through utilization and commercialization of associated gas.<sup>185</sup>

### 2.2.3 Review of Nigeria's Environmental Protection Regulations in the Oil and Gas Sector

The following analysis of Nigeria's principal laws and regulations for the protection of the environment is intended to demonstrate that Nigeria has laws that seek to curb oil spills and gas flaring in the O&G sector. More importantly, the ineffectiveness of these laws and regulations shows that IOCs pollute the Niger Delta region without any consequences, and therefore, the people of the Niger Delta are left without a remedy. The essence of analyzing these principal environmental laws and regulations is to demonstrate that there are gaps in these laws and advance an argument that Nigeria's government needs to improve its laws in addition to renegotiating Nigeria's BITs to reflect IOCs' obligation relating to environmental protection, which is the core argument of this thesis.

#### 2.2.3.1 The *Petroleum Act*

The *Petroleum Act*<sup>186</sup> is the bedrock of any discussion on the regulation of O&G exploration and production in Nigeria, as it is the foremost law in this regard. Under the *Petroleum Act*, petroleum "means mineral oil (or any related hydrocarbon) or natural gas as it exists in its natural state in strata, and does not include coal or bituminous shales or other stratified deposits from which oil can be extracted by destructive distillation."<sup>187</sup> In conformity with the regulatory power wielded by the Minister under the *Petroleum Act* for the prevention of pollution of watercourses and the atmosphere,<sup>188</sup> the *Petroleum (Drilling and Production) Regulations*, the *Petroleum Refining Regulations* and the *Mineral Oil (Safety) Regulations* were enacted.

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<sup>185</sup> Udok & Basse, *supra* note 92 at 26.

<sup>186</sup> *Petroleum Act*, Cap P10 Laws of the Federation of Nigeria LFN 2004.

<sup>187</sup> *Ibid.*, section 15.

<sup>188</sup> *Ibid.*, section 9 (1) (b) (iii).

#### 2.2.3.1.1 The *Petroleum (Drilling and Production) Regulations*, 1969

Regulation 25 of the *Petroleum (Drilling and Production) Regulations*, (PDPR)<sup>189</sup> is the most significant provision relating to the protection of the environment and requires that oil companies should:

adopt all practicable precautions including the provision of up-to-date equipment approved by the Director of Petroleum Resources, to prevent the pollution of inland waters, rivers, watercourses, the territorial waters of Nigeria or the high seas by oil, mud or other fluids or substances which might contaminate the water, banks or shoreline or which might cause harm or destruction to freshwater or marine life and where any such pollution occurs or has occurred, shall take prompt steps to control and if possible, end it.

Also, regulation 37 (d) of the PDPR respectively enjoins oil companies to carry out their activities or “operations in a proper and workmanlike manner” in accordance with “good oil field practices” and to avoid the leakage of “petroleum into any water, well, spring, stream, river, lake, reservoir, estuary or harbor.”

While the PDPR purports to ensure that IOCs do not pollute the environment, the primary concern of its provisions is that it allows the director to have a wide latitude of discretion.<sup>190</sup> Although it is not clear whether the director has ever exercised the discretion wrongfully, it has been argued that this discretion may either be influenced by bribery or exercised in accordance with the desire of the director to accommodate a vital business entity<sup>191</sup> for its economic benefit to Nigeria. This argument is tenable considering that there is no basis for assessing whether the discretion has been exercised in the interest of the public. This has necessitated an argument for the establishment of guidelines to check the excesses of the director in the exercise of discretion.<sup>192</sup> However, even if guidelines are established, there is no guarantee, for instance, of strict implementation of the “good oil field practices” due to the economic gain that accrues to Nigeria from the O&G sector. What this means is that the interest of the Niger Delta people as it relates to their environment could be shortchanged within the domestic legal framework, and this necessitates consideration of how this interest could be protected under Nigeria’s BITs.

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<sup>189</sup> *Petroleum (Drilling and Production) Regulations* Cap P10 LFN 2004.

<sup>190</sup> Oshionebo, *Regulating Transnational Corporations*, *supra* note 32 at 52.

<sup>191</sup> *Ibid* at 52 – 3.

<sup>192</sup> *Ibid* at 53.



### 2.2.3.1.2 The *Petroleum Refining Regulations*, 1974

The *Petroleum Refining Regulations* (PRR) requires that:

The Manager [of an oil company] shall adopt all practicable precautions including the provision of up-to-date equipment as may be specified by the Director [of Petroleum Resources] from time to time, to prevent the pollution of the environment by petroleum or petroleum products; and where such pollution occurs the manager shall take prompt steps to control and, if possible, end it.<sup>193</sup>

The effect of this regulation is that although IOCs could alter the environment in areas covered by their licences, they are not allowed to unreasonably cause environmental pollution as they are obliged to take measures to prevent the pollution of the environment.<sup>194</sup> By regulation 45(1), any contravention of the provisions of the PRR attracts either a paltry sum of 100 (NGN) as a penalty or imprisonment for six months. Also, some punishments, which are provided under section 8 (d) *Petroleum Act*, are applicable. These include the arrest of a person who is alleged to have contravened the *Petroleum Act* or any of its regulations by the Minister of Petroleum. As with the PDPR, the provisions of PRR are rarely enforced against the IOCs owing to the latter's contribution to the Nigerian economy.<sup>195</sup>

Some critics have raised concerns about the vagueness of some phrases in the PDPR and the PRR, such as “practicable precautions,” “operations in a proper and workmanlike manner,” and “good oil field practices.”<sup>196</sup> However, it is arguable that such imprecision may allow the Nigerian authorities to make some amendments to its laws to prevent subsequent irresponsible “exploration and production” practices.<sup>197</sup> For instance, it has been argued that if these phrases were defined in the regulations, some practices that currently degrade the environment might be acceptable.<sup>198</sup>

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<sup>193</sup> The *Petroleum Refining Regulations*, 1974, reg. 43 (3).

<sup>194</sup> Oshionebo, *Regulating Transnational Corporations*, *supra* note 32 at 52.

<sup>195</sup> Eghosa O Ekhaton, “Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation” (2016) 21 *Annual Survey Intl & Comparative L* 42 at 67 [Ekhaton, *Public Regulation of the Oil and Gas Industry in Nigeria*].

<sup>196</sup> Emeka Duruigbo, *Multinational Corporations and International Law: Accountability and Compliance Issues in the Petroleum Industry* (New York: Transnational Publishers, 2003) at 170 [Duruigbo].

<sup>197</sup> Oshionebo, *Regulating Transnational Corporations*, *supra* note 32 at 52.

<sup>198</sup> *Ibid.*

### 2.2.3.1.3 The *Mineral Oil (Safety) Regulations*, 1997

The *Mineral Oil (Safety) Regulations*,<sup>199</sup> which are made under the *Petroleum Act*, is another instructive regulation that is related to the protection of the environment in Nigeria. Regulation 7 requires that procedures for the production and handling of oil and gas shall conform to “good oil field practice,” which is appropriately covered by the “appropriate current Institute of Petroleum Safety Codes; or the American Petroleum Institute Codes; or the American Society of Mechanical Engineers Codes.”<sup>200</sup> Authors such as Ekhaton have argued that this provision automatically requires IOCs operating in Nigeria to comply with international standards.<sup>201</sup> As plausible as this argument might appear, this thesis argues that another environmental regulation, as analyzed below, has relaxed the application of this provision and has indeed provided lower standards as it allows IOCs to determine the suitable standard to follow.

### 2.2.3.2 The *Associated Gas Re-Injection Act*, 1984

The *Associated Gas Re-Injection Act* (AGRA) is the primary legislation that regulates gas flaring in Nigeria.<sup>202</sup> The AGRA applies to all associated gas in all lands.<sup>203</sup> The AGRA prohibits gas flaring unless the Minister authorizes such. Despite fixing the date for terminating gas flaring at January 1984,<sup>204</sup> the Minister has extended this date because IOCs refused to comply with the deadline.<sup>205</sup> It further grants the Minister a broad discretion to authorize gas flaring, where he considers that gas utilization or reinjection is not feasible in respect of an oilfield.<sup>206</sup> This discretion allows the Minister to either make an authorization for gas flaring by specifying certain conditions at his discretion or by attaching a fine for flaring gas.<sup>207</sup> Sadly, this discretion effectively exempts 86 out of 155 oilfields from the anti-flaring provisions.<sup>208</sup> While the requirements for the exercise of the Minister's discretion in favour of flaring of gas may include:

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<sup>199</sup> The *Mineral Oil (Safety) Regulations*, 1990, pursuant to the fourth paragraph of the Fourth Schedule to the *Petroleum Act*, *supra* note 71.

<sup>200</sup> *Ibid.*

<sup>201</sup> Ekhaton, Public Regulation of the Oil and Gas Industry in Nigeria, *supra* note 195 at 63.

<sup>202</sup> AGRA, *supra* note 95.

<sup>203</sup> *Ibid.*, section 6.

<sup>204</sup> *Ibid.*, section 3.

<sup>205</sup> Omoregbe, *supra* note 98. The Minister has extended this date for the umpteenth time and thus, IOCs are permitted to continue flaring gas.

<sup>206</sup> AGRA, *supra* note 95, section 3 (1) and (2).

<sup>207</sup> *Ibid.*, section 3 (2) (a) and (b).

<sup>208</sup> Mohammed, *supra* note 96 at 1254.

where 75 percent of the gas is utilized or conserved effectively; where the gas contains over 15 percent impurities; and if an ongoing program is interrupted by the failure of equipment,<sup>209</sup> the amount to be paid per unit of flared gas is prescribed by the Minister.<sup>210</sup> The provision for the payment of a fine for gas flaring is one reason for IOCs' complacency.<sup>211</sup> The payment of this fine is more economically viable for IOCs as an official of an IOC is quoted to have said, "it was cheaper to flare gas, while gas flaring would cost the company only \$1 million, the cost of switching from water to gas injection would cost \$56 million."<sup>212</sup>

Given the permissive provisions of the AGRA, it is beyond doubt that it seeks to either encourage IOCs to utilize gas through the use of technologies<sup>213</sup> or to generate revenues for the government through penalties. Therefore, the AGRA intends to curb gas flaring in Nigeria. Statistics demonstrate that IOCs in Nigeria have continued to neglect the provisions of the AGRA because of their economic interest and, perhaps, the lax attitude of the government towards enforcing the AGRA.<sup>214</sup>

Apart from the AGRA, the Nigerian government has recently approved the *Flare Gas (Prevention of Waste and Pollution) Regulations* (Regulation). This Regulation seeks to reduce the environmental and social impacts of gas flaring following the National Gas Flaring Commercialization Programme.<sup>215</sup> The Regulation prohibits any oil producer from flaring gas unless such producer is issued a certificate to do so by the Minister of Petroleum under the AGRA.<sup>216</sup> In this case, the oil producer would be liable to the Nigerian government for a flare payment.<sup>217</sup> However, it is too early in the life of the Regulation to ascertain its effectiveness in its objective to reduce gas flaring in the Niger Delta region. Apart from the AGRA and the Regulation, the Nigerian government has taken some initiatives such as the *National Gas Policy* (NGP) towards placing primary consideration on gas utilization over other ways of handling

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<sup>209</sup> The *Associated Gas Re-Injection (Continued Flaring of Gas) Regulations*, Statutory Instrument 43 of 1984, Regulation 1.

<sup>210</sup> AGRA, *supra* note 95, section 3(2)(b).

<sup>211</sup> Ibrionke Odumosu, "Transferring Alberta's Gas Flaring Reduction Regulatory Framework to Nigeria: Potentials and Limitations" (2007) 44 Alberta L Rev 863 at 889 [Odumosu, Transferring Alberta's Gas Flaring].

<sup>212</sup> Yinka Omorogbe, "An appraisal of Nigerian natural gas legislation" (1985) 4 (2) Oil & Gas L Taxation Rev, 51 cited in Mohammed, *supra* note 96.

<sup>213</sup> Oshionebo, *Regulating Transnational Corporations supra* note 32 at 54.

<sup>214</sup> *Ibid.*

<sup>215</sup> *Flare Gas (Prevention of Waste and Pollution) Regulations* 2018 (S1 2018, NO. 9), Regulation 1 (a).

<sup>216</sup> *Ibid.*, regulation 12.

<sup>217</sup> *Ibid.*, regulation 13.

associated gas.<sup>218</sup> According to the NGP, the commercialization of gas is essential in attaining a national plan for flare-out by 2020.<sup>219</sup>

### 2.2.3.3 The *EGASPIN*, 2002

The *Environmental Guidelines and Standards for the Petroleum Industries in Nigeria* (EGASPIN) also regulate oil spillage in Nigeria and were issued by the Department of Petroleum Resources (DPR). Notably, the EGASPIN reiterates the obligation of the oil companies concerning the environment and therefore does not permit the discharge of wastes in the course of oil exploration and production into inland waters, swamp, coastal, shallow offshore and any pit other than the approved temporary holding retention unless such discharge is permitted by the Director of Petroleum Resources.<sup>220</sup> The EGASPIN envisages self-enforcement by oil operators in the sector as it expects oil corporations to perform some duties in their operations.<sup>221</sup> Oil corporations appoint a management representative who has the responsibility of ensuring that environmental policies are established, as well as appropriately implemented.<sup>222</sup> The most striking aim of the environmental system is to ensure that unexpected, “identified and unidentified environmental issues are contained and brought to an acceptable minimum.”<sup>223</sup> Another responsibility of the oil companies that is tied to the self-enforcement mechanism is the fact that oil corporations are required to carry out self-monitoring exercise(s) to ensure compliance with the standards under EGASPIN by monitoring the emission of oil-related wastes from the production process<sup>224</sup> and patrol for the inspection of oil pipelines once in a month or as directed by the Director of Petroleum Department.

Additionally, the remediation process and requirements demonstrate the primary role of oil corporations in ensuring the EGASPIN’s enforcement. While the oil corporations are mandated to restore an affected environment to its original state before the occurrence of an oil spillage as

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<sup>218</sup> Federal Republic of Nigeria, Ministry of Petroleum Resources “National Gas Policy” (last visited 20 November 2018) at 61, online (pdf): <[www.petroleumindustrybill.com/wp-content/uploads/2017/06/National-Gas-Policy-Approved-By-FEC-inJune2017.pdf](http://www.petroleumindustrybill.com/wp-content/uploads/2017/06/National-Gas-Policy-Approved-By-FEC-inJune2017.pdf)>.

<sup>219</sup> *Ibid* at 62.

<sup>220</sup> EGASPIN, *supra* note 101, Article 3.4.

<sup>221</sup> Oshionebo, *Regulating Transnational Corporations*, *supra* note 32 at 55.

<sup>222</sup> EGASPIN, *supra* note 101, Article 3.1.1.

<sup>223</sup> *Ibid*, Articles 1.1; at 47, 4.1 (i) and 5.1; at 92.

<sup>224</sup> *Ibid*, Articles 4.3; at 56, 4.4; at 56-7, and 4.5; at 58.

much as possible, they also have the responsibility “to monitor the impacted environment alongside the restorative activities.”<sup>225</sup>

The main reason for the self-enforcement requirement is connected with the fact that identifying toxic substances requires in-depth scientific knowledge and necessary equipment, which the DPR does not possess.<sup>226</sup> The self-regulation system practically leaves the regulation of oil spills and their detrimental effects on host communities solely on oil corporations. Oshionebo argues that this deficiency is the bane of regulation in Nigeria.<sup>227</sup>

#### 2.2.3.4 The *Environmental Impact Assessment Act*, 1992

The Nigerian government enacted the *Environmental Impact Assessment* (the EIA Act) in 1992.<sup>228</sup> The *EIA Act* applies to all operations, notwithstanding the sector, that affects the environment in Nigeria. Being proactive, the *EIA Act* requires that if the nature or location of a project is likely to affect the environment, then an assessment of such impact should be taken before undertaking such projects<sup>229</sup> and the measures that are in place to tackle the environmental impacts.<sup>230</sup> The objectives of an environmental impact assessment as set out in section 1 of the *EIA Act* are as follows:

establishing the activities that may likely, or to a significant extent affect the environment before a decision is taken by any person, authority, corporate body intending to undertake or authorize the undertaking of any activity; promoting the implementation of appropriate policy in all Federal, State and local government lands consistent with all environmental impact assessment laws and decision-making processes; and encouraging the development of procedures for information exchange, notification and consultation between organs and persons when proposed activities are likely to have significant transboundary environmental effects.

Markedly, if, in the opinion of the Federal Ministry of Environment (FME), the O&G projects will likely have adverse impacts on the environment, it may refuse to grant a permit required to

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<sup>225</sup> *Ibid*, Articles 2.11.1, 2.11.2 and 2.11.3

<sup>226</sup> Oshionebo, Regulating Transnational Corporations, *supra* note 32 at 56.

<sup>227</sup> *Ibid* at 95.

<sup>228</sup> The *Environmental Impact Assessment Act*, 1992, Laws of the Federation Nigeria 2004 Cap E 12 [*Environmental Impact Assessment Act*].

<sup>229</sup> *Ibid*, Section 2 (1) and (2).

<sup>230</sup> *Ibid*, Section 4 (e).

undertake the project either in whole or part.<sup>231</sup> An equally significant provision of the *EIA Act* is its requirement for the consultations of persons where the proposed projects are likely to have a substantial impact on the environment of surrounding villages and towns.<sup>232</sup>

Despite these provisions that tend to protect the environment, the *EIA Act* provides for exceptions that undermine its effectiveness in ensuring environmental safety. Under the *EIA Act*, an impact assessment is not required in the following circumstances, to wit: where the President of Nigeria or the Federal Environmental Protection Council is of the view that the environmental impacts of the project may likely be minimal, the project is to be undertaken during national emergency period for which the government has taken temporary steps, and the FME is of the view that such a project is in the interest of public health or safety.<sup>233</sup> These exceptions are responsible for non-compliance with the environmental protection provisions by IOCs.<sup>234</sup> For instance, the first exception may be explored by IOCs with political connections with the President to avoid compliance with the requirements of the *EIA Act*.<sup>235</sup> The last exception that allows non-compliance with the environmental impact assessment requirement appears to counteract the entire objective of the *EIA Act*. This is because the only way to determine whether a project is safe or healthy for the public is by assessing its potential impacts on the environment.

#### 2.2.3.5 The *NESREA (Establishment) Act, 2007*

The *National Environmental Standards and Regulations Enforcement Agency (Establishment) Act*<sup>236</sup> (the *NESREA Act*) is an enactment that generally regulates the protection of the environment in Nigeria. The *NESREA Act* establishes an agency that is responsible for ensuring that environmental standards, laws and regulations are enforced.<sup>237</sup> The *NESREA Act* proscribes the discharge of harmful quantities of hazardous substances into the air, water and on the land unless such discharge is permitted by any law.<sup>238</sup> In this context, the *NESREA Act* defines hazardous substances as any chemical and physical materials that threaten human health and the

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<sup>231</sup> *Ibid*, Section 40 (b).

<sup>232</sup> *Ibid*, Section 1 (c).

<sup>233</sup> *Ibid*, Section 15 (1).

<sup>234</sup> Oshionebo, Regulating Transnational Corporations, *supra* note 32 at 59.

<sup>235</sup> *Ibid*.

<sup>236</sup> *NESREA Act*, *supra* note 104.

<sup>237</sup> *Ibid*, Sections 1 and 2.

<sup>238</sup> *Ibid*, Section 27 (1).

environment.<sup>239</sup> The *NESREA Act* criminalizes any violation of its provision by an individual or corporation with a fine not exceeding 1,000,000 Naira (USD 3,269).

Moreover, it provides for an additional fine of 50,000 Naira (USD 163) for an offence committed by corporations for each day the offence persists,<sup>240</sup> and “every person who at the time the offence was committed was in charge of the body corporate shall be deemed to be guilty of such offence.”<sup>241</sup> This thesis argues that the fines imposed by the *NESREA Act* are not substantial enough to dissuade IOCs from discharging harmful quantities of hazardous substances. Another criticism of the *NESREA Act* is that the agency is not empowered to investigate oil spillages.<sup>242</sup> This thesis further argues that the absence of such a provision inhibits the powers of the NESREA to curb oil spillage, and also signifies regulatory deficiency in Nigeria’s O&G sector. However, the lack of power that incapacitates the NESREA from investigating complaints of oil spillage has been attributed to the fact that the drafters of the *NESREA Act* intended to avoid potential conflict between the roles of the NESREA and the National Oil Spillage Detection and Response Agency (NOSDRA).<sup>243</sup>

#### 2.2.3.6 The *National Oil Spillage Detection and Response Agency Act, 2006*

The National Oil Spillage Detection and Response Agency (NOSDRA) is charged with the responsibility of detecting and responding to all oil spill incidences in Nigeria.<sup>244</sup> Considering that the NOSDRA has the power to sue in its name, it could bring a claim against an IOC for a failure to comply with the standards set under the *NOSDRA Act*.<sup>245</sup> Among others, the objective of the NOSDRA is to coordinate and implement the National Oil Spill Contingency Plan (Plan) for Nigeria, and this includes establishing a viable national operational organization to ensure a safe, timely and effective response to ‘major or disastrous’ oil pollution.<sup>246</sup> A critical examination of sections 6 and 7 providing for the functions of NOSDRA suggests that apart from the detection of oil spills, it also coordinates responses to oil spills in Nigeria. The responsibility

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<sup>239</sup> *Ibid*, Section 37.

<sup>240</sup> *Ibid*, Section 27 (3).

<sup>241</sup> *Ibid*, Section 27 (4).

<sup>242</sup> *Ibid*, Section 8 (g).

<sup>243</sup> Oshionebo, *Regulating Transnational Corporations*, *supra* note 32 at 58

<sup>244</sup> *National Oil Spillage Detection and Response Agency (Establishment) Act No.15 2006*, section 1.

<sup>245</sup> *Ibid*, Section 1.

<sup>246</sup> *Ibid*, Section 5.

to coordinate responses has been described as a leadership role in a multi-agency response to oil spills in Nigeria.<sup>247</sup>

The major criticism of the NOSDRA concerns its capacity to respond to oil spillage in Nigeria. Amnesty International reported that investigations regarding oil spillage are led by the personnel of IOCs, and thus, the NOSDRA relies on IOCs to take it to oil spill sites and to provide technical data regarding the spills.<sup>248</sup> This indicates that the NOSDRA could only act on the facts and figures presented to it by the IOCs, and that makes it impossible for them to carry out their primary objective. Secondly, the *NOSDRA Act* undermines itself by providing that an objective of NOSDRA is to ensure a response to ‘major or disastrous’ oil pollution. Invariably, minor oil spills are permitted under the *NOSDRA Act*. Moreover, the *NOSDRA Act* does not provide what constitutes ‘major or disastrous’ oil pollution, thereby leaving a broad discretion for the NOSDRA.

### 2.3 Human Rights Implications of the Operations of the International Oil Companies in Nigeria’s Oil and Gas Sector

The focus of this section is on the human rights implications of the operations of the IOCs. Frequent oil spills pollute the environment upon which human survival depends and they are harmful to human health.<sup>249</sup> Equally, gas flaring has serious health implications. Dermal exposure to the hydrocarbons in the air can lead to skin redness, edema dermatitis, rashes and blisters; inhalation exposure can lead to red, watery and itchy eyes, coughing, throat irritation, shortness of breath, headache and confusion, and ingestion of hydrocarbons can lead to nausea and diarrhea.<sup>250</sup> Environmental degradation affects the quality of life, enjoyment of life, and the guaranteed fundamental human rights.<sup>251</sup> This section also considers the complicity of the IOCs in the violations of human rights of the Niger Delta communities by the Nigerian government. Regarding human rights implications of environmental pollution, while this part of the chapter acknowledges other methods of enforcing Nigeria’s environmental laws such as through the law

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<sup>247</sup> Ayobami Olaniyan, “The Multi-Agency Response Approach to the Management of Oil Spill Incidents: Legal Framework for Effective Implementation in Nigeria” (2015) 6 Afe Babalola UJ Sustainable Development L & Policy 109 at 116.

<sup>248</sup> Amnesty International, “Bad Information: Oil Spill Investigation in the Niger Delta” (2013) at 15, online (pdf): [www.amnesty.nl/content/uploads/2016/11/1311\\_rap\\_shell\\_.pdf?x93624](http://www.amnesty.nl/content/uploads/2016/11/1311_rap_shell_.pdf?x93624).

<sup>249</sup> Onwuazombe, *supra* note 4 at 132.

<sup>250</sup> Taleb, *supra* note 8 at 364.

<sup>251</sup> Adejonwo-Osho, *supra* note 75 at 3.



of torts,<sup>252</sup> it restricts its discussion to the human rights approach to environmental justice in Nigeria in light of the scope of this thesis.

Equally, this section acknowledges that under the theory of state responsibility, the Nigerian government bears the obligation to ensure compliance with, and protection of, human rights and the environment of the Niger Delta people through regulation of private conduct,<sup>253</sup> including the activities of IOCs that violate these rights. However, the thesis' approach, which argues for the imposition of obligations relating to human rights and environmental protection on IOCs, is similar to what Oshionebo explains as progressively assaulting and maybe, theoretically demystifying the conventional perspective.<sup>254</sup> Essentially, imposing obligations regarding environmental and human rights protection on IOCs through Nigeria's BITs as proposed in this thesis challenges the conventional international law approach that TNCs are not generally direct bearers of international law obligations relating to environmental and human rights obligations.

### 2.3.1 Human Right to a Healthy Environment

At the global level, no treaty provides for a stand-alone right to a healthy environment. This is so even though it is been several decades since "the first formal international law recognition of the links between environmental protection and human rights."<sup>255</sup> This recognition dates back to the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) of 1972.<sup>256</sup> Principle 1 of the Stockholm Declaration states that "man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being and he bears a solemn responsibility to protect and improve the environment for the present and future generations."<sup>257</sup>

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<sup>252</sup> The cases of *Shell Petroleum Company of Nigeria Ltd v Anaro* (2000) 2 WRN part 111 and *Umudje v Shell Petroleum Company of Nigeria Ltd* (1975) 11 S.C. 155 demonstrate that the environmental degradation could be addressed by a tort action hinged on the rule in *Ryland v Fletcher*.

<sup>253</sup> Oshionebo, *Regulating Transnational Corporations*, *supra* note 32 at 116.

<sup>254</sup> *Ibid.*

<sup>255</sup> Rebecca Bratspies, "Do We Need a Human Right to a Healthy Environment" (2015) *Santa Clara J Intl L* 31 at 52 [Bratspies].

<sup>256</sup> Stockholm Declaration of the United Nations Conference on the Human Environment, UN Doc No A/CONF.48/14/Rev. 1 (1972).

<sup>257</sup> *Ibid.*

However, since 1972, there has been a “widespread public and legal recognition of the right to a healthy environment across the world”<sup>258</sup> that has led to the on-going debate for its recognition by the United Nations. The recognition of the right to a healthy environment would strengthen the understanding that the protection of human rights requires environmental protection.<sup>259</sup> Thus, the “recognition of the right to a healthy environment by the United Nations would not only make this right universal in application but would also serve as a catalyst for the implementation of stronger measures to effectively respect, fulfil and promote this right.”<sup>260</sup> Moreover, such recognition will complement and strengthen both “regional and national norms and jurisprudence” that have developed over the years.<sup>261</sup>

Over 100 states have recognized the right to a healthy environment in their constitutions,<sup>262</sup> with Portugal being the first to do so.<sup>263</sup> Some states’ constitutions have included the procedural aspect of environmental rights such as rights to obtain information, “participate in decision-making” regarding environmental issues, as well as “obtain access to justice if the right to a healthy environment” has been either endangered or violated.<sup>264</sup> Others have enacted laws spelling out the substantive elements of the right to a healthy environment.<sup>265</sup> Indeed, no other relatively ‘new’ human right has attracted such prevalent recognition in national constitutions.<sup>266</sup>

However, the Nigerian constitution does not provide for the right to a healthy environment. Chapter 2 of the Nigerian constitution refers to the environmental objectives of the state and provides that “the state shall protect and improve the environment and safeguard the water, air, and land, forest, and wildlife in Nigeria.”<sup>267</sup> While the main aim of this provision is to ensure a

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<sup>258</sup> Report of the Special Rapporteur on Issues of Human Rights, *supra* note 79, at 11 para 29.

<sup>259</sup> *Ibid* at 18 para 39.

<sup>260</sup> *Ibid* at para 54.

<sup>261</sup> *Ibid* at 18, para 39.

<sup>262</sup> David R Boyd, “Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment” in John H Knox & Ramin Pejan, eds, *The Human Rights to a Healthy Environment* (Cambridge, Cambridge University Press, 2018) at 4. For further analysis of the application of the right to a healthy environment across the countries of the globe, see David R Boyd, “The Implicit Constitutional Right to Live in a Healthy Environment” (2011) Rev European Community & Intl Environmental L 20 at 172 – 7.

<sup>263</sup> Report of the Special Rapporteur on Issues of Human Rights, *supra* 79 at 11, para 30.

<sup>264</sup> *Ibid*, at 11, para 31.

<sup>265</sup> *Ibid*, para 32. Substantive right to a healthy environment refers to the provisions of national constitutions and treaties spelling out in concrete terms the existence of the right to a healthy environment.

<sup>266</sup> *Ibid*, para 30.

<sup>267</sup> The Nigerian Constitution, *supra* note 71, Section 20.

healthy environment,<sup>268</sup> the Nigerian constitution prevents the courts from giving effect to it.<sup>269</sup> Section 6 (6) (c) of the Nigerian constitution provides:

The judicial powers vested in accordance with the foregoing provisions of this section – shall not except as otherwise provided by this constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.

This provision implies that all provisions of chapter 2 of the constitution, including the provisions relating to the environment in section 20, are non-justiciable. As a result, the host communities are not allowed to rely on section 20 of the Nigerian constitution to claim a breach of a right to a healthy environment against the Nigerian government before a law court in Nigeria. The Nigerian courts are also, in some cases, reluctant to give effect to the claims of host communities regarding environmental pollution as the courts prefer to take an economic-approach as opposed to a sustainable approach and consider that the Nigerian economy depends on O&G.<sup>270</sup> Although writers have suggested that section 6 (6) (c) of the Nigerian Constitution inhibits the enforceability of the right to a healthy environment in a Nigerian court,<sup>271</sup> this thesis argues that the domestication of the *African Charter on Human and Peoples' Rights* (the African Charter) in Nigeria undermines the argument. This is because the ratification of the African Charter automatically makes it an Act of the legislature which all government authorities, including the courts of competent jurisdiction, are bound to enforce.<sup>272</sup> Moreover, the non-justiciability of chapter 2 applies only to the extent that section 6 (6) (c) of the Constitution provides.<sup>273</sup> The Supreme Court of Nigeria made this point in *Attorney General of Ondo State v Attorney General of Nigeria*, where it held that where an Act is passed into law in fulfillment of

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<sup>268</sup> Ogbodo, *supra* note 72 at 18.

<sup>269</sup> The Nigerian Constitution, *supra* note 71, Section 6 (6) (c).

<sup>270</sup> Kaniye Ebeku, "Judicial Attitudes to Redress for Oil Related Environmental Damages in Nigeria" (2003) 12 *Rev European, Comparative & Intl Environmental L* 199 at 207.

<sup>271</sup> Adejonwo-Osho, *supra* note 75 at 125.

<sup>272</sup> *African Charter on Human and Peoples Rights (Ratification and Enforcement) Act*, *supra* note 74, section 1.

<sup>273</sup> Halima Doma Kutigi, "Towards Justiciability of Economic, Social, and Cultural Rights in Nigeria: A Role for Canadian-Nigerian Cooperation?" (2017) 4 *Transnational Human Rights Rev* 126 at 135.

the directive principles of state policy, such an Act becomes enforceable in any court of law in Nigeria.<sup>274</sup>

At the regional level, Article 24 of the African Charter recognizes the right to a healthy environment.<sup>275</sup> The Nigerian government is a party to the African Charter, with an obligation to protect the right to a healthy environment of the Niger Delta communities. The African Charter, in its article 24, provides that “all peoples shall have the right to a general satisfactory environment favourable to their development.” Although the content of the right to a healthy environment has been disputed,<sup>276</sup> its existence, particularly concerning the environmental degradation caused by IOCs in Nigeria, is beyond contestation. As a result, Niger Delta communities, through various nongovernmental organizations, have relied on the African Charter in search of a remedy. An author notes that:

The Social and Economic Rights Action Center (SERAC) and the Centre for Economic and Social Rights (CESR) communication against Nigeria before the African Commission on Human and Peoples’ Rights (African Commission or Commission) reiterates the fact that inadequate protection of human rights at the domestic level necessitates the existence of human rights mechanisms at an international level.<sup>277</sup>

Relying on Article 24 of the African Charter, the Court of Justice of the Economic Community of West African States in *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria*, held that that the *Ogoni* people of the Niger Delta had their rights to a healthy and satisfactory environment violated by the failure of the Nigerian government to prevent pollution from oil exploration in the community.<sup>278</sup> Also, the African Commission on Human and Peoples’ Rights (African Commission) in *Socio and Economic Rights Action Center v Federal Republic of Nigeria* (SERAC Case), found merit with the Communication filed by the SERAC that the Nigerian government violated the right to a general satisfactory environment of the *Ogoni* people

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<sup>274</sup> *The Attorney General of Ondo State v Attorney General of Nigeria*, (2002) 9 Nigeria Weekly Law Report, Part 772 at 222.

<sup>275</sup> African Charter, *supra* note 18. The *United Nations Economic Commission for Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* 25 June 1998 (entered into force 30 October 2001), Articles 1 and 3 (1) also recognize the right to a healthy environment. See also the *Arab Charter on Human Rights* 22 May 2004 (entered into force 15 March 2008), Article 38 which provides for the right to a healthy environment.

<sup>276</sup> Morne Van Der Linde, “Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples’ Rights in light of the SERAC communication” (2003) 3 African Human Rights LJ 167 at 174.

<sup>277</sup> *Ibid.*

<sup>278</sup> *Socio-Economic Rights and Accountability Project v Nigeria*, (2012) Judgment No ECW/CCJ/JUD/18/12.

of the Niger Delta under article 24 of the African Charter by “failing to protect the *Ogoni* population from the harm caused by the NNPC-Shell Consortium but instead used its security forces to facilitate the damage.”<sup>279</sup> The African Commission noted that the right to a general satisfactory environment is also known as the right to a healthy environment.<sup>280</sup>

As applaudable as the judgment is, it is unsatisfactory for the African Commission to merely “appeal” to the Nigerian government to conduct an investigation into the human rights violations and undertake a “cleanup of lands and rivers damaged by oil operations.”<sup>281</sup> The use of the word “appeal” reduces the effect of the obligation owed by the Nigerian government to the Niger Delta communities. However, the decision of the African Commission is understandable in the light of the fact that it is only empowered to make recommendations to state parties, which according to Oshionebo, can either be accepted or rejected by states.<sup>282</sup>

### 2.3.2 Human Right to Health

Article 12 (1) of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* provides for “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>283</sup> This provision encapsulates the right to health. Although the provision does not expressly guarantee a right to a healthy environment, it is arguable that certain acts that amount to a breach of the right to a healthy environment under the African Charter may affect the enjoyment of the highest standard of physical health.<sup>284</sup>

The United Nations Committee on Economic, Social and Cultural Rights acknowledges that the right to health includes several socio-economic conditions that lead to a healthy life and also extends to the fundamental determinants of health such as access to safe water, healthy

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<sup>279</sup> *SERAC v Nigeria*, *supra* note 29, paragraph 50. Also, in *Gbemre v SPDC*, *supra* note 12, a Nigeria’s Federal High Court held that SPDC’s continuous gas flaring in the course of oil exploration violates the applicant community’s right to life, including healthy environment.

<sup>280</sup> *SERAC v Nigeria*, *Ibid*, paragraph 52.

<sup>281</sup> *Ibid*, the ruling section.

<sup>282</sup> Oshionebo, *Regulating Transnational Corporations*, *supra* note 32 at 111.

<sup>283</sup> *ICESCR*, *supra* note 9.

<sup>284</sup> For instance, the exposure of the skin to polluted air caused by the act of gas flaring can lead to edema dermatitis, skin rashes and blisters. See Taleb, *supra* note 8 at 364. In this regard, it is doubtful that a person who suffers from edema dermatitis, skin rashes or blisters enjoys the highest standard of physical health. Also, see *SERAC v Nigeria*, *supra* note 29, where the Court of Justice of the Economic Community of West Africa held the position that the failure of the Nigerian government to prevent pollution from oil exploration amounts to a violation of right to a healthy environment under article 24 of the African Charter, *supra* note 18.

environment and food.<sup>285</sup> States have an obligation to respect, protect and fulfill the right to health and the content of these obligations extends to preventing third parties such as IOCs from violating the right to health.<sup>286</sup> The right to health will be violated if the state of the environment is such that it would upset human health. Individuals in the Niger Delta communities suffer from diseases such as cancer, leukemia, chronic bronchitis, respiratory disorders and cardiovascular diseases as a result of inhaling air that is contaminated by flared gas.<sup>287</sup> The pervasive water-related diseases such as typhoid and cholera are often linked to the pollution of their environment, which is caused by the operations of the IOCs.<sup>288</sup>

Further, Article 12 of the ICESCR states that “the steps to be taken by the State Parties to the present Covenant to achieve the full realization of this right shall include those necessary for . . . [t]he improvement of all aspects of environmental and industrial hygiene.” Regarding this provision, “the need to protect and improve the environment is mentioned as a means of achieving the right to health.”<sup>289</sup>

### 2.3.3 Human Right to Life

The Nigerian Constitution provides a broad scope of human rights from which a right to a healthy environment can be derived, and one of such is the right to life. Section 33 of the Nigerian Constitution provides that “every person has the right to life and no one shall be deprived intentionally of his life...” The right to life is also protected under international instruments.<sup>290</sup> Article 4 of the African Charter provides that “every human being shall be entitled to respect for his life” and that no person should be deprived of the right to life.<sup>291</sup> The right to life is universal and obligatory, and no other right makes sense without it, and the protection of it extends to the protection of the environment. Regarding the scope of the right to life, Hunter David stated that:

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<sup>285</sup> *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12, CESCR UN Doc E/C.12/2000/4*, para 4 [General Comment No 14].

<sup>286</sup> *Ibid*, para 33.

<sup>287</sup> Adeoye O Akinola, “Resource Misgovernance and the Contradictions of Gas Flaring in Nigeria: A Theoretical Conversation” (2018) 53 *J Asian & African Studies* 749 at 753 [Akinola]. See also, Onwuazombe, *supra* note 4 at 136.

<sup>288</sup> Akinola, *Ibid*.

<sup>289</sup> Bratspies, *supra* note 255 at 59.

<sup>290</sup> *International Covenant on Civil and Political Right*, *supra* note 9, Article 6, *Universal Declaration of Human Rights*, 10 December 1948, Article 3 and *African Charter on Human and Peoples’ Rights*, *supra* note 18, Article 4.

<sup>291</sup> African Charter, *Ibid*.

Initially, the right to life was aimed at preventing arbitrary killing by the government. In recent years, the right to life has evolved to extend to address certain environmental harms that directly or indirectly infringe on the right to life. This extension of the ambit of the right to life is as a result of the efforts and works of environmental and human rights advocates.<sup>292</sup>

The above quote demonstrates that the right to life has gone beyond the brutality of a state's security agents that leads to the death of its citizens. Similarly, the UN Human Rights Committee has interpreted the right to life broadly.<sup>293</sup> Accordingly, the right to life also concerns the right of all persons "to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death."<sup>294</sup> States have an obligation to adopt necessary laws and measures for the protection of their citizens from all foreseeable threats, which include threats from corporate entities.<sup>295</sup> For states to protect the right to life, they should take necessary steps to "address the general conditions in the society that may" pose direct threats to life, including environmental degradation.<sup>296</sup> Degradation of the environment and "unsustainable development" are considered to be a serious threat to the right to life of both "present and future generations," and therefore, states should ensure that the environment is protected against the pollution that is caused by corporate actors.<sup>297</sup> Indeed, any activity by either the state or a corporate body that reduces life expectancy breaches the right to life.<sup>298</sup> Therefore, there is no doubt that environmental pollution continues to constitute a threat to life as it reduces life expectancy and could cause death. For instance, after a significant oil spill several years ago, about 180 people were reported to have died in a Niger Delta community as a result of the discharge of toxins into the environment.<sup>299</sup>

The idea that the right to life could be threatened by environmental degradation has also attracted judicial recognition in Nigeria. In the celebrated case of *Gbemre v Shell Petroleum Development Corporation of Nigeria Ltd*,<sup>300</sup> the federal high court interpreted the right to life to include the right to be free from pollution that endangers life such as gas flaring. In the case, Mr. Gbemre

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<sup>292</sup> Hunter, Salzman & Zaelke, *supra* note 11 at 1374.

<sup>293</sup> *General Comments No 36*, *supra* note 16.

<sup>294</sup> *Ibid*, para 3.

<sup>295</sup> *Ibid*, para 18.

<sup>296</sup> *Ibid*, para 26.

<sup>297</sup> *Ibid*, para 62.

<sup>298</sup> Onwuazombe, *supra* note 4 at 120.

<sup>299</sup> *Ibid* at 121.

<sup>300</sup> *Gbemre v SPDC*, *supra* note 12, para 90.

sued SPDC, NNPC and the Attorney General of the federation in a representative capacity, for and on behalf of himself and a community in the Niger Delta. He claimed, among others, that gas flaring caused by SPDC violates their right to life, the dignity of persons and general satisfactory environment as stipulated in Nigeria's constitution and the African Charter which has been domesticated in Nigeria. Among others, the court held that the fundamental rights to life (including a healthy environment) and dignity of a human person under the constitution and the African Charter were violated by the gas flaring activities of SPDC in the course of their oil production.<sup>301</sup> The court further held that the failure of the SPDC to conduct an environmental impact assessment also contributed to the abuse of the fundamental rights to life and dignity of human person.<sup>302</sup>

However, after several years, the final judgment of the court granting a restraining order against the SPDC as partly sought by the plaintiff is yet to be enforced, and this has raised questions regarding its value to the Niger Delta people and their quest to protect their environment and human rights. This, perhaps, explains why the pronouncement of the court has not deterred IOCs from their continuous gas flaring in the Niger Delta communities. Be that as it may, a major significance of this case is its recognition of IOCs as duty bearers within Nigeria's domestic law as it demonstrates the applicability of environmental and human rights provisions on IOCs in Nigeria.<sup>303</sup>

#### 2.3.4 Human Rights to Water and Food

*"Water, water everywhere, not a drop to drink."*<sup>304</sup>

The access to clean water and food of communities across the Niger Delta is closely related to land and environmental quality.<sup>305</sup> Environmental degradation directly affects the quality of water and food to which the Niger Delta is entitled. One of the studies of the environmental impacts of oil operations in the Niger Delta region reveals that incessant oil spills of various magnitudes have resulted in massive pollution of water bodies as well as degradation of

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<sup>301</sup> *Ibid* at 30

<sup>302</sup> *Ibid.*

<sup>303</sup> Onwuazombe, *supra* note 4 at 135.

<sup>304</sup> Samuel Taylor Coleridge, *The Rime of the Ancient Mariner* (Reynal & Hitchcock, Inc. 1946) 1797 cited in Obiora Amede, "Symbolic Episodes in the Quest for Environment Justice" (1999) 21 Human Rights Q 464 at 465.

<sup>305</sup> Amnesty International, "Negligence in the Niger Delta: Decoding Shell and Eni's Poor Record on Oil Spills" (2018) at 13, online (pdf): [amnesty.org/download/Documents/AFR4479702018ENGLISH.PDF](https://www.amnesty.org/download/Documents/AFR4479702018ENGLISH.PDF).



“agricultural land, destruction of” the artisanal fishery, and general adverse socio-economic consequences.<sup>306</sup>

The rights to water and food are considered economic and social rights, which are guaranteed under the ICESCR.<sup>307</sup> Article 11 of the ICESCR guarantees the right to an adequate standard of living, which includes adequate water and food.<sup>308</sup> The UN Committee on Economic, Social and Cultural Rights has articulated a three-pronged obligation of states regarding the rights under the ICESCR.<sup>309</sup> They are the obligations to respect, protect and fulfil, among others, the rights to water and food in the context of the impacts of business activities.<sup>310</sup> The state obligations apply to businesses whether their operations are transnational or purely domestic, or whether private actors or states wholly own them.<sup>311</sup>

In the context of business activities’ impacts on the rights to water and food, states’ obligation to protect is the most relevant.<sup>312</sup> Within the ambit of the obligation to protect, states should adopt an appropriate legal framework to ensure that businesses engage in due diligence to ensure that they “identify, prevent and mitigate the” adverse impact of their operations on the rights to water and food.<sup>313</sup> Besides, states should ensure that they provide access to remedies to victims of corporate abuses of economic and social rights.<sup>314</sup> The obligation of the state to respect the rights to water and food is violated when the state prioritizes business interests over these rights without a good reason,<sup>315</sup> while the obligation to fulfil requires that states take appropriate steps to encourage the enjoyment of the rights to water and food.<sup>316</sup> All of these show that corporate activities could violate economic and social rights such as the rights to water and food, and states have an obligation to ensure the protection of these rights.

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<sup>306</sup> Kaniye Ebeku, “Judicial Attitudes to Redress for Oil Related Environmental Damages in Nigeria” (2003) 3 African Human Rights LJ 149 at 157 [Ebeku].

<sup>307</sup> ICESCR, *supra* note 9.

<sup>308</sup> *Ibid.*

<sup>309</sup> *Ibid.*

<sup>310</sup> *General Comment No 24, supra* note 19, para 10.

<sup>311</sup> *Ibid.*, para 3.

<sup>312</sup> *Ibid.*, para 10.

<sup>313</sup> *Ibid.*, para 16.

<sup>314</sup> *Ibid.*, para 14.

<sup>315</sup> *Ibid.*, para 12.

<sup>316</sup> *Ibid.*, para 23.

The right to water is necessary for securing an adequate standard of living because it is one of the essential conditions for human survival.<sup>317</sup> As it relates to the right to water, three factors are relevant under all circumstances in considering the adequacy of water: availability, quality and accessibility.<sup>318</sup> The Niger Delta communities do not have access to water that meets these requirements. This is because acid rain resulting from gas flaring pollutes drinkable rainwater<sup>319</sup> and contaminates freshwater.

The United Nations Committee on Economic, Social and Cultural Rights interpreted the content of the right to food to include not only the availability of food but also the quality and quantity of food that is “free from adverse substances.”<sup>320</sup> Regarding the impact of environmental pollution on the right to food, oil pipelines run across farmlands, and head and flow stations are often close to farmlands.<sup>321</sup> Consequently, when an oil spill occurs, its spillage on the land makes cultivation difficult for these communities, and when they eventually cultivate, the yield is inferior.<sup>322</sup> The African Commission in the SERAC Case held that the minimum expectation of the right to food is that the Nigerian government should not contaminate food sources and should not allow IOCs to contaminate food sources or prevent efforts of the people to feed themselves as the right to food is essential to the fulfilment of other rights such as rights to health.<sup>323</sup> Unfortunately, the Nigerian government has failed in its obligation under ICESCR and the African Charter to protect these rights as the IOCs continuously violate them.

### 2.3.5 International Oil Companies’ Complicity in Violations of Human Rights in Niger Delta Communities

The doctrine of ‘complicity’ recognizes the indirect participation of an actor in the irresponsible conduct of another party who commits the actual offence.<sup>324</sup> The subject of corporate

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<sup>317</sup> *General Comment No 15*, *supra* note 54, 1 at 2 para 3.

<sup>318</sup> *Ibid*, para 12.

<sup>319</sup> Ahmed, *supra* note 86.

<sup>320</sup> *General Comments on the Right to Adequate Food (Art.11)*, UNESOR, 20<sup>th</sup> Sess, UN Doc E/C.12/1999/5, (1999), Para 8.

<sup>321</sup> Chukwuemeka Chuks-Ezike, “Environmental Crime Liability of the Government of Nigeria in its Oil Pollution Menace” (2018) at 1, online (pdf): <<C:/Users/user/Downloads/environmental-crime-liability-of-the-nigerian-government-in-its-oil-pollution-menace.pdf>>.

<sup>322</sup> *Ibid*.

<sup>323</sup> *SERAC v Nigeria*, *supra* note 29 para 65.

<sup>324</sup> Benjamin Richardson, “Socially Responsible Investing for Sustainability: Overcoming Its Incomplete and Conflicting Rationales” (2013) 2 *Transnational Environmental L* 311 at 317.

‘complicity’ takes four different forms.<sup>325</sup> These are: where a corporation either aids or abets the violation of human rights; where a corporation has a joint venture agreement with a host state and knows or ought to know of the human rights violations committed by the latter in fulfillment of the agreement; where the corporation benefitted from the abuse, for instance, the state security forces are used to suppress peaceful protest against business operations, and finally, where there are continuous violations of human rights and the corporation remains silent.<sup>326</sup>

In the context of the Niger Delta communities and the IOCs, it is widely-acknowledged that IOCs encouraged the Nigerian government to engage the Nigerian military force to pulverize individuals who protested against the environmental degradation and human rights violations that were examined earlier as being caused by the IOCs. Therefore, apart from the direct violation of environmental and human rights, the complicity of IOCs leads to a breach of the human rights of the people of the Niger Delta, such as rights to life and dignity of the human person.

Muchlinski explained complicity in the context of *Ken Saro Wiwa v Royal Dutch Petroleum*,<sup>327</sup> where he noted that the plaintiffs claimed that SPDC was allegedly “supporting the Nigerian state in its repression of the Ogoni people through *inter alia* the supply of money, weapons and logistical support to the Nigerian military which carried out the abuses.”<sup>328</sup> In the critique of human rights violations involving the complicity of an IOC in Nigeria, Amnesty International reports that “the evidence [it has] reviewed shows that [SPDC] repeatedly encouraged the Nigerian military to deal with community protests, even when it knew the horrors this would lead to – unlawful killings, rape, torture, the burning of villages.”<sup>329</sup> Similarly, it reports that “sometimes [SPDC] played a more direct role in the bloodshed – for example by transporting armed forces to break up protests, even when it became clear what the consequences would be.”<sup>330</sup>

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<sup>325</sup> Commission on Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights* UNESCOR, 267<sup>th</sup> Sess, UN Doc E/CN.4/2005/91, 13 at para 34.

<sup>326</sup> *Ibid.*

<sup>327</sup> *Wiwa v. Royal Dutch Petroleum Company* [2001] 226 F.3d 88b, 2nd Circuit 532 U.S. 941.

<sup>328</sup> Peter Muchlinski, “Human rights and multinationals: Is there a Problem?” (2001) 77 Intl Affairs J 31 at 41.

<sup>329</sup> Amnesty International, “Investigate Shell for complicity in murder, rape and torture” (2017) online: <https://www.amnesty.org/en/latest/news/2017/11/investigate-shell-for-complicity-in-murder-rape-and-torture/>.

<sup>330</sup> *Ibid.*

The establishment of the complicity of IOCs in respect of human rights violations in the Niger Delta community remains a topical issue that has suffered a setback as a result of the difficulty of establishing extraterritorial jurisdiction in foreign courts before which such cases are brought. Providing a mechanism that offers a legal basis for establishing the extraterritorial jurisdiction of the domestic courts of the home states of the IOCs operating in Nigeria is partly the primary aim of this thesis.

#### 2.4 Justifying the Internationalization of IOCs' Obligations through Nigeria's Bilateral Investment Treaties

The idea that IOCs' obligations regarding environmental and human rights protection should be internationalized through BITs may arouse inquisitive skepticism as it is generally accepted that such obligations should be addressed through domestic laws. Although this view is tenable, this thesis argues that making efforts at the domestic level alone is insufficient to address the environmental and human rights issues arising from the operation of IOCs.

The survey and analysis of Nigeria's domestic regulations reveal that there are several deficiencies in Nigeria's environmental laws, and this situation could be described as the 'governance gap,' having regard to their direct and indirect negative impacts on the human rights of host communities.<sup>331</sup> Further, the thesis recognizes that the economic relevance of the O&G sector to the Nigerian government may have contributed to the lack of political will by the government to address these deficiencies. The Nigerian government often takes cognizance of the revenue that accrues from O&G production in Nigeria,<sup>332</sup> as it contributes significantly to Nigeria's economy accounting for sixty-five percent of the government's total revenue.<sup>333</sup> Since the government has equity stakes in the investments of IOCs through Joint Venture Agreements, strict regulation of the activities of the IOCs may also affect the economic benefits that accrue to the government. It is expected, however, that the Nigerian government should rise above its economic interest to bring its domestic laws in line with the realities facing the Niger Delta people as the importance of effective domestic regulations cannot be overemphasized.

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<sup>331</sup> Simons & Macklin, *supra* note 33 at 9.

<sup>332</sup> Felix M. Edoho, "Oil Transnational Corporations: Corporate Social Responsibility and Environmental Sustainability," (2008) 15 Corporate Soc Responsibility & Environmental Management J 210 at 212.

<sup>333</sup> The latest report of the Nigeria Extractive Industries Transparency Initiative (NEITI) in 2019 reports that Nigeria is respectively Africa's and the world's largest and 13<sup>th</sup> largest oil producer See NEITI Reports, (last modified 22 November 2019) online: [eiti.org/es/implementing\\_country/32](http://eiti.org/es/implementing_country/32) [NEITI Report].

Several works have demonstrated how these regulations could be significantly improved to address the environmental and human rights implications of IOCs' operations in the Niger Delta.<sup>334</sup> However, dealing with the domestic laws alone will not address the challenges that the Nigerian government might face within Nigeria's BIT. These challenges, as addressed in section 3.4.2 of chapter 3, are a result of the government's BIT obligations such as protection from expropriation and the obligation under the FET clause that may have a regulatory chill on the efforts of the government to improve its domestic laws. This thesis argues that it is equally necessary to tackle these challenges within the BITs by amending the clause regarding expropriation, and in the process, impose obligations relating to environmental and human rights protection on IOCs in BITs.

Beyond domestic regulation, this thesis argues that through BITs, international law could also play a significant role in ensuring that IOCs are held accountable for the pollution of the environment and violation of human rights. This argument builds on Simons' and Macklin's suggestion that the "governance gap" could be observed [and perhaps addressed], among others, from the perspective of the failure of a host government and home states, and from the *inability of "international legal orders to assert effective governance over TNCs."*<sup>335</sup> This thesis observes the lack of accountability by the IOCs through the optics of international law and, connects with the objective of the Third World Approaches to International Law to offer an alternative legal edifice for international governance<sup>336</sup> for addressing IOCs' misconduct through BITs.

Since non-state actors such as IOCs in Nigeria are protected by international instruments such as BITs, and also, they leverage on the failure of existing international law regime that does not insist on corporations' liability for pollution of the environment and violation of human rights, it is not unreasonable to explore the potential of international law to tackle these problems. The approach of this thesis to turn to international law through BITs is already garnering support from the United Nations Intergovernmental Working Group (the UN Intergovernmental Working

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<sup>334</sup> Odumosu, Transferring Alberta's Gas Flaring *supra* note 211, Ekhaton, Public Regulation of the Oil and Gas Industry in Nigeria, *supra* note 195 and Oshionebo, Regulating Transnational Corporations *supra* note 32

<sup>335</sup> Simons & Macklin, *supra* note 33 at 272.

<sup>336</sup> Makau Mutua, "What is TWAIL?" (2000) 94 American Society Intl L at 1.

Group).<sup>337</sup> The UN Intergovernmental Working Group acknowledges in the *Zero Draft Treaty* that agreements between states such as BITs could be used to provide access to justice to victims of human rights violations, which include environmental rights.<sup>338</sup> However, the practical challenges of using BITs as an international instrument to address environmental and human rights concerns in the Niger Delta, particularly the possible lack of political will by both the Nigerian government and the relevant home states, are recognized in chapter 4.

## 2.5 Conclusion

The crux of the argument in this chapter is that IOCs' activities in Nigeria's Niger Delta communities affect the environment and human rights. The analysis of Nigeria's environmental laws in this chapter demonstrates some inadequacies, which make them ineffective. The analysis points to the need for domestic legislative reforms in Nigeria in order to address IOCs' pollution of the environment and violation of human rights.

However, in light of the ultimate aim of this thesis to consider how international law can be employed to complement Nigeria's laws to hold IOCs accountable, this chapter argues that Nigeria could explore BITs for this purpose. In effect, the chapter argues that regulating IOCs should not be restricted to arguments for the improvement and effective enforcement of Nigeria's regulations.

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<sup>337</sup> The UN Open-Ended Intergovernmental Working Group (OEIGWG) is already bringing to table the elements of a legally binding international instrument on TNCs and other business to address their impact on human rights and environment. The components of their draft instrument as it relates to this thesis are discussed in chapter 3.

<sup>338</sup> *Zero Draft Treaty*, *supra* note 36, Article 12 (3).

## **CHAPTER THREE: INCORPORATING OBLIGATIONS RELATING TO ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS IN NIGERIA'S BITs**

### 3.1 Introduction

Having examined Nigeria's domestic regulations relating to the O&G sector and their challenges, which have led to environmental degradation and human rights violations in the Niger Delta communities, this chapter examines international mechanisms that have been adopted to address these challenges. It discusses international codes, principles, and guidelines that stipulate IOCs' obligations regarding environmental and human rights protection. The core argument of this chapter concerning these international instruments is that they are ineffective in executing their aims and objectives. This may be attributable to the fact that they are not designed to be legally binding on IOCs. Instead, they are intended to encourage IOCs to consider them in their operations. Therefore, IOCs are not liable for a failure to operate within their provisions.

The second substantive part of this chapter situates BITs within the broader conversation in international law concerning IOCs' obligations regarding environmental protection and human rights. It examines the objectives of Nigeria's BITs, as well as provisions such as the 'guarantee against expropriation' and the 'fair and equitable treatment' clauses, which may have implications on the environmental and human rights protection of the Niger Delta communities. The last part of the chapter analyzes the incorporation of IOCs' obligations relating to the environment and human rights in Nigeria's BITs and adopts a model draft for these obligations. Also, it argues that imposing these obligations on IOCs in Nigeria's BITs could provide options for ensuring that IOCs operate within internationally recognized standards.

Overall, the central argument of this chapter is that international law does not currently offer an effective measure that tackles environmental degradation and human rights violations in the context of IOCs' operations in the Niger Delta. As a result, this chapter advances an argument for obligations in BITs relating to the environment and human rights, which could be enforced against IOCs.

## 3.2 International Regulation of International Oil Companies

This section examines international law's approaches for responding to IOCs' contributions to environmental degradation and human rights violations in the Niger Delta. Specifically, it analyzes the initiatives of multilateral organizations such as the UN, the OECD and the World Bank in this regard. Two points must be noted in respect of the provisions of these initiatives. First, they generally recognize that business activities could violate human rights. In particular, they acknowledge that environmental degradation adversely impacts human rights. Second, these initiatives seek to influence rather than compel IOCs to respect the environment and human rights of their host communities. Perhaps, the soft nature of these initiatives is connected to why they have been ineffective in their bid to address the pollution of the environment and violations of human rights by TNCs in Third World countries,<sup>339</sup> and this raises a compelling question regarding the value of their existence and the need for a change. As a scholar rhetorically asked:

Of what good is the jungle of documents created by these fancy international organizations if they cannot deliver an iota of satisfaction to the poor masses of our so-called civilized universe? When we encounter a situation like this, we are forced to reassess our profound claims to wisdom. Immediately, a feeling about the inadequacy of traditional methods of negotiation comes to mind. If we are to evolve beyond the current stalemate to prove that we are not a static society, then an innovative experiment is necessary.<sup>340</sup>

This concern, which was raised a couple of decades ago, continues to be relevant in the contemporary practice of international law, considering that IOCs are consistent in their acts that pollute the environment as well as violate human rights in the Niger Delta region. The following section analyzes some of these initiatives and highlights their inadequacies.

### 3.2.1 The *United Nations Global Compact*, 2000

In 2000, the *United Nations Global Compact* (UNGC) was inaugurated as a multilateral initiative seeking to engage the commitments of private businesses, UN agencies and civil society organizations towards the protection of human rights, labour rights, and the environment.<sup>341</sup> The

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<sup>339</sup> Evaristus Oshionebo, *Regulating Transnational Corporations*, *supra* note 32 at 116.

<sup>340</sup> Sudhir K. Chopra, "Multinational Corporations in the Aftermath of Bhopal: The Need for a New Comprehensive Global Regime for Transnational Corporate Activity" (1994) 29 *Valparaiso UL Rev* 235 at 240.

<sup>341</sup> Graham Knight & Jackie Smith, "The Global Compact and Its Critics: Activism, Power Relations, and Corporate Social Responsibility" (2008) online: [link.springer.com/chapter/10.1057/9780230612792\\_9](http://link.springer.com/chapter/10.1057/9780230612792_9) 191 at 192.



UNGC has ten principles, five of which encourage companies to embrace a set of primary values within their scope of influence in the areas of human rights and environment. Specifically, companies should respect states' effort to protect internationally recognized human rights and to endeavour that they are not complicit in any abuse of human rights in their operations.<sup>342</sup> Also, corporations should support precautionary approaches to environmental issues and should carry out initiatives in order to promote their responsibilities regarding the environment.<sup>343</sup> Member corporations are expected to make an annual report demonstrating their commitments to these principles.<sup>344</sup>

Over the years, there have been debates about the effectiveness of the UNGC. Although some argue that the UNGC presents opportunities for businesses, international organization and civil societies to dialogue in order to develop a global standard for environmental practices,<sup>345</sup> it is arguable that the UNGC does not have the capacity to implement its principles. The dialogue approach is what Mujih describes as an “era of cooperation” instead of actual regulation by the UN.<sup>346</sup> The most significant criticism against this approach is the fact that such cooperation between UN agencies and TNCs would result in conferring legitimacy on TNCs with poor social and environmental records.<sup>347</sup> This entails that the UNGC permits irresponsible corporations to use the UN logo in carrying out their activities without complying with the principles.<sup>348</sup>

There is no enforcement mechanism within the UNGC. Rather, it expects self-regulation from the TNCs.<sup>349</sup> Although Oshionebo recognized this deficiency, he argues that the integrity measures in place have the potential to address the abuse of the UNGC principles by TNCs<sup>350</sup> as a failure by a partner corporation to file a Communication expressing its compliance progress for

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<sup>342</sup> UNGC, *supra* note 111, Principles 1 and 2.

<sup>343</sup> *Ibid.*, Principles 7 and 8.

<sup>344</sup> Christian Voegtlin & Nicola M. Pless, “Global Governance: CSR and the Role of the UN Global Compact” (2014) 122 *J Bus Ethics* 179 at 181 [Voegtlin & Pless].

<sup>345</sup> Andreas Rasche & Georg Kell, *The United Nations Global Compact, Achievements, Trends and Challenges* 1<sup>st</sup> ed (Cambridge: Cambridge University Press, 2010) cited in *ibid.* See also, Georg Kell & David Levin, “The Global Compact Network: An Historic Experiment in Learning and Action” (2003) 108 *Bus & Society Rev* 151 at 157 – 158.

<sup>346</sup> Edwin Mujih, *Regulating Multinationals in Developing Countries: A Conceptual and Legal Framework for Corporate Social Responsibility* (Surrey, England: Gower Publishing Limited, 2012) at 139 [Mujih].

<sup>347</sup> *Ibid* at 140.

<sup>348</sup> *Ibid.*

<sup>349</sup> Oshionebo, *Regulating Transnational Corporations*, *supra* note 32 at 125.

<sup>350</sup> *Ibid.*

two consecutive years may result in labeling such corporation as “inactive.”<sup>351</sup> Further, the UNGC Office introduced a 3-differentiation level based on the depth of participant’s disclosure of their efforts to “uphold the ten principles of the UNGC.”<sup>352</sup> Similarly, in the event of a written complaint about a violation of UNGC principles by a participant corporation, the UNGC Office evaluates it to determine if it is frivolous.<sup>353</sup> Given that when such a complaint is found not to be frivolous and forwarded to the relevant TNC for a written response to the complaint,<sup>354</sup> the UNGC could facilitate the resolution of the problem.<sup>355</sup> Oshionebo argues that a refusal to resolve the problem by the TNC involved may lead to the UNGC Office declaring the TNC as ‘inactive’ on the UNGC website – a declaration that negates the criticism against UNGC that it offers an opportunity for the TNCs to violate human rights as well as degrade the environment while simultaneously enjoying a good public image through their participation in the UNGC.<sup>356</sup>

Despite Oshionebo’s argument, which seems plausible, this thesis argues that the UNGC should have a clear regulatory structure instead of relying solely on the reports of the corporations to determine their good-standing. It has been suggested that the UNGC Office should scrutinize prospective TNC partners to ensure that those with poor history and tendencies towards environmental and human rights issues are excluded.<sup>357</sup>

According to Voegtlin and Pless, the debate about the impact of the UNGC is demonstrated in the O&G sector where IOCs – BP and Shell – were removed from the Dow Jones Sustainability Index (DJSI) in 2010.<sup>358</sup> BP was removed due to the environmental disaster it caused in the Gulf of Mexico, and Shell was removed for its role in the environmental degradation in the Niger Delta.<sup>359</sup> Subsequently, BP was listed, while Shell is yet to be listed. With regard to the controversy surrounding the effectiveness of the UNGC, it is instructive to note that BP and Shell are signatories to the UNGC. Despite being a signatory to the UNGC and being delisted

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<sup>351</sup> *Ibid.*

<sup>352</sup> UNGC, “The Communication on Progress (CoP) in Brief” (last accessed 5 August 2019) online: [unglobalcompact.org/participation/report/cop](http://unglobalcompact.org/participation/report/cop).

<sup>353</sup> UNGC, Integrity Measure online: (Last modified June 2016) at 4 online (pdf): [unglobalcompact.org/docs/about\\_the\\_gc/Integrity\\_measures/Integrity\\_Measures\\_Note\\_EN.pdf](http://unglobalcompact.org/docs/about_the_gc/Integrity_measures/Integrity_Measures_Note_EN.pdf).

<sup>354</sup> *Ibid.*

<sup>355</sup> Oshionebo, Regulating Transnational Corporations, *supra* note 32 at 126.

<sup>356</sup> *Ibid* at 126.

<sup>357</sup> *Ibid* at 125.

<sup>358</sup> Voegtlin & Pless *supra* note 344 at 180.

<sup>359</sup> *Ibid.*

from DJSI, Shell continues to pollute the environment and violate human rights in the Niger Delta region. Worrisome situations such as the case of the Niger Delta prompt authors to continue to question the effectiveness of the UNGC regarding its objective to ensure that corporations incorporate international standards in their operations. Moreover, the non-regulatory system of the UNGC poses a challenge. The UNGC is not a code of conduct and does not set out particular standards with which participant corporations should comply.<sup>360</sup>

### 3.2.2 The *United Nations Guiding Principles for Business and Human rights*

Following the rejection of the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* 2003 (the Norms),<sup>361</sup> the UN Commission on Human Rights established a mandate in 2005 for the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises.<sup>362</sup> As a result of this mandate, the then SRSG – John Ruggie – developed the United Nations Guiding Principles on Business and Human Rights (UNGPs) in 2011. The UNGPs provide 31 principles and rest on three different but complementary pillars which are:

- a) “The states’ existing obligations to respect, fulfill and protect human rights against abuse within their jurisdiction by third parties which includes business;
- (b) The role of business as specialized organs of the society which performs specialized functions, required to comply with all applicable laws and to respect human rights; and
- (c) The need for human rights to have appropriate and effective remedies provided by the states when they are breached.”<sup>363</sup>

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<sup>360</sup> Oshionebo, *Regulating Transnational Corporations*, *supra* note 32 at 124.

<sup>361</sup> The Norms, which imposed binding duties on TNCs to respect and protect domestic and internationally recognized human rights, including the rights of vulnerable groups in their business operations were rejected by the UN Human Rights Commission. See Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N Doc No. E/CN.4/Sub.2/2003/12/Rev.2 (2003) 116 at para 1. Essentially, the obligation of TNCs under the Norms is not restricted to civil and political rights but extends to economic, social and cultural rights.

<sup>362</sup> John Ruggie, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy Framework’” (2011) 29 *Netherlands Q Human Rights* 224 at 225.

<sup>363</sup> *Report of the Special Representative of the Secretary-General*, UNHRC, 17<sup>th</sup> Sess, UN Doc A/HRC/13/31 (2011) at1 [Guiding principles].

The obligation of the state to protect human rights under the UNGPs requires that a state must take appropriate steps to prevent, investigate and provide remedies for their abuse through policies, regulations, legislation and adjudication.<sup>364</sup> This obligation is derived from the international human rights agreements that states have ratified.<sup>365</sup> As part of their obligation to protect human rights, states must ensure that they “enforce existing laws that directly or indirectly regulate” corporations’ respect for human rights, including environmental laws.<sup>366</sup>

While it is clear that states have duties to protect human rights within their territories, it remains debatable whether states are required to regulate the extraterritorial conducts of their corporations as a matter of international human rights law – an issue that is dealt with in detail in Chapter 4. The question is: if host states such as Nigeria are unable or unwilling to provide a remedy for human rights violations within their territory, can a home state of a TNC rely on its international human rights treaties’ obligations to regulate the violations of human rights by such TNC?

Ruggie’s response to this question is conservative. He expressed that human rights treaties neither require states to exercise extraterritorial jurisdiction over business abuse nor do they generally prohibit states from doing so, provided there is a recognized basis for their jurisdiction.<sup>367</sup> The SRSG’s view has been criticized for being a misrepresentation of the opinion of the Office of the High Commissioner for Human Rights (OHCHR), which interpreted the General Comments of the Committee on the Economic, Social and Cultural Rights’ to entail the extraterritorial jurisdiction of states.<sup>368</sup>

The second pillar is related to the responsibility of corporations to respect human rights. Unlike the obligation on states, the responsibility of corporations to respect human rights is not legally binding on corporations. This principle has influenced the formation of some multilateral initiatives such as the OECD Guidelines, as will be discussed shortly. A significant improvement from the provisions of the OECD Guidelines is the provision that TNCs should ensure they

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<sup>364</sup> UNHR, *Frequently asked Questions About the Guiding Principles on Human Rights*, UN Doc HR/PUB/14/3 October 2014 at 7 [UNHR].

<sup>365</sup> *Ibid.*

<sup>366</sup> Guiding principles, commentary, *supra* note 363 at 5.

<sup>367</sup> Guiding principles, *ibid* at 3 – 4.

<sup>368</sup> Davitti, *supra* note 118 at 61. For the OHCHR’s view see: Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, UN Doc A/HRC/10/61 (2009) at para 86.

respect internationally recognized human rights even when domestic laws do not address the challenges facing business and human rights.<sup>369</sup> The second pillar expects corporations to avoid violating human rights and also requires a positive due diligence duty on their part to ensure that the adverse effects of their operations on human rights are addressed.<sup>370</sup> Concerning these negative impacts, corporations are encouraged to prioritize ‘severe human rights impact,’ which has been described as any activity that affects an increasing number of people, such as environmental degradation.<sup>371</sup> The United Nations Human Rights Council’s categorization of environmental harm as having “severe human rights impact” based on the number of people that are affected reflects the environmental pollution caused by IOCs that affect the human rights of a significant number of the people in the Niger Delta region.

Human rights due diligence also requires TNCs to identify, prevent and mitigate their adverse human rights impacts by conducting an assessment of actual and potential human rights impacts, integrating and acting on these findings as well as communicating how these impacts are addressed.<sup>372</sup> In this regard, IOCs in Nigeria have the scientific and technological knowledge to conduct due diligence but have failed to do so.<sup>373</sup> Consequently, Abe<sup>374</sup> argues that according to the UNGPs’ provision on human rights due diligence, Nigeria should criminalize the activities of IOCs that do not comply with the due diligence requirements under the *Environmental Impact Assessment Act*.<sup>375</sup>

The third pillar is formulated on the basic principle of international law that victims of human rights abuse should be provided with an effective remedy. For a remedy to be effective, it must be accessible, affordable, adequate and timely.<sup>376</sup> Access to remedy refers to the process of providing justice for human rights abuse and the substantive outcome of the process, which

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<sup>369</sup> Guiding principles, *supra* note 363, commentary to principle 23.

<sup>370</sup> John Knox, “The Ruggie Rules: Applying Human Rights Law on Corporations” in Radu Mares, eds, *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Leiden: Martinus Nijhoff, 2012) 51 at 66 [John Knox].

<sup>371</sup> UNHR, *supra* note 364 at 45.

<sup>372</sup> Guiding principles, *supra* note 363, principle 17.

<sup>373</sup> Abe, *supra* note 117 at 149.

<sup>374</sup> *Ibid* at 150.

<sup>375</sup> *Environmental Impact Assessment Act*, *supra* note 228, section 62.

<sup>376</sup> *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UNGA, 72<sup>nd</sup> Sess, UN Doc A/72/162 (2017) at 11 [The Report of the Working Group].

should compensate for its negative impacts.<sup>377</sup> For right holders to consider a remedy to be accessible, they must know that such a remedy exists and should have “access to it without too much expenses” and inconvenience.<sup>378</sup> Although the UNGPs emphasize the duty of states to provide remedy through “judicial, administrative, legislative or other appropriate means,”<sup>379</sup> it is appropriate for corporations to provide remedies through cooperation with other state and non-state remedy mechanisms and in most cases, corporations are better disposed to provide remediation.<sup>380</sup>

Regarding affordability, it should be considered that a remedy that may be regarded as affordable from an objective viewpoint may be viewed as unaffordable by the impacted host communities.<sup>381</sup> Similarly, the adequacy of remedy should be determined by the quantum of compensation, although this might not always work.<sup>382</sup> Also, both the current and future needs of the victims should be considered to determine the adequacy of a remedy.<sup>383</sup> Finally, considering that, for the most part, justice delayed is deemed justice denied, a remedy should be timely.<sup>384</sup> The most critical factor that determines whether a remedy is timely is what a right holder deems as timely considering the circumstance.<sup>385</sup> Others may include the complex nature of a case, the number of impacted people, the nature of the human rights violation and the nature of the remedy sought.<sup>386</sup>

Although the UNGPs provide essential guidelines for regulating IOCs, the most significant critique they attract is concerning their legal status. While the first and third pillars of the UNGPs reaffirm states’ existing obligations and responsibility under international human rights to protect human rights and provide access to justice for human rights victims, the second pillar is legally nonbinding on corporations including IOCs. The use of the term ‘responsibility’ to respect instead of ‘obligation’ suggests that the UNGPs do not intend to impose a direct human rights

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<sup>377</sup> UNHR, *supra* note 364 at 34.

<sup>378</sup> The Report of the Working Group, *supra* note 376 at 5.

<sup>379</sup> Guiding principles, *supra* note 363, principle 25.

<sup>380</sup> UNHR, *supra* note 364 at 36.

<sup>381</sup> The Report of the Working Group, *supra* note 376 at 5.

<sup>382</sup> *Ibid.*

<sup>383</sup> *Ibid.*

<sup>384</sup> *Ibid.*

<sup>385</sup> *Ibid.*

<sup>386</sup> *Ibid.*

obligation on corporations, although domestic laws could impose such duty.<sup>387</sup> This suggests that the UNGPs are only an appeal to non-state actors to address the negative impacts of environmental pollution and human rights violations, and therefore, a breach of the UNGPs provisions would not attract sanctions.

### 3.2.3 The *OECD Guidelines for Multinational Enterprises*

The *OECD Guidelines for Multinational Enterprises* (the Guidelines) is another multilateral initiative for regulating TNCs.<sup>388</sup> Adopted in 1976, the Guidelines were substantially revised in 2000 and 2011. The latest version contains a chapter on the human rights obligations of TNCs, which is a significant improvement on the 2000 version that made scanty reference to the TNCs' human rights obligations.<sup>389</sup> Specifically, Chapter 4 of the 2011 version of the Guidelines has six paragraphs that essentially mandate TNCs to respect internationally recognized human rights in their operations.<sup>390</sup>

As it relates to the environment, the Guidelines encourage TNCs to consider the need to protect the environment, public health and safety, and to conduct their activities in a way that contributes to the broader goal of sustainable development.<sup>391</sup> In this regard, the Guidelines recommend that TNCs establish and maintain a system of environmental management appropriate to the enterprise, which includes collecting and evaluating adequate and timely information relating to the environmental, health, and safety impacts of their activities; to establish measurable objectives; and to monitor and verify the progress of environmental, health, and safety objectives regularly.<sup>392</sup>

Another significant improvement in the Guidelines is the introduction of commentaries, which aid the interpretation of the substantive provisions. The commentary on TNCs' expectation to respect human rights explains that the fact that a state either fails to enforce its relevant domestic laws or implement its international human rights obligations or act contrary to its laws or its

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<sup>387</sup> UNHR, *supra* note 364 at 28.

<sup>388</sup> OECD Guidelines, *supra* note 112.

<sup>389</sup> Mujih, *supra* note 348 at 146.

<sup>390</sup> OECD Guidelines, *supra* note 112 at 31.

<sup>391</sup> *Ibid* at 42.

<sup>392</sup> *Ibid*.

international obligations does not reduce the expectation for TNCs to respect human rights.<sup>393</sup> Another commentary explains that “in countries where domestic laws and regulations conflict with internationally recognized human rights, enterprises should seek ways to honour them to the fullest extent, which does not place them in violation of domestic law and consistent with paragraph 2 of the Chapter on Concepts and Principles.”<sup>394</sup>

Concerning the latter commentary, this thesis posits that if the TNCs are to comply with domestic laws at the expense of internationally recognized human rights standards in situations of conflict as suggested, then such compliance defeats the entire purpose of the Guidelines to encourage TNCs to act according to international standards. Thus, IOCs are not expected to comply with the Guidelines beyond the standards obtainable in host states.<sup>395</sup> What the commentary’s expectation from IOCs to honour domestic laws and policies in situation of conflict with international human rights could mean is that IOCs could continue to engage in environmental pollution which causes human rights violations since Nigeria’s laws and regulations are weak given that the Minister of Petroleum could permit gas flaring, for instance. Hence, it could be argued that the Guidelines do not genuinely support strict regulation of TNCs’ behaviour<sup>396</sup> as they are merely a preemptive effort by developed countries to shut out the clamour by developing countries and nongovernmental organizations for TNCs’ international regulation by avoiding strict international regulation.<sup>397</sup>

The ineffectiveness of the Guidelines in the context of the Niger Delta could also be attributable to their scope. The Guidelines are addressed by the OECD-compliant governments to TNCs that operate in or from OECD-adhering countries, and this raises a question as to the scope of the Guidelines. Mainly, the question is whether they are appropriate for the regulation of TNCs operating in non-member states such as Nigeria.<sup>398</sup> The Guidelines serve the economic interest of member states, which prevails over those of the non-member states.<sup>399</sup> Considering that effective regulation of TNCs that operate in non-member states may affect the economic interest of TNCs as well as member-states, it may not be convincingly argued that the OECD is a desired platform

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<sup>393</sup> *Ibid* at 32.

<sup>394</sup> *Ibid*. Paragraph 2 of the Chapter on Concepts and Principles essentially reiterates the position of the commentary.

<sup>395</sup> Oshionebo, *Regulating Transnational Corporations supra* note 32 at 139.

<sup>396</sup> *Ibid* at 138.

<sup>397</sup> *Ibid* at 139.

<sup>398</sup> *Ibid* at 138.

<sup>399</sup> *Ibid*.



for international regulation<sup>400</sup> of IOCs in Nigeria. However, the scope of the Guidelines extends to all countries, and adhering governments are recommended to encourage TNCs that operate in their countries to observe the Guidelines wherever they operate provided they take into account the particular circumstances of each host country.<sup>401</sup> To this extent, it should be expected that IOCs operating in Nigeria's O&G sector should develop and maintain a responsible business culture, but unfortunately, they do not.

The legal status of the Guidelines is unequivocally stated as nonbinding and legally unenforceable as they are recommendations addressed by governments to TNCs.<sup>402</sup> Besides, even though the Guidelines address TNCs, they wield significant influence in the process of making OECD policies, and this makes the Guidelines remarkably weak.<sup>403</sup> As a result, the Guidelines are not a genuine effort to regulate TNCs but are designed to deflect disapprovals of TNCs activities<sup>404</sup> as well as advance the economic interest of the TNCs and OECD member states.

### 3.2.4 International Finance Corporation's Performance Standards

The International Finance Corporation (IFC) could be influential in the regulation of IOCs in Nigeria. This is because the IFC provides financial support for investment in the extractive sector by private investors.<sup>405</sup> The IFC's performance standards require that clients should manage the environmental and social impacts of their projects on the communities.<sup>406</sup> In particular, the IFC's pollution prevention policy prohibits the emission of pollutants by investors whose investments are funded by the IFC, and where the emission of pollutants is impossible to avoid, the borrowers are expected to minimize the intensity of their release.<sup>407</sup> This mandate applies to the pollutants of air, water, and land as a result of the routine, non-routine, and accidental release, which has

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<sup>400</sup> Bob Hepple, "A Race to the Top?: International Investment Guidelines and Corporate Codes of Conduct" (1999) cited in Oshionebo, *Regulating Transnational Corporations*, *ibid*.

<sup>401</sup> OECD Guidelines, *supra* note 112 at 17.

<sup>402</sup> *Ibid* at 13.

<sup>403</sup> Oshionebo, *Regulating Transnational Corporations* *supra* note 32 at 138.

<sup>404</sup> Rhys Jenkins, "Corporate Codes of Conduct: Self-Regulation in a Global Economy" at 4 cited in Mujih, *supra* note 346 at 149.

<sup>405</sup> Oshionebo, *Regulating Transnational Corporations*, *supra* note 32 at 153.

<sup>406</sup> World Bank Group, "IFC Performance Standards on Environmental and Social Sustainability" (1 January 2012) online: [ifc.org/wps/wcm/connect/c02c2e86-e6cd-4b55-95a2-b3395d204279/IFC\\_Performance\\_Standards.pdf?MOD=AJPERES&CVID=kTjHBzk](http://ifc.org/wps/wcm/connect/c02c2e86-e6cd-4b55-95a2-b3395d204279/IFC_Performance_Standards.pdf?MOD=AJPERES&CVID=kTjHBzk) [World Bank Group] at 2.

<sup>407</sup> *Ibid* at 24.

potential impacts on home communities.<sup>408</sup> According to Oshionebo, the IFC's policies prescribe international best practices for O&G development, including emissions, hazardous wastes and flaring.<sup>409</sup>

Admittedly, the IFC performance standards generally say very little about human rights. However, the Performance Standard 1 stipulates that "business should respect human rights, which means to avoid infringing on the human rights of others and address adverse human rights impacts business may cause or contribute to."<sup>410</sup> Also, each performance standard should have the elements that are "related to the human rights dimension that a project may face in the course of its operation."<sup>411</sup> Therefore, there is a need for due diligence in order for a business to address several human rights implications of a project.<sup>412</sup>

As a means of ensuring compliance with its policies, the IFC only finances investments that are expected to meet the requirements of the performance standards within a reasonable time, and a continuing delay in meeting the requirements may lead to a withdrawal of IFC's financial support for the project.<sup>413</sup> Given that there is no known O&G project in Nigeria that is being financed by the IFC, it would be difficult to comment on the effect of the IFC's performance standards in Nigeria's O&G sector.

Assuming there is an O&G project which is financed by the IFC, the environmental pollution caused by the relevant IOC in the course of executing such a project may be challenged by the Niger Delta communities. This is because of the existence of the IFC's Compliance Advisor Ombudsman (CAO), which was expressly set up to address complaints by the impacted individuals or communities regarding environmental and social concerns of an IFC sponsored project.<sup>414</sup> Upon such complaints by communities such as the Niger Delta community, the CAO, through its dispute resolution mechanism, could draw up a voluntary agreement between the

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<sup>408</sup> *Ibid.*

<sup>409</sup> Oshionebo, *Regulating Transnational Corporations*, *supra* note 32 at 154.

<sup>410</sup> World Bank Group, *supra* note 406 at 6, para 3.

<sup>411</sup> *Ibid.*

<sup>412</sup> *Ibid.*

<sup>413</sup> World Bank Group, "IFC Sustainability Framework" online: [https://www.ifc.org/wps/wcm/connect/b9dacb004a73e7a8a273fff998895a12/IFC\\_Sustainability\\_Framework.pdf?MOD=AJPERES](https://www.ifc.org/wps/wcm/connect/b9dacb004a73e7a8a273fff998895a12/IFC_Sustainability_Framework.pdf?MOD=AJPERES) at para 22.

<sup>414</sup> Compliance Advisor Ombudsman, "About the CAO: Who We Are" (2009) online: <http://www.cao-ombudsman.org/about/whoweare/index.html>.

community and the relevant IOC for future plans to address the complaints and states remedial actions to be taken.<sup>415</sup> Also, by exploring its compliance function, which may consider human rights and environmental laws,<sup>416</sup> the CAO could conduct an audit into the complaints of the Niger Delta community and file a report of noncompliance to the IFC's performance standards by the relevant IOC to the IFC management for appropriate action.<sup>417</sup>

While the CAO mechanism seems a valuable platform for addressing host communities' complaints regarding projects that negatively impact their environment,<sup>418</sup> the CAO "yields a much narrower result" in respect of compensation that may be awarded to the impacted communities.<sup>419</sup> The CAO's complaints mechanism, which ensures that they play dispute resolution, compliance, and advisory roles<sup>420</sup> is not "a legal enforcement mechanism,"<sup>421</sup> but a "flexible, collaborative, problem-solving approach"<sup>422</sup> involving the impacted communities, states and relevant investors.

### 3. 2. 5 The *Zero Draft Treaty*

In the context of TNCs' impact on the environment and human rights, there has been a recurring argument for binding obligations on corporations through a multilateral human rights treaty. As a result, the United Nations Human Rights Council established the UN Intergovernmental Working Group on TNCs and other business enterprises in respect of human rights and mandated it "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of TNCs and other business enterprises."<sup>423</sup> After several deliberations, the UN Intergovernmental Working Group published the *Zero Draft Treaty* in 2018, which was

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<sup>415</sup> Compliance Advisor Ombudsman, "Operational Guidelines" (March 2013) online: [http://www.cao-ombudsman.org/documents/CAOOperationalGuidelines\\_2013.pdf](http://www.cao-ombudsman.org/documents/CAOOperationalGuidelines_2013.pdf), section 3.2.2 [CAO, Operational Guidelines]. For a detailed analysis on the functions of the CAO, see Benjamin M Saper, "The International Finance Corporation's Compliance Advisor/Ombudsman (CAO): An Examination of Accountability and Effectiveness from a Global Administrative Law Perspective" (2012) 14 Intl L Politics 1280 at 1299 [Saper].

<sup>416</sup> Saper, *Ibid* at 1302.

<sup>417</sup> CAO, Operational Guidelines, *supra* note 415, section 4.4.5. See also Saper, *ibid* at 1304.

<sup>418</sup> Ibironke T Odumosu-Ayanu, "Local Communities, Environment and Development: the Case of Oil and Gas Investment in Africa" Kate Miles, ed, *Research Handbook on Environment and Investment Law* (Cheltenham: Edward Elgar, 2019) 480 at 497.

<sup>419</sup> *Ibid* at 495

<sup>420</sup> CAO, Operational Guidelines, *supra* note 415 at 5.

<sup>421</sup> *Ibid* at 4.

<sup>422</sup> *Ibid* at 5.

<sup>423</sup> Human Rights Council, *Elaboration of an Internationally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights*, 2014, UN Doc A/HRC/RES/26/9, 2.

revised in July 2019.<sup>424</sup> The preamble states that all businesses irrespective of size, sector, ownership and structure shall respect human rights by avoiding contribution to adverse human rights effects through their activities and address the impacts where they occur. Human rights violation means any harm done by a business entity against an individual or group of persons, including the impairment of environmental rights.<sup>425</sup>

The *Zero Draft Treaty* applies to human rights violations as a result of the activities of all businesses and particularly those that have a transnational character.<sup>426</sup> In order to prevent these violations, state parties to the treaty shall ensure that businesses with a transnational character within their territory, shall have due diligence obligations, identify and take appropriate actions to prevent the actual and potential human rights risk associated with their business activities.<sup>427</sup> Also, Article 6, paragraph 7, provides that “state parties shall ensure through their domestic law that natural and legal persons may be held criminally, civil, or administratively liable” for violations of human rights undertaken in the context of business activities.

A remarkable improvement in the revised 2019 *Zero Draft Treaty* is seen in Article 6. Article 6 (1) mandates state parties to ensure that their domestic laws provide liability for business activities, including those of a transnational nature that violate human rights. Further, Article 6 (6) enjoins all state parties to provide domestic legislation for the liability of a transnational business entity for its failure to prevent another business entity which it has a contractual relationship with from causing harm. A contractual relationship means “any relationship between natural or legal persons to conduct business activities” and includes “those activities conducted through affiliates, subsidiaries, agents, suppliers, any business partnership or association, joint venture, beneficial proprietorship.”<sup>428</sup> In this vein, the liability of a parent or associate company could be possible where it either controls the activities of the subsidiary or should have foreseen a risk of violations of human rights in the course of the business operations, notwithstanding where the activity takes place.<sup>429</sup>

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<sup>424</sup> *Zero Draft Treaty*, *supra* note 36.

<sup>425</sup> *Ibid*, Article 1 (2).

<sup>426</sup> *Ibid*, Article 3 (1).

<sup>427</sup> *Ibid*, Article 5 (2).

<sup>428</sup> *Ibid*, Article 1 (4).

<sup>429</sup> *Ibid*, Article 6, paragraph 6.

Collectively, these provisions emphasize that the obligation to enforce the *Zero Draft Treaty* resides in the state parties and do not impose direct obligations on corporations. This entails that the *Zero Draft Treaty* does not deviate from the rules of international law, where only states have direct obligations for human rights. Thus, it provides in the preamble that “all business enterprises shall respect all human rights,” and that states have the obligations and primary responsibility to promote, respect, protect and fulfill human rights. This provision reiterates the traditional rule of international law regarding the controversy over the legal status of TNCs in international law discussed in chapter 4.

The *Zero Draft Treaty* should be applauded for its provisions on the possibility of the court of a home state exercising jurisdiction in respect to violations of human rights in other territories where the TNCs are domiciled in such home states.<sup>430</sup> Moreover, the *Zero Draft Treaty* encourages state parties to enter into more conducive agreements, including BITs, for the protection and fulfillment of human rights by providing further access to justice to victims of human rights violations related to business activities.<sup>431</sup> The possibility of the home state option suggested in Article 6 (6), where state parties including home states of the IOCs could make laws that enable the liability of business entities with transnational operations, is similar to one of the core arguments that this thesis makes concerning having obligations relating to the environment and human rights enforceable against IOCs in their home states.

Despite the promises of a stand-alone instrument such as the *Zero Draft Treaty*, this thesis argues that the imposition of BIT obligations regarding environmental and human rights protection on IOCs remains necessary. First, negotiating and completing a multilateral treaty such as the *Zero Draft Treaty* takes a significant length of time.<sup>432</sup> The *Zero Draft Treaty* is currently in the negotiation process. The UN Intergovernmental Working Group is working tirelessly with several stakeholders to ensure the success of the negotiation process.<sup>433</sup> Only the passage of time

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<sup>430</sup> *Ibid*, Article 7 (1) (b) & (2). This Article provides that the court of the state where the natural or juridical person alleged to have committed the acts that violate the obligation in the *Zero Draft Treaty* is domiciled has jurisdiction. It further provides in subsection 2 that the place of domicile of a juridical person may be considered as the place where it has its statutory seat, central administration, substantial business interest, or subsidiary.

<sup>431</sup> *Ibid*, Article 12 (3).

<sup>432</sup> David Bilchitz, “The Necessity for a Business and Human Rights Treaty” (2016) 1 Bus & Human Rights J 203 at 223.

<sup>433</sup> These include representatives of states, civil societies and industry stakeholders. See Kellie Johnson, Jasmine Landau & Benedict Wray, “Consultations open on the UN “zero draft” treaty on business and human rights”

will determine the successful conclusion of the *Zero Draft Treaty*. The possibility of its failure is also not ruled out considering that efforts made in the past to negotiate a similar multilateral treaty failed.<sup>434</sup>

Second, as argued in the previous paragraph, the *Zero Draft Treaty* envisages the use of BITs to provide “access to justice and remedy to victims of human rights violations in the context of business activities” without more. This thesis, unlike the *Zero Draft Treaty*, analyzes in detail potential enforcement mechanisms for the IOCs’ obligations in BITs. Further, it is not clear whether the provisions of the *Zero Draft Treaty* would apply to existing BITs in order to permit an investment tribunal to rely on its provisions in their interpretation of those BITs. This is because Article 12 (6) provides that a BIT between state parties shall be interpreted to reflect the provisions of the *Zero Draft Treaty* on the protection of human rights without referring to whether such interpretation should extend to existing BITs. This explains why Krajewski argues that the *Zero Draft Treaty* is not clear on its effect on existing BITs.<sup>435</sup> It is, however, the argument of this thesis that existing BITs should be interpreted in a manner that makes them compatible with the provisions of the *Zero Draft Treaty*. However, in order to ensure the primacy of human rights over other BIT provisions, there is a need for an express provision on IOCs’ obligations regarding environmental protection and human rights in BITs, and this is partly what this thesis intends to achieve.

Finally, although related explicitly to the protection of human rights that are violated by TNCs, the *Zero Draft Treaty* provides, among others, for states’ obligation to regulate conduct that violates human rights at the domestic level. Similar obligations on states, though not directly on the point of business and human rights, have been provided under other human rights treaties without achieving the desired result.<sup>436</sup> Therefore, the argument of this thesis for the imposition of direct obligations regarding the environment and human rights on IOCs is relevant despite the

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(February 2019) online: <https://www.nortonrosefulbright.com/en/knowledge/publications/0ee77b2f/consultations-open-on-the-un-zero-draft-treaty-on-business-and-human-rights>.

<sup>434</sup> *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* *supra* note 361, which was a multilateral treaty regarding corporations’ international human rights obligations was not successful.

<sup>435</sup> Krajewski, *supra* note 154.

<sup>436</sup> For example, article 24 of the *African Charter*, *supra* note 18, provides for the right to a general satisfactory environment.

possibility of the *Zero Draft Treaty* coming into force. Since this thesis explores BITs, the following section examines the nature and scope of Nigeria's BITs

### 3.3. Nigeria's Bilateral Investment Treaties and the Oil and Gas Sector

The exponential growth of Foreign Direct Investment (FDI) is a relatively recent phenomenon that is attributable to globalization. Globalization is a process that increases the cross-border trade of goods, services, assets, and know-how.<sup>437</sup> Due to the lack of finances and technical expertise for the exploitation of their natural resources, developing countries such as Nigeria turn to TNCs for investment.<sup>438</sup> In an effort to attract FDI and considering the competition from other countries of the global south, developing countries tend to remove obstacles from the way of foreign investors. Hence, the liberalization of FDI regimes in many countries has accelerated the process of globalization, and one of the tools for such liberalization is BITs.<sup>439</sup>

BITs are traditionally used to ensure the protection of the investments of a national of one contracting state party in the territory of another. Globally, about 2956 and 2358 BITs have been signed and are in force, respectively,<sup>440</sup> out of which Nigeria has signed thirty, with fifteen of them in force.<sup>441</sup> Three out of the fifteen, which are partly the focus of this thesis, are between the Nigerian government and the governments of Italy,<sup>442</sup> the United Kingdom (U.K.)<sup>443</sup> and the Netherlands.<sup>444</sup> The provisions of these BITs seek to protect the investments of the major IOCs in Nigeria along with other foreign investors, given that they are nationals of Italy, the U.K. and the Netherlands. Where there is a breach of provisions of these BITs, there is an extensive arbitral procedure for the IOCs to challenge such breach in international investment arbitration. Against this backdrop, the following section will discuss the nature and scope of some of the protections of the IOCs' investments under Nigeria's BITs to determine how their provisions

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<sup>437</sup> Surya Subedi, *International Investment Law: Reconciling Policy and Principles* 2<sup>nd</sup> ed (Portland: Hart Publishing, 2012) at 88 [Subedi].

<sup>438</sup> Prem Sikka, "Accounting for Human Rights: The Challenge of Globalization and Foreign Investments Agreements" (2011) 22 *Critical Perspectives on Accounting* 1 at 10 [Sikka].

<sup>439</sup> Subedi, *supra* note 437 at 132.

<sup>440</sup> UNCTAD, "Investment Policy Hub" (2019) online: [investmentpolicyhub.unctad.org/IIA](http://investmentpolicyhub.unctad.org/IIA).

<sup>441</sup> UNCTAD, "Investment Policy Hub" (2019) online: [investmentpolicyhub.unctad.org/IIA/CountryBits/153](http://investmentpolicyhub.unctad.org/IIA/CountryBits/153).

<sup>442</sup> Nigeria – Italy BIT, *supra* note 41.

<sup>443</sup> Nigeria – UK BIT, *supra* note 41.

<sup>444</sup> Nigeria – Netherlands BIT, *supra* note 41.

may potentially undermine the efforts of the Nigerian government towards the environmental and human rights protections of the Niger Delta communities.

### 3.3.1 Clauses Relevant to the Environment and Human Rights in Nigeria's Bilateral Investment Treaties

BITs generally have two main objectives.<sup>445</sup> First, they specifically protect FDI. Secondly, they encourage the flow of foreign investments by creating a stable and foreseeable legal environment for investors as well as stimulate the economic relations between the state parties.<sup>446</sup> The preamble to the Nigeria - Italy BIT underscores these purposes:

The Government of the Italian Republic and the government of the Federal Republic of Nigeria hereinafter referred to as "the Contracting Parties" desiring to establish favourable conditions for improved economic cooperation between the two countries, and especially for investment by nationals of one Contracting Party, in the territory of the other Contracting Party and acknowledging that offering encouragement and mutual protection to such investments will contribute towards stimulating business ventures that will foster the prosperity of both Contracting Parties . . .

Despite the purposes that are highlighted in the above provision, the reality is that almost all the substantive provisions of BITs have one objective, which is to protect investors who are the primary beneficiaries, notwithstanding that they are not a party to BITs.<sup>447</sup> Despite these protections for IOCs as this thesis will analyze shortly, Nigeria's BITs do not impose any form of obligation on the IOCs. The failure of these BITs to impose corresponding obligations on IOCs has been described as the "asymmetrical nature of BITs" and has attracted criticism, especially from environmental and human rights standpoints.<sup>448</sup> The key argument of the critics is that a regulatory measure that could be taken by a government to protect the environment and human rights may be viewed as a violation of BIT provisions.<sup>449</sup> Therefore, the following section considers a few of these BIT provisions,<sup>450</sup> especially those that may interfere with the efforts of the government to protect the environment and human rights of the Niger Delta communities.

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<sup>445</sup> Gazzini, *supra* note 57, at 106.

<sup>446</sup> *Ibid* at 107.

<sup>447</sup> *Ibid*.

<sup>448</sup> *Ibid*.

<sup>449</sup> *Ibid* at 127.

<sup>450</sup> There are other provisions that generally protect investors such as the National Treatment and the Most Favoured Nation clauses.



### 3.3.1.1 Clause Regarding Expropriation of Investments

Generally, the provision of ‘guarantee against expropriation’ of investments in Nigeria’s BITs was made to assuage the fears of foreign investors regarding the sovereign power of the Nigerian government to control natural resources within its territory. A similar guarantee is also available in the *Nigerian Investment Promotion Commission Act*.<sup>451</sup> According to the Nigeria-Italy<sup>452</sup> and Nigeria-Netherlands BITs,<sup>453</sup> expropriation is any act or measure that either directly or indirectly deprives or limits an investor of a contracting party of its investment or the use of it. Under these provisions, it is clear that an act of expropriation could either be direct or indirect. While direct expropriation is the outright and explicit taking of property of a foreign investor,<sup>454</sup> indirect/regulatory expropriation includes any regulatory measure taken by the government that restricts the right of a foreign investor over its investment.<sup>455</sup> However, the effect of globalization and the increasing existence of an extensive body of law on FDI make direct expropriation increasingly rare.<sup>456</sup>

Nigeria’s BITs provide that the Nigerian government may only expropriate the investments of the IOCs where doing so is non-discriminatory, for national interest or public purpose, and such expropriation shall be accompanied by prompt, adequate and effective compensation.<sup>457</sup> While this provision seems fair to the Nigerian government and the IOCs, an analysis of the literature and jurisprudence shows that its major issue could lie in its chilling effect.

Given the decisions of investment arbitration tribunals and scholars’ arguments, this thesis argues that the requirement for the payment of compensation for expropriation in Nigeria’s BITs could have a chilling effect on the regulatory power of the Nigerian government even when the operations of the IOCs pollute the environment as well as violate human rights as they do currently in the Niger Delta communities.<sup>458</sup> Although it may not always be the case, Ren

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<sup>451</sup> *Nigerian Investment Promotion Commission Act CAP N117, Laws of the Federation of Nigeria 2004, Section 25.*

<sup>452</sup> Nigeria – Italy BIT, *supra* note 41, Article 5.

<sup>453</sup> Nigeria – Netherlands, *supra* note 41, Article 6.

<sup>454</sup> Collins, *supra* note 56 at 158.

<sup>455</sup> *Ibid* at 162.

<sup>456</sup> Subedi, *supra* note 437 at 118.

<sup>457</sup> Nigeria – Italy BIT, *supra* note 41, Article 5, the Nigeria – Netherlands BIT, *supra* note 41, Article 6 and the Nigeria – U.K. BIT, *supra* note 41, Article 5.

<sup>458</sup> The decisions of the investment tribunals in *De Santa Elena, S.A. v The Republic of Costa Rica*, *supra* note 38 and *Metalclad Corporation v The United Mexican States*, *supra* note 60 firmly adopt the view that as long as the

observed that regulatory measures for environmental protection directed towards IOCs could amount to either a direct or indirect expropriation because such measures would either expropriate an investment project entirely or limit its benefit for environmental reasons.<sup>459</sup> This is because complying with an environmental measure may require a considerable amount of money from an investor, thereby reducing the financial benefits of a project. For instance, IOCs consider it economically viable to flare gas instead of re-injecting it into oil wells and an insistence on the latter practice by the Nigerian government may substantially affect the commercial return from an IOC's investment, thereby attracting the payment of compensation if challenged by an IOC.

Applying this logic to the Nigerian situation, the threat by the Nigerian government to withdraw the licences of IOCs that continue to flare gas, which is apparently for a public purpose, would potentially amount to an indirect expropriation which requires the payment of compensation by the government if the IOCs challenge such before an arbitral tribunal.<sup>460</sup> Such withdrawal of licence may amount to indirect expropriation because an arbitral tribunal suggested that any measure that affects 'the capacity to earn a commercial return' amounts to expropriation.<sup>461</sup> There is little doubt that the withdrawal of their licences would affect the economic viability of the investment of the relevant IOCs. Considering that the Nigerian government may prefer to refrain from withdrawing these licences in order to avoid payment of compensation if declared an indirect expropriation, there is a 'chilling effect' on the power of the government to make and implement environmental policies against IOCs.

A review of investment arbitration practice reveals doubt over the weight attached to environmental protection as well as human rights in the process of decision-making by arbitral tribunals as they are divided on the role of public purpose in their assessment of damages. While it has been argued that a measure taken for a public purpose should mitigate compensation,<sup>462</sup>

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host states' regulations had caused damages, and a case of either direct or indirect established, the payment of compensation must be made irrespective of the intent of the government.

<sup>459</sup> Ren, *supra* note 63 at 119.

<sup>460</sup> Jerome Mario Utomi, "Gas Flaring and Kachikwu's Threat" *The Nigerian Voice* (1 October 2018) online: <http://thenigerianvoice.com/news/271148/gas-flaring-and-kachikwus-threat.html>

<sup>461</sup> *Burlington Resources Inc v Republic of Ecuador*, (2012) CASE No ARB/08/5 at para 456 (International Centre Settlement Investment Disputes) (Arbitrators: Gabrielle Kaufmann-Kohler, Brigitte Stern and Francisco Orrego Vicuña).

<sup>462</sup> Ren, *supra* note 63 at 139.

arbitral tribunals have justified an award of damages for expropriation irrespective of the public purpose aim of a regulatory measure by the government based on the ‘sole-effect principle.’<sup>463</sup>

The case of *Biwater Gauff (Tanzania) Ltd (BGT) v the United Republic of Tanzania*,<sup>464</sup> involved Tanzania’s termination of a contract with BGT for water investment. In the case, an *amicus* noted that “human rights and sustainable development issues” are to be considered in determining the degree of the responsibility of an investor, and that foreign investors that are “engaged in projects intimately related to human rights” are expected to meet their obligations because such investments pose a danger to the public.<sup>465</sup> However, it appears that the tribunal was resistant to the reasoning of the *amicus* because BGT succeeded in its expropriation claim, although no compensation was awarded to BGT because BGT failed to establish a link between its claims and the government’s termination of the contract.<sup>466</sup> This failure was because, at the time of the government’s wrongful action, the City Water investment owned by BGT had zero economic value as its liability was more than its total assets.<sup>467</sup> In *Santa Elena v Costa Rica*, the arbitral award held that environmental reasons for expropriation are not relevant in determining whether there should be payment of compensation.

Further, the decision of the tribunal in *SAUR International v. Argentina*<sup>468</sup> clearly illustrates the point that an establishment of public purpose by a government does not necessarily exclude compensation. In the case, the investor alleged that the intervention of Argentina in its business amounts to expropriation. The arbitral tribunal agreed with Argentina that human rights in general and the right to water in particular are some of the sources of international law to take into account to resolve an investment dispute.<sup>469</sup>

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<sup>463</sup> Sole-effect doctrine means that the impact on the investor’s ability to use the property is the exclusive factor in expropriation. See Ren, *ibid* at 116. See also, *Metalclad Corporation v The United Mexican States*, *supra* note 60 at para 111.

<sup>464</sup> *Biwater Gauff (Tanzania) Ltd (BGT) v the United Republic of Tanzania* (2008) Case No ARB/05/25 (International Centre Settlement Investment Disputes) (Arbitrators: Gary Born, Toby Landau and Bernard Hanotiau).

<sup>465</sup> *Ibid*, para 380.

<sup>466</sup> *Ibid*, para 805.

<sup>467</sup> *Ibid*, para 795.

<sup>468</sup> *SAUR International v The Argentina Republic*, (2014) Case No ARB 04/4 (International Centre Settlement Investment Disputes) (Juan Fernández-Armesto, Bernard Hanotiau and Christian Tomuschat) [reported in French and Spanish] reported in English in Kube & Petersmann, *supra* note 134 at 83.

<sup>469</sup> Kube & Petersmann, *Ibid*.

Notwithstanding, the tribunal held that the human rights obligation of Argentina did not contradict the obligation of Argentina, which emanates from an expropriation clause, to pay compensation to the investor. A similar decision was also reached in *Tecmed v Mexico* where the arbitral tribunal applied the proportionality test to rule that environmental harm caused by investment was not enough to necessitate the non-renewal of licence by the government and does not preclude the payment of compensation.<sup>470</sup>

It has been argued, on the other hand, that investment tribunals should consider and decide an investor's claim for an infringement of an expropriation clause in favour of the host state based on the protection of human rights and the environment.<sup>471</sup> In *Chemtura Corporation v Government of Canada*, the investment tribunal held that a governmental measure does not amount to an expropriation provided that such is for a public purpose.<sup>472</sup> After considering whether there was a "substantial deprivation" of the claimant's investment by the cancellation of licences for the use of harmful pesticide (lindane) in agricultural production, the arbitral tribunal held that even if such was a substantial deprivation of the claimant's investment in Canada, it does not amount to a regulatory expropriation as it was within Canada's powers to protect public health and the environment.<sup>473</sup>

It is important to note that there is a marked difference with respect to the decisions of the arbitral tribunals in the latter case and the former cases analyzed. This may be explained by the fact that an arbitral tribunal's decision is not binding on other tribunals. The inconsistencies in tribunals' decisions may instil a degree of uncertainty on the possible outcome of investment arbitration concerning the interpretation of the clause against expropriation, thereby contributing to regulatory chill.

The uncertainties generated by these decisions may affect states' confidence in their ability to legislate and implement laws in a manner that is consistent with their environmental and human rights duties in light of IOCs' rights under BITs. It is, therefore, essential for Nigeria to be cautious in the assessment of its obligation under the expropriation clause because IOCs will likely not

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<sup>470</sup> *Tecmed v Mexico* (2003) Case No ARB(AF)/00/2 at para 121 (International Centre Settlement Investment Disputes) (Arbitrators: Horacio Grigera Naon, Jose Carlos Farnandez and Carlos Bernal Vereza).

<sup>471</sup> Cordes, Johnson & Szorke-Burke, *supra* note 134.

<sup>472</sup> *Chemtura Corporation v Government of Canada*, (2010) Ad Hoc NAFTA Arbitration under UNCITRAL, para 266 (Arbitrators: Gabrielle Kaufmann-Kohler, Charles Brower and James Crawford).

<sup>473</sup> *Ibid* at para 254.

hesitate to pursue compensation against the Nigerian government where they perceive that the latter's policies aimed at protecting the environment and human rights violate the expropriation clause in BIT.

One way for the Nigerian government to avoid the potential chilling effect of the expropriation clause is to renegotiate its BITs with the home states of the IOCs and model them towards either the US or Canada model BITs. The US model BIT provides that the distinction between indirect expropriation and lawful exercise of regulatory powers is on case to case and fact-finding bases that consider the economic impact of the measure on the investor, the extent of interference with the reasonable expectation and the nature of the governmental actions.<sup>474</sup> Furthermore, the US and Canada model BITs recommend that the regulatory measure of a host government should not be regarded as an indirect expropriation when it is intended to protect public interest objectives (e.g., health, safety or the environment).<sup>475</sup> Recent trends in BIT-making show that more than half of post-2010 BITs have either made reference to or included exceptions for the preservation of the environment and human rights,<sup>476</sup> and this figure demonstrates the growing recognition of the prohibitive effect of BITs on policy-making of the host governments around the world. Adopting this approach will achieve two purposes: it would place IOCs on a check regarding their operations and precludes the possibility of payment of compensation by providing clear guidance for arbitral tribunals on what constitutes lawful expropriation.

### 3.3.1.2 Fair and Equitable Treatment Clause

The Fair and Equitable Treatment Clause (FET) is found in almost all of Nigeria's BITs.<sup>477</sup> The broad interpretation of the FET clause covers almost all measures and actions undertaken by the government that are not covered by other provisions.<sup>478</sup> This explains why it is a preferred provision among the investor community, and a majority of investor-state claims have

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<sup>474</sup> The *US Model Bilateral Investment Treaty*, 2004, Annex B, article 4 (a) [US Model BIT].

<sup>475</sup> *Ibid*, US Model BIT, *ibid*, Article 4 (b) and *Canada Model Bilateral Investment Treaty*, 2004, Article 13 (1) (c).

<sup>476</sup> UNCTAD, "World Investment Report 2013: Global Value Chains, Investment and Trade for Development" at 102, (2013) online (pdf): <[unctad.org/en/PublicationsLibrary/wir2013\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf)>. See also Ren *supra* note 63 at 125.

<sup>477</sup> Nigeria – U.K. BIT, *supra* note 41, Article 2 (2), Nigeria – Netherlands BIT, *supra* note 41, Article 3 (1) and Nigeria – Italy BIT, *supra* note 41, Article 2 (3).

<sup>478</sup> Kavaljit Singh, "An Analysis of India's New Model Bilateral Investment Treaty" in Kavaljit Singh & Burghard Ilge, eds, *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (Amsterdam, Both Ends: 2016) 81 at 87 [Singh].

successfully relied on the breach of the FET standard.<sup>479</sup> Even though the meaning of FET standard is subject to debate, it is generally agreed that the principle mandates host states to protect “the reasonable expectations which have been relied upon by the investor to make investment,”<sup>480</sup> and this includes any contractual provision, which guarantees the stability of the legal regime that governs the contract<sup>481</sup> so that any new law that imposes an additional environmental obligation on the investor for its compliance may be considered as affecting the investment.<sup>482</sup>

The FET standard *simpliciter* has a similar effect as a stabilization clause in investment contracts. This is because a “reasonable expectation” of an investor has been interpreted to mean that the foreign investor expects a host state to act consistently so that the former would know about the regulations that govern its investment before any investment is made so it could plan how its investment would comply with the regulations.<sup>483</sup> If, for instance, the Nigerian government insists that IOCs utilize gas instead of flaring gas, such insistence may be considered not to be a reasonable expectation of an IOC that has received an oil mining lease to operate its business in Nigeria before the enactment of the AGRA<sup>484</sup> such as the SPDC and, therefore, a breach of the FET clause. In the strict legal sense, given that the FET clause “protects the reasonable expectations of investors arising from a concession contract including the expectation that the legal regime prescribed in the concession contract would not be amended or changed,” it could “limit the host state’s ability to take legislative action promoting its sustainable development goals,”<sup>485</sup> since pre-existing environmental standards under domestic laws were established before the investments were made in order to determine the legitimate expectation of the investor.<sup>486</sup>

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<sup>479</sup> *Ibid.*

<sup>480</sup> *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka* (2012) Case No ARB/09/2, para 420 (International Center for Settlement of Investment Disputes) (Arbitrators: Makhdoom Ali Khan, David Williams and Bernard Hanotiau).

<sup>481</sup> Oshionebo, *Stabilization Clauses*, *supra* note 65 at 27.

<sup>482</sup> Evaristus Oshionebo, *Corporations and Nations*, *supra* note 35 at 429.

<sup>483</sup> *Tecmed v Mexico*, *supra* note 470, para 154.

<sup>484</sup> The AGRA, *supra* note 95 which was enacted in 1984 generally prohibits gas flaring in Nigeria, although an IOC could be permitted by the Minister under Section 3 (1) and (2) to flare gas where gas utilization is not feasible.

<sup>485</sup> Oshionebo, *Stabilization Clause* *supra* note 65 at 28.

<sup>486</sup> Collins, *supra* note 56 at 257. Note that pre-existing environmental standards refer to pre-AGRA era when there was no primary legislation for the regulation of gas flaring in Nigeria.

Furthermore, the FET provision in Nigeria’s BITs contains an umbrella clause that mandates Nigeria to “observe any obligation it may have entered into with regards to investments” of the IOCs.<sup>487</sup> A similar provision to Nigeria’s BIT FET provision has been explained to be an “umbrella clause” of a “catch-it all” nature, which guarantees compliance with obligations under investment contracts between a host state and an investor.<sup>488</sup> This entails that apart from the interpretation of the FET clause as explained earlier, a violation of a stabilization clause in an investment contract (or legislation), for instance, could be considered a violation of the FET provision resulting in a treaty claim.<sup>489</sup> If this is considered correct, then, the Nigerian government’s amendment of its laws to ensure strict environmental standards would amount to a breach of the stabilization clauses in Nigeria’s investment contracts, and by extension a violation of its BIT FET provision because such amendment would change the legal regime (which currently allows the IOCs to either flare gas or spill oil) in some material respects.<sup>490</sup> This would depend on whether the stabilization clause has a freezing effect or maintains the economic equilibrium.<sup>491</sup>

Regardless of the form that a stabilization provision takes, the shared denominators are that it protects foreign investors from the application of regulations that are enacted after the execution of investment contracts and requires a payment of compensation for their breach. It has been argued that stabilization clauses can impede the ability of a host state to place and monitor human rights obligations on IOCs and that it prevents host states from complying with their obligations under international law.<sup>492</sup> It also “promotes social irresponsibility by freezing the legal regime governing resource extraction projects and as such hurt human rights and environmental protection of developing states” like Nigeria.<sup>493</sup>

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<sup>487</sup> Nigeria – U.K. BIT, *supra* note 41, Article 2 (2) and the Nigeria – Netherlands BIT, *supra* note 41, Article 3 (4).

<sup>488</sup> Singh, *supra* note 478 at 91.

<sup>489</sup> *Ibid* at 92.

<sup>490</sup> Oshionebo, Stabilization Clause, *supra* note 65 at 26. This thesis argues that the legal regime in Nigeria allow gas flaring because the Minister of Petroleum has wide discretion to permit gas flaring under the AGRA as shown in section 2.2.3.2 of chapter 2.

<sup>491</sup> While the one with a freezing effect prohibits a host state from a unilateral amendment or change of its laws, the “economic equilibrium clause” permits a change in legislation but with a condition that where such change adversely impacts the economic interests of IOCs, they should be put in the position they were before the change. Putting the IOCs in the position they were before the changes or amendments in law were made could be achieved through the payment of compensation. See, *ibid* at 2 – 8, for a detailed analysis of both types.

<sup>492</sup> *Ibid* at 224.

<sup>493</sup> Oshionebo, Stabilization Clauses *supra* note 65 at 20.

However, some argue that a stabilization clause does not place an absolute bar on the legislative powers of the country.<sup>494</sup> While this argument sounds convincing, in reality, the government of Nigeria might incur the cost for compensation if challenged as a breach of the umbrella clause before an investment tribunal by an IOC. The resultant effect is that the Nigerian government may well be deterred by the possibility of being liable to pay huge compensation to the IOCs for new regulations that breach its obligation under a stabilization clause.

In Nigeria, guarantees for the stabilization of regulatory regimes governing the Nigerian Liquefied Natural Gas project have been codified in the *Nigerian Liquefied Natural Gas Act* (NLNG Act) and provides:

Without prejudice to any other provision contained herein, neither the company nor its shareholders in their capacity as shareholders in the company shall in any way be subject to new laws, regulation and taxes, duties, imports or charges of whatever nature which are not applicable generally to companies incorporated in Nigeria or to shareholders in companies incorporated in Nigeria respectively,<sup>495</sup> ... the government further agrees to ensure that the said guarantees [not to be subject to new laws], ... shall not be suspended, modified or revoked during the life of the venture except with the mutual agreement of the government and the shareholders of the company.<sup>496</sup>

This provision is capable of posing a problematic challenge to, or may restrain the government of Nigeria from making and implementing regulations that may affect IOCs economically even when they seek to protect the environmental and human rights of host communities. The provision ties the hands of the Nigerian government for the entire period of a project.<sup>497</sup> In *Niger Delta Development Commission (NDDC) v Nigerian Liquefied Natural Gas (NLNG)* (the NDDC Case),<sup>498</sup> the NLNG successfully relied on the stabilization provision of the *NLNG Act* to ward

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<sup>494</sup> Patrick Dumberry, "International Investment Contracts" in Tarcisio Gazzini & Eric De Brabandere, eds, *International Investment Law: The Sources of Rights and Obligations* (Leiden: Martinus Nijhoff, 2012) at 221.

<sup>495</sup> *Nigerian Liquefied Natural Gas (Fiscal Incentives, Guarantees and Assurances) Amendment Act, 1993*, Second Schedule, para 3.

<sup>496</sup> *Ibid* at para 6.

<sup>497</sup> Oshionebo, *Stabilization Clauses supra* note 65 at 16.

<sup>498</sup> *NDDC v NLNG*, (2010) Suit No: CA/PH/520/2007. At the Court of Appeal, the case was not necessarily decided on its merits, but on the ground that the NDDC did not lead evidence or canvass arguments to show that the 'freezing effect' of the provision of the NLNG Act contravenes the Constitution of Federal Republic of Nigeria, 1999 (as amended) on the exclusive power of the National Assembly to make the NDDC Act so as to be entitled to collect tax accruable to it from the NLNG.



off the claims of the NDDC (an agency of the federal government of Nigeria) to pay taxes imposed on it in a subsequent legislation. Although the issue at stake in the NDDC Case was for the payment of tax, it is arguable that applying the same logic, the guarantee for the stabilization of regulatory regime under the *NLNG Act* and investment contracts between Nigeria and IOCs may deter the implementation of regulations that prioritize public purpose.

Considering the effect that the FET clause may have on the environment and human rights in the context of the stabilization clauses in Nigeria's investment contracts and legislations, this thesis argues that the FET clause in Nigeria's BITs should be expunged as was done by the Indian government in its BITs.<sup>499</sup> This is because of the broad meaning that could be ascribed to the FET standard by investment tribunals, as discussed earlier. However, this research acknowledges that relevant home states may resist the proposal to expunge the FET clause from Nigeria's BITs considering the degree of protection it has for investors and the asymmetrical economic relations that exist between the relevant home states and the Nigerian government. The possible resistance evinces a lack of political will from the home states, which is a significant challenge to the practicability of the central argument of this thesis, as discussed in chapter 4.

Because of the potential negative impacts of the "clauses against expropriation" and the "FET standards" on the pursuit of environmental and human rights, several governments have commenced the negotiation of BITs that refer to the importance of the environmental and human rights protection. Recent BITs such as the Nigeria-Morocco BIT referred to the right of the state parties to regulate and introduce new legislative measures in order to balance the rights and obligations of the state parties and the investors.<sup>500</sup> Also, it imposes some obligations on investors, which are examined in the next section alongside the proposed imposition of obligations relating to environmental and human rights protection on IOCs.

### 3.4 The Proposed Obligations Relating to Environmental and Human Rights Protection: The Choice of Bilateral Investment Treaties

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<sup>499</sup> Singh, *supra* note 478 at 88 – 89.

<sup>500</sup> *Reciprocal Investment Promotion and Protection Agreement Between The Government of the Kingdom of Morocco and The Government of the Federal Republic of Nigeria*, 3 December 2016, preamble and Article 23 [Nigeria – Morocco].

The analysis in the previous section indicates that BITs provide overwhelming protection for foreign investments in Nigeria's O&G sector. Perhaps, this leaves the Nigerian government in a disadvantaged position if it intends to strengthen its environmental laws. When taken together with the earlier argument of this thesis regarding the importance of exploring an international law perspective in addressing IOCs' pollution of the environment and human rights violations in Nigeria's O&G sector,<sup>501</sup> it becomes apparent that relying solely on the idea of improving domestic regulations negates the reality that confronts the government as explained in section 3.4. Therefore, this thesis advocates for a turn to international law. While it is generally accepted that the impact of businesses on the environment and human rights requires regulations from an international law perspective, it remains a question of debate whether imposing obligation on TNCs should be made in a multilateral treaty or a BIT.<sup>502</sup>

While some propose that BITs should be explored for this purpose,<sup>503</sup> scholars such as Duruigbo have suggested that the straight-forward way of incorporating IOCs' obligations would be through a multilateral treaty.<sup>504</sup> Although the latter argument has gathered significant support, which has resulted in drafting the *Zero Draft Treaty* as analyzed earlier, only the passage of time will determine its success. The last attempt to impose legally binding human rights and environmental obligations on corporations on a multilateral basis through the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* was mostly unsuccessful.<sup>505</sup> Therefore, from a practical perspective, one fundamental reason for the choice of BITs for imposing binding obligations on IOCs is because the negotiation of a BIT involves two states, unlike a multilateral treaty that may include nearly 200 countries.<sup>506</sup> This reason is tenable, notwithstanding that it may also take a considerable length of time and resources to re-negotiate the relevant BITs. A multilateral treaty-making

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<sup>501</sup> See Chapter two, section 2.4 above.

<sup>502</sup> Choudhury, *supra* note 147 at 442.

<sup>503</sup> Simons, *supra* note 42 at 18.

<sup>504</sup> Duruigbo, *supra* note 196 at 206.

<sup>505</sup> Pini Pavel Miretski & Sascha-Dominik Bachmann, "The UN '*Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*': A Requiem" (2012) 17 Deakin L Rev 6 at 9 [Miretski & Bachmann].

<sup>506</sup> Choudhury, *supra* note 147 at 476.

process is much more prolonged and cannot match the urgency of action that the challenges of business and human rights require.<sup>507</sup>

Secondly, since BITs form part of the legal basis for the investment of IOCs in Nigeria, the enforcement mechanisms under BITs could be explored for the enforcement of IOCs' obligations under the BIT. A BIT offers a robust and easily accessible avenue to investment arbitration for remedies and enforcement of BIT obligations.<sup>508</sup> As has been observed, investment arbitration mainly provides a remedy for foreign investors, but the imposition of obligations in BITs could also offer remedies to other actors.<sup>509</sup> Relatedly, imposing obligations on investors in BITs could serve as a balancing mechanism, since Nigeria's BITs require Nigeria to accord IOCs FET, national and most-favoured-nation treatments, among others, without a corresponding obligation on IOCs.

The framework for obligations regarding the environment and human rights protection in Nigeria's BITs as proposed in this thesis is partly inspired by the works of Simons,<sup>510</sup> Dumberry<sup>511</sup> and Choudhury<sup>512</sup> who have analyzed how inserting obligations for human rights and environmental protection for corporations in BITs could address environmental pollution and human rights violations caused by corporations in Third World countries. Their works focus mainly on imposing obligations on TNCs in BITs as a way of balancing the competing interests of host states and TNCs since TNCs' right of access to investment arbitration for a breach of a BIT clause by host states is considered to restrict the regulatory powers of the latter.

While this thesis agrees with their views, it proceeds to argue further that not only should the IOCs' obligations in BITs be explored in the context of investment arbitration but also that the relevant obligations should be enforced in the home states of the IOCs by the individuals of the impacted host communities of the Niger Delta. This is because no rule of international law prevents state parties from imposing substantive obligations, including those related to the

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<sup>507</sup> John Ruggie, "Business and Human Rights: Treaty Road Not Travelled" May 2008 at 42 – 3 cited in Anita Ramasastry, "Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-corruption Movement" in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013) at 170.

<sup>508</sup> Choudhury, *supra* note 147 at 464.

<sup>509</sup> *Ibid.*

<sup>510</sup> Simons, *supra* note 42 at 18.

<sup>511</sup> Dumberry & Dumas-Aubin, *supra* note 144 at 3.

<sup>512</sup> Choudhury, *supra* note 147 at 430.

protection of human rights and environmental standards on IOCs, as well as providing a functional enforcement mechanism in home states.<sup>513</sup> This thesis does not intend to argue that providing IOCs' obligations in BITs addresses all the issues relating to environmental pollution and human rights that are facing the Niger Delta communities. There are no magic wands for resolving the environmental pollution and human rights issues caused by IOCs in Nigeria. Instead, this thesis presents a preliminary idea on how formulating these obligations in the context of Nigeria's BITs could provide additional remedial options for the Niger Delta communities in their demand for responsible operations by IOCs in their region, and this enhances IOCs' accountability.

### 3.4.1 The Language of Obligations Relating to Environmental and Human Rights Protection

The content and scope of BITs have evolved over the years. As it relates to environmental and human rights provisions in BITs, three generations of BITs are identifiable. The first generation of BITs has a narrow focus, which is limited to the protection of foreign investment and does not make reference to environmental and human rights protection.<sup>514</sup> However, as the operation of foreign investment began to have both environmental and human rights impacts, states started introducing provisions relating to environmental and human rights protection in their BITs to ensure responsible investments in their territory. Hence, the second generation of BITs such as the Nigeria – Austria BIT refers to environmental protection in its preamble.<sup>515</sup> This thesis' categorization of BITs as second-generation BITs is because their provisions often refer to the responsibility of state parties in respect of environmental and human rights protection.<sup>516</sup> The provision of environmental protection in the Nigeria – Austria BIT is narrow as it focuses on the commitment of state parties to achieve the BIT objectives "in a manner consistent with the

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<sup>513</sup> Gazzini, *supra* note 57 at 107.

<sup>514</sup> They contain several provisions that are intended to offer protection to the investment of foreigners against actions and measures that may be taken by host states. Such provisions include the clause regarding expropriation of investment and the FET clause as discussed earlier in this chapter. Other provisions include the Most-favoured Nation clause, the National Treatment clause and the Umbrella clause.

<sup>515</sup> *Austria- Nigeria Agreement for the Promotion and Protection of Investment between the Republic of Austria and the Federal Republic of Nigeria*, 8 April 8 2013 (not in force) [Austria – Nigeria BIT]. The preamble to the *Agreement between the Government of the Republic of Finland and the Government of the Federal Republic of Nigeria on the Promotion and Protection of Investments* (entered into force 20 March 2007).

<sup>516</sup> This categorization applies even if the environmental and human rights provisions are found in the main text of a BIT, and it does not matter that such provisions are enforceable against the state parties.

protection...the environment.”<sup>517</sup> The commitment of state parties in this regard is, however, not legally binding on them.

Another second-generation BIT that is relevant is the US Model BIT.<sup>518</sup> Before the era of the third-generation BITs, BITs did not contain substantive provisions regarding human rights and neither did they condition an investor’s “rights... upon responsibilities of the investor”.<sup>519</sup> Article 12 of the US Model BIT acknowledges that domestic “environmental laws and policies” should play an essential role in the effort of state parties to protect the environment. It further “recognizes that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws” or by failing to ensure the enforcement of such laws.<sup>520</sup> While these provisions refer to the protection of the environment, they neither bind state parties nor foreign investors. At best, they are meant to encourage the relevant state parties not to lower environmental standards in a bid to accommodate or encourage foreign investments.

Similarly, the Nigeria-Canada BIT provides that states “recognize that it is inappropriate to encourage investment by relaxing... safety or environmental measures” and that these measures should not be waived in order to encourage the operation of foreign investment.<sup>521</sup> However, the provision regarding environmental standards in the Nigeria – Canada BIT differs from the provision under the US Model BIT because unlike the latter provision, it envisages that a state party could bring a claim against the other contracting party before an investment tribunal where it considers that the other contracting party relaxed its environmental law in order to encourage an investment within its territory.<sup>522</sup> The implication is that the environmental protection in Nigeria – Canada BIT confers an enforceable obligation on the state government to protect the environment. This is a significant development in the field of international investment law.

Another critical aspect of the Nigeria – Canada BIT is its use of environmental and human rights language. It recognizes the responsibility of the state parties to *encourage* corporations to

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<sup>517</sup> Austria – Nigeria BIT, *supra* note 515.

<sup>518</sup> US Model BIT 2012, *supra* note 474.

<sup>519</sup> Luke Eric Peterson & Kevin R. Gray, “International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration” at 8, (April 2003) online (pdf): <[iisd.org/pdf/2003/investment\\_int\\_human\\_rights\\_bits.pdf](http://iisd.org/pdf/2003/investment_int_human_rights_bits.pdf)>

<sup>520</sup> US Model BIT, *supra* note 474, Article 12 (2).

<sup>521</sup> *Agreement between Canada and the Federal Republic of Nigeria for the Promotion and Protection of Investments*, 6 May 2014, Article 15 [Nigeria – Canada].

<sup>522</sup> *Ibid.*

voluntarily integrate recognized international standards such as the principles that address environmental and human rights issues, among others, in their practice.<sup>523</sup> Such hortatory language, which merely encourages IOCs to incorporate recognized international standards, is unlikely to be effective<sup>524</sup> as it allows IOCs to engage in self-regulation, which has proven not to prevent them from degrading the environment and violating human rights.<sup>525</sup> Indeed, they are not legally binding on either the state parties or investors.

The recent Nigeria-Morocco BIT represents a third-generation BIT.<sup>526</sup> While the Nigeria – Canada and US Model BITs address only state parties in respect of environmental and human rights standards, the Nigeria – Morocco BIT addresses both state parties and investors in treaty-like language. Article 15 (6) provides that state parties “shall ensure that their laws, policies and actions are consistent with the international human rights agreements [that] they are a Party.”<sup>527</sup> It further provides that “investors and investments *shall* uphold human rights in the host state” and *shall* not operate their investments in a manner that undermines international environmental and human rights obligations to which the state parties are a party.<sup>528</sup> Interestingly, the Nigeria – Morocco BIT provides for the civil liability of investors in their home states where their acts “lead to significant damage, personal injury or loss of life.”<sup>529</sup> The mandatory language such as *shall* that is used in the Nigeria – Morocco BIT demonstrates that the provisions are framed as obligations that must be complied with by investors. While the provisions of the Nigerian – Morocco BIT are commendable, it is not clear whether the provision on the civil liability of investors in their home states where their acts “lead to significant damage, personal injury or loss of life” applies to environmental pollution and human rights violations caused by investors. Moreover, the Nigeria-Morocco BIT does not apply to IOCs in Nigeria because there is no Moroccan oil company operating in Nigeria’s O&G sector.

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<sup>523</sup> *Ibid*, Article 16.

<sup>524</sup> Dumberry & Dumas-Aubin, *supra* note 144 at 6.

<sup>525</sup> Anthony VanDuzer, Penelope Simons & Graham Mayeda, “Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries” (August 2010) at 304, online (pdf): [iisd.org/pdf/2012/6th\\_annual\\_forum\\_commonwealth\\_guide.pdf](http://iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf) [VanDuzer, Simons & Mayeda].

<sup>526</sup> Nigeria – Morocco BIT, *supra* note 500.

<sup>527</sup> *Ibid*.

<sup>528</sup> *Ibid*, Article 18 (2) (4).

<sup>529</sup> *Ibid*, Article 20.

The obligations that this thesis envisages must be specific, with mandatory environmental and human rights obligations for corporate activities.<sup>530</sup> Nigeria's BITs should create mandatory legal obligations, which compel IOCs to adopt environmental and human rights standards.<sup>531</sup> While the Nigeria – Morocco BIT may envisage civil liability for an investor in only an investor's home state for a breach of obligation,<sup>532</sup> this thesis envisages the liability of IOCs in their home states as well as before investment tribunals for a breach of the obligations relating to environmental and human rights protection. This thesis adopts the model proposed by VanDuzer, Simons and Mayeda, and tracks most of its language, with some modifications.<sup>533</sup> Although the model appears to use only human rights language, its choice is hinged on the fact that it has broad provisions that also accommodate environmental pollution and their negative impacts on human rights. Relying on the model, IOCs' obligations relating to environmental protection and human rights could be provided as follows:

Investors of a Party and their investments shall respect internationally-recognized human rights in their operations in the other Party. For greater certainty, the obligation to respect human rights means that: investors of a Party and their investments have a legal obligation to exercise due diligence to avoid violating or contributing to the violation of the human rights of individuals and communities in the other Party; investors of Party and their investments shall exercise due diligence to prevent or mitigate adverse human rights impacts that are directly linked to their operations, *including the human right impacts of environmental pollution*, products or services by their business relationships in the Party even if the investor or the investment has not contributed to those impacts; where an investor of a Party or its investment violates the human rights or is complicit in the violations of human rights of individuals or groups of individuals in the Party, the investor and/or its investment shall take measures to mitigate such adverse impacts and shall provide reparations to the victims, including restitution, compensation and satisfaction, as appropriate.<sup>534</sup>

While this provision should form part of the substantive provisions in Nigeria's BITs, a reference to the obligations of IOCs should also be made in the preamble of the BITs. This is because Article 31 (1) of the *Vienna Convention on the Law of Treaties* provides that treaty obligations

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<sup>530</sup> Penelope Simons, "Corporate Voluntarism and Human Rights: The Adequacy and Effectiveness of Voluntary Self-Regulation Regimes" (2004) 59 *Industrial Relations* 101 at 130.

<sup>531</sup> Cf, VanDuzer, Simons & Mayeda, *supra* note 525 at 304.

<sup>532</sup> Nigeria – Morocco BIT, *supra* note 500, Article 20.

<sup>533</sup> VanDuzer, Simons & Mayeda, *supra* note 525 at 308.

<sup>534</sup> *Ibid.* Emphasis mine and it represents the modification made by this thesis to reflect its argument.

are interpreted in the context of the purpose and objective of the treaty.<sup>535</sup> A preamble often indicates the purpose and context of an obligation in a treaty.<sup>536</sup> Consequently, since a preamble of a BIT, for the most part, stipulates investment protection as its purpose, it is necessary to also refer to environmental and human rights objectives in BITs as a court or an investment tribunal prefers an interpretation that best reflects the goals of the preamble.<sup>537</sup>

### 3.5 Conclusion

The analysis undertaken in this chapter can be summarized as follows. The extant position of international instruments regarding the regulation of IOCs is not sufficient for the protection of the environment and human rights of the Niger Delta communities. It mainly adopts an approach that leaves the regulation of IOCs solely to Nigeria's domestic laws. This chapter concludes that this neglects the challenges that are facing the Nigerian government in regulating the IOCs and, by extension, the need to explore other complementary regulatory approaches using an international law mechanism. This chapter, therefore, concludes with a discussion of a model framework for the imposition of environmental and human rights obligations on IOCs in BITs.

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<sup>535</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, No: 18232 (entered into force 27 January 1980).

<sup>536</sup> Dumberry & Dumas-Aubin, *supra* note 144 at 4.

<sup>537</sup> VanDuzer, Simons & Mayeda, *supra* note 525 at 46.



## **CHAPTER FOUR: THE PRACTICABILITY OF IMPOSING OBLIGATIONS ON IOCs AND EXAMINATION OF ENFORCEMENT MECHANISMS**

### **4.1 Introduction**

So far, one of the significant arguments this thesis has advanced is that ‘soft’ international instruments have not been able to address environmental pollution as well as human rights violations caused by the IOCs in the Niger Delta region. This partly informs the main argument of this thesis that not only should there be binding obligations on IOCs relating to environmental protection and human rights, but that such obligations should be enforceable by exploring the potential that BITs may offer.

This concluding chapter is divided into two substantive parts. The first part analyzes the potential challenges to the argument of this thesis that Nigeria and the home countries of the IOCs in Nigeria should renegotiate the relevant BITs to incorporate obligations relating to environmental protection and human rights. There are two relevant challenges to this argument. The first problem deals with the political will of the Nigerian government and the home states of IOCs to incorporate these obligations. The second problem is related to the national treatment clause in Nigeria’s BITs. In this part, this thesis also discusses the debate regarding the current status of IOCs in international law, with a view to demonstrate that corporations generally have rights and obligations under international law. Elements of this debate include the status of IOCs as ‘subjects’ of international law, the interpretation of this status and its implication on the argument for enforceable obligations against IOCs as proposed by this thesis.

The second part examines two enforcement mechanisms for the obligations placed on IOCs that operate in Nigeria. This part of the chapter argues that these enforcement mechanisms could improve the accountability of IOCs. First, it discusses the possibility of the Nigerian government initiating a claim for a breach of these obligations against the relevant IOCs in investment arbitration. Second, it examines how, and the extent to which such obligations could facilitate the initiation of transnational litigation by the Niger Delta people in the home state of an IOC that

violates its obligations in BITs. While undertaking these analyses, this part also reviews the potential challenges that are likely to face the enforcement mechanisms proposed by this thesis. The chapter ends on an optimistic note that the implementation of the framework explained in this thesis could improve the accountability of IOCs by deterring them from carrying out activities that pose a menace to the environment as well as human rights of the Niger Delta communities.

## 4.2 The Practicability of Imposing Obligations Relating to Environmental Protection and Human Rights on IOCs in BIT

There are three relevant challenges that could confront the imposition of BIT obligations regarding the environment and human rights on IOCs. While the first problem relates to the political will of the Nigerian government and the home states of IOCs, the second and third are legal issues.

### 4.2.1 The Nigerian Government and Home States' Political Will

Considering that the renegotiation of Nigeria's BITs to include obligations for IOCs in BITs would require the concurrence of the relevant governments, it is necessary to examine the extent to which the Nigerian government and the home states of the IOCs would want to renegotiate these BITs. On the one hand, the reliance of the government of Nigeria on the economic benefit of the O&G sector may be an indication that it could resist the idea of imposing BIT obligations regarding the environment and human rights on IOCs. This argument may be supported by the assumption that strict regulation of IOCs could lead to the withdrawal of their investments. Indeed, an ExxonMobil executive was quoted to have asserted that "developing countries [such as Nigeria] cannot afford environmental protection, and if they insist on such measures, foreign investments might just go elsewhere."<sup>538</sup>

While the preceding argument might appear plausible, this thesis argues that it should not dissuade the Nigerian government from renegotiating the relevant BITs. This is because IOCs are likely to continue operating their investments as UNCTAD noted that "corporate objectives

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<sup>538</sup> Sikka, *supra* note 438 at 32.

have remained unchanged” in the quest for maximization of profit.<sup>539</sup> Moreover, IOCs have made so much financial investment in Nigeria’s O&G sector. For instance, IOCs in Nigeria have spent an enormous amount of money on drilling oil wells under the oil exploration and prospecting licences<sup>540</sup> and may find it difficult to withdraw their investments provided that they still make a commercial profit from their operation. Oshionebo notes that: “it may not be feasible for [IOCs] to divest from Nigeria...given their huge financial investments in extant projects.”<sup>541</sup> Therefore, there is no real risk of the government losing its economic benefits if it decides to renegotiate BITs to bring them in tune with the arguments of this thesis.

At present, it seems that the Nigerian government has realized that the negative impact of the operations of IOCs in the Niger Delta should be addressed as it has started considering “quality” instead of “quantity” of investments and this has conducted to a review of Nigeria’s BITs.<sup>542</sup> Accordingly, Nigeria’s model treaty was drafted in 2016, bearing obligations regarding the environment and human rights for investors with a plan to renegotiate or terminate BITs that fall short of this standard.<sup>543</sup> Renegotiating Nigeria’s BITs would also provide an opportunity to amend other aspects of these BITs to ensure that future amendment of Nigeria’s environmental laws, which is also as relevant as the model being proposed by this thesis, would not breach any BIT clause that protects an IOC as discussed in the previous chapter.

On the other hand, the operations of the IOCs in the Niger Delta have economic benefits for their home states and, therefore, their home states may fear that consenting to strict regulation of IOCs could affect their competitiveness.<sup>544</sup> Since the current international law regime of not holding IOCs responsible for their conduct promotes the economic interests of the home states,<sup>545</sup> it is doubtful that countries such as the United Kingdom, Netherlands and Italy would have the

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<sup>539</sup> UNCTAD, “Economic Development in Africa: “Rethinking the Role of Foreign Direct Investment” (2005) Online: [unctad.org/en/Docs/gdafrica20051\\_en.pdf](http://unctad.org/en/Docs/gdafrica20051_en.pdf) 1 at 44.

<sup>540</sup> Under the *Petroleum Act*, *supra* note 186, Article 2, IOCs are given licences to explore designated areas for potential oil discovery. They bear all the risks and costs of oil exploration but recoup from the produced crude oil if there is a break through. See Omoregbe, *supra* note 98 at 47.

<sup>541</sup> Oshionebo, *Regulating Transnational Corporations*, *supra* note 32 at 78.

<sup>542</sup> International Institute for Sustainable Development, “The Changing World of Investment Negotiations: From bilateral protection to...?” (February 2018) at 10, online: [iisd.org/sites/default/files/meterial/11th-annual-forum-report-en.pdf](http://iisd.org/sites/default/files/meterial/11th-annual-forum-report-en.pdf). This is a report of the address by Ms. Ajuma Patience Okala, the Deputy Director and Legal Adviser of Nigeria Investment Promotion Commission, Nigeria in the 11<sup>th</sup> Annual Forum of Developing Country Investment Negotiators.

<sup>543</sup> *Ibid.*

<sup>544</sup> Oshionebo, *Corporations and Nations*, *supra* note 35 at 427.

<sup>545</sup> *Ibid* at 435.

political will to renegotiate their BITs for stricter regulation of IOCs. The suggestion that the powerful states resisted the implementation of the draft Norms<sup>546</sup> which tend to impose obligations relating to environmental and human rights protection on IOCs on the ground that it would dilute the primary responsibilities of the state in this regard<sup>547</sup> seems to support the possible lack of political will by the home states.

The possible lack of political will raises a cogent doubt on the issue of whether home states may agree to renegotiate their BITs with Nigeria to reflect the argument of this thesis. However, the reliance on the suspicion that home states may not accede to such re-negotiation may be insufficient to warrant a conclusion. This thesis is hopeful that at a time when the more ‘powerful’ states such as the United States of America and Canada have shown a growing interest towards environmental and human rights considerations in their BIT models,<sup>548</sup> there may be an indication that renegotiating BITs that bear such obligations as proposed by this thesis will not face an insurmountable opposition from the home states. The environmental and human rights considerations in these BITs are not as extensive as the proposal made in this thesis, however. Article 12 of the Nigeria – Canada BIT merely requires states to encourage corporations to voluntarily include international environmental and human rights standards in their practices.<sup>549</sup> Therefore, it remains to be seen how these powerful home states would react to the idea of inserting obligations regarding human rights and environmental protection in their BITs, considering that these are model BITs and states are at liberty to discard the environmental and human rights considerations before they enter into force.

A study that investigated the contribution of O&G companies to climate change suggests that the business operations of IOCs such as Shell, Exxon and Chevron contribute over 10% of the global emission of carbon dioxide since 1965.<sup>550</sup> In fact, Nigeria acknowledges that gas flaring in the

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<sup>546</sup> *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, *supra* note 361.

<sup>547</sup> Miretski & Bachmann, *supra* note 505 at 32. See Chapter three above for a detailed analysis of the Norms.

<sup>548</sup> Choudhury, *supra* note 145 at 464. USA Model BIT, 2012, *supra* note 474 Article 12 and *Nigeria – Canada BIT*, *supra* note 521, Article 16.

<sup>549</sup> *Nigeria – Canada, BIT*, *ibid.*

<sup>550</sup> Mathew Taylor & Jonathan Watts, “Revealed: the 20 Firms Behind a Third of All Carbon Emissions” *The Guardian* (20 October 2019) at 1 online: <[theguardian.com/environment/2019/oct/09/revealed-20-firms-third-carbon-emissions](https://www.theguardian.com/environment/2019/oct/09/revealed-20-firms-third-carbon-emissions)>.

Niger Delta region contributes to climate change and that it intends to end gas flaring by 2030.<sup>551</sup> Since Nigeria and the home states of IOCs are parties to international instruments on climate change such as the Paris Agreement, which intends to enhance universal and determined efforts to address climate change and its impacts,<sup>552</sup> renegotiating Nigeria's BITs to impose obligations relating to environmental and human rights protection on IOCs will demonstrate a commitment on the part of the Nigerian government and relevant home states under the Paris Agreement to reduce greenhouse gas emission.

While this thesis strengthens its hope that the Nigerian government and IOCs' home states would renegotiate the relevant BITs to reflect its arguments on the basis that it is within their ethical obligation to promote respect for human rights, it does not suggest a magic wand to the problem of lack of political will.<sup>553</sup> However, it provides an answer to the first research question, which is, if the relevant states consent to do so, "what value could imposing obligations relating to human rights and the environment on IOCs in Nigeria's BITs offer to the quest to hold IOCs accountable for the violation of these obligations?" It focuses on the analysis of legal impediments facing the model proposed by the thesis but recognizes the political considerations. Hence its second research question: "Are there any legal impediments to imposing enforceable obligations relating to human rights and the environment on IOCs in BITs?"

#### 4.2.2 The National Treatment Standards

The imposition of obligations relating to environmental protection and human rights on IOCs could be seen as violating national treatment clauses in Nigeria's BITs. The relevant BITs provide that treatments that are given to the investment activities of foreign investors in Nigeria shall not be less favourable than that accorded to comparable activities of the investments of domestic investors.<sup>554</sup> At the minimum, the national treatment provision ensures that a host government does not make a negative differentiation between the management of investments of

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<sup>551</sup> United Nations Climate Change, "Nigeria's Intended Nationally Determined Contribution" (last seen 22 January 2020) at 11 online (pdf): [https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Nigeria%20First/Approved%20Nigeria's%20INDC\\_271115.pdf](https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Nigeria%20First/Approved%20Nigeria's%20INDC_271115.pdf).

<sup>552</sup> United Nations Climate Change, "The Paris Agreement" (last seen 22 January 2020) online: <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>.

<sup>553</sup> Cf. Simons & Macklin, *supra* note 33 at 273.

<sup>554</sup> Nigeria – U.K. BIT, *supra* note 41, Article 3, Nigeria – Netherlands BIT, *supra* note 41, Article 3 and Nigeria – Italy BIT, *supra* note 41 Article 3.

foreign investors and domestic investors through its laws.<sup>555</sup> Therefore, IOCs should be allowed to compete on an equal basis with Nigerian companies that operate in the O&G sector.<sup>556</sup>

Some BITs, however, may exclude the application of the national treatment standard in some circumstances.<sup>557</sup> Notably, a Nigerian BIT excludes any treatment accorded to Nigerian companies under an agreement between the contracting state parties, which includes a BIT.<sup>558</sup> Without exceptions such as this, what the national treatment provision might entail is that imposing such obligations on IOCs could amount to differential treatment against IOCs if challenged before investment arbitration on the basis that these obligations do not apply to Nigerian oil companies. Once an IOC establishes that the obligations relating to environmental protection and human rights do not apply to Nigerian oil companies that operate similar investments as it does, an arbitral tribunal may declare that such obligations incorporated under a BIT violate the national treatment standard. In *Marvin Feldman v Mexico*, the tribunal held that there was a violation of the national treatment standard where a different treatment was given to a foreign investor that was in a similar business with domestic investors.<sup>559</sup>

However, proving that there is a differential treatment in the context of this thesis may be difficult because primarily the national treatment provision only affects the differential application of domestic laws of the host state,<sup>560</sup> and a BIT is not domestic law. Notwithstanding this argument, this thesis suggests that the Nigerian government and the IOCs' home states should expressly exclude the national treatment standard from applying to obligations regarding the environment and human rights in the relevant BITs.<sup>561</sup>

#### 4.2.3 The “Subjecthood” and International Law Obligations on IOCs

Over the years, there has been a debate about the status of corporations in international law. Indeed, there have been two opposing theories – the orthodox and emerging – that have engaged

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<sup>555</sup> Collins, *supra* note 56 at 96 – 7.

<sup>556</sup> *Ibid* at 97.

<sup>557</sup> *Ibid* at 100 – 2.

<sup>558</sup> Nigeria – Netherlands BIT, *supra* note 41, Article 5.

<sup>559</sup> *Marvin Feldman v Mexico*, Case No ARB/(AF)/99/1 Award, 16 December 2002, at page 73 (International Center for Settlement for Investment Dispute) (Arbitrators: Professor Konstantinos D. Kermeus, Mr. Jorge Covarrubias Bravo, Prof. David A. Gantz).

<sup>560</sup> Collins, *supra* note 56 at 97.

<sup>561</sup> The position of this thesis in this regard is similar to the approach adopted in the Nigeria – Netherlands BIT, *supra* note 41, Article 5.

in the conversation over who falls within the scope of subjects of international law.<sup>562</sup> The orthodox theorists insist that states and international institutions such as the UN are the only entities imbued with the capacity of being subjects of international law.<sup>563</sup> The application of this theory to this thesis means that imposing obligations on IOCs in Nigeria's BITs, which are international law instruments, contradicts international law as IOCs being corporations are not subjects of international law. However, critics of the orthodox theory have argued that considering the extensive rights and obligations of corporations in international law, corporations are subjects of international law.<sup>564</sup> According to this view, since corporations can bring legal claims for a breach of human rights instruments,<sup>565</sup> investment treaties and contracts, as well as enter into investment contracts, they are subjects of international law with rights and obligations.<sup>566</sup>

This thesis agrees with the view that corporations are subjects of international law. TNCs have rights and obligations under various aspects of international law<sup>567</sup> as they can be held liable where they are complicit in the acts that violate human rights.<sup>568</sup> In the context of international investment law, TNCs, including IOCs, have rights and obligations in international law and are subjects of international law.<sup>569</sup> Developments in the field of international investment law have

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<sup>562</sup> Duruigbo, *supra* note 196 at 192.

<sup>563</sup> J. G. Collier, "Is International Law Really Part of the Law of England?" (1989) 38 Intl & Comparative L Q 924 at 925 cited in Duruigbo, *ibid.* See the *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 ICJ 174 at 178 – 9, where the International Court of Justice held that the UN has capacity to bring a claim in international law.

<sup>564</sup> For an extensive discussion regarding the nature of the rights and obligations of corporations in international law that lead to the conclusion that corporations are subjects of international law, see the following: Ian Brownlie, *Principles of Public International Law* 6<sup>th</sup> ed (Oxford: Oxford University Press, 2003) and Oshionebo, Corporations and Nations, *supra* note 35 and Duruigbo, *supra* note 196 .

<sup>565</sup> *Autronic AG v Switzerland* [1990] ECHR Application No 12726/87 at para 65. In this case, the European Court of Human Rights held that a corporation has a right to freedom of expression which it can sue to protect.

<sup>566</sup> Oshionebo, Corporations and Nations, *supra* note 35 at 432.

<sup>567</sup> For an extensive discussion of these rights and obligations under international human rights, international environmental law and international criminal law, see Jan Wouters & Anna-Luise Chané, "Multinational Corporations in International Law" Leuven Centre for Global Governance Studies Working Paper No 129.

<sup>568</sup> Jose Alvarez, "Are Corporations "Subjects" of International Law?" (2011) 9 Santa Clara J Intl L 1 at 3.

<sup>569</sup> TNCs have rights under various BITs, including BITs between Nigeria and home states. See *Urbaser S. A. v the Argentine Republic*, *supra* note 157, at 1194 where an investment tribunal expressly held that corporations are capable of bearing obligations under international law. Also, under the international environmental law "Polluter Pay Principle", IOCs can be liable for causing serious environmental damage, including oil spills. See the *International Convention on Civil Liability for Oil Pollution Damage* 29 November 1969 973 UNTS 3 (entered into force 19 June 1975).

tremendously increased the participation of TNCs,<sup>570</sup> and therefore, international law should consider the degree of their impacts in determining the scope of obligations on TNCs. Since states determine the nature and scope of these obligations, perhaps, through BITs,<sup>571</sup> the Nigerian government and the home states of IOCs should incorporate obligations relating to environmental and human rights protection in BITs as this thesis proposes. This thesis argues that imposing obligations regarding environmental protection and human rights on IOCs in BITs would create a layer in international law where the Nigerian government and the Niger Delta communities will be able to challenge IOCs for a breach of these obligations.

#### 4.3 Enforcement of IOCs' Environmental and Human Rights Obligations

It is not new to argue that investment agreements, including BITs, should be framed in such a way that investors would not only have enforceable rights but also have a corresponding set of obligations.<sup>572</sup> What is relatively new and generates debate among scholars in the field of international investment law is the appropriate enforcement approach for these obligations against TNCs. There is arguably no version of a BIT that is currently in force, which provides enforceable rights for host communities.<sup>573</sup> The reason is that most BITs that incorporate environmental and human rights standards do not intend that such standards become obligations for the TNCs<sup>574</sup> and where they consider them as TNCs' obligations such as in the Nigeria-Morocco BIT,<sup>575</sup> the mechanism for their enforcement is often unclear.

This thesis, however, argues that there are two potential ways to enforce IOCs' obligations relating to environmental protection and human rights. First, it proposes that if these obligations are explicitly stipulated in the BITs as discussed in chapter 3, the Nigerian government could rely on them to proceed against IOCs in investment arbitration for failure to abide by the

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<sup>570</sup> Jennifer Zerk, James Crawford & John Bell, "Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law" (Cambridge: Cambridge University Press, 2006) at 74 [Zerk, Crawford & Bell].

<sup>571</sup> Duruigbo, *supra* note 196 at 194. See also Steve Coughan et al, "Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization" (2007) [unpublished, archived at Canadian Electronic Library] at 24 [Coughan].

<sup>572</sup> Mavluda Sattorova, "Investor Responsibilities From A Host State Perspective: Qualitative Data and Proposals For Treaty Reform" Symposium on Investor Responsibility: The Next Frontier in International Investment Law (2019) online (pdf): <[C:/Users/user/Downloads/Investor Responsibilities from a Host State Perspe.pdf](C:/Users/user/Downloads/Investor_Responsibilities_from_a_Host_State_Perspe.pdf)>.

<sup>573</sup> Ibrinke Odumosu-Ayanu, Governments, Investors and Local Communities, *supra* note 49 at 21.

<sup>574</sup> Some of the BITs like the Nigeria – Canada BIT, *supra* note 521, incorporate environmental and human rights standards as a corporate social responsibility for investors.

<sup>575</sup> Nigeria – Morocco BIT, *supra* note 500.



obligations. Second, this thesis argues that IOCs' obligations could be enforced by the Niger Delta communities in the home states of IOCs if enabling provisions are provided in BITs.

#### 4.3.1 Nigeria's Claim in Investment Arbitration

At first, the notion that the Nigerian government could institute a claim against IOCs for a breach of their obligations relating to environmental protection and human rights may attract doubt because most investment arbitration or conciliation disputes are often initiated by foreign investors against host governments. A scholar's opinion that investment arbitration is an "international quasi-judicial review of national regulatory action" suggests that only investors are entitled to challenge the actions of host governments in an investment arbitral tribunal.<sup>576</sup> Against this assumption, the World Bank Executive Directors who drafted the International ICSID Convention unambiguously validated the notion that "the [ICSID] Convention permits the institution of the proceedings by host states as well as by investors," maintaining that "*the provisions of the Convention should be equally adapted to the requirements of both cases.*"<sup>577</sup> This view strongly indicates that the system of investment arbitration does not reserve an exclusive right to bring a claim in the investment arbitration to the IOCs. An arbitrator described the view that a host state cannot bring a claim in investment arbitration as "colourful as misconceived."<sup>578</sup>

Although differently worded, almost all Nigeria's BITs contain a dispute resolution clause, which provides for arbitration under the ICSID Convention in the event of any dispute between the Nigerian government and an investor.<sup>579</sup> A review of Nigeria's BITs reveals that IOCs could institute claims against the Nigerian government for a breach of BIT obligations, but leaves doubt about the possibility of the government instituting claims against the IOCs.

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<sup>576</sup> Hege Elisabeth Veenstra-Kjos, "Counter-claims by Host States in Investment Dispute Arbitration "without Privity"" in P Kahn and T Wa'ld eds cited in Gustavo Laborde, "The Case for Host State Claims in Investment Arbitration" (2010) 1 J Intl Dispute Settlement 97 at 100 [Laborde]. As observed by Laborde, a review of the ICSID's case archives shows that out of nearly 3000 cases filed at the ICSID, only three were instituted by host states. However, none of these three cases was based on breach of a BIT clause.

<sup>577</sup> ICSID Convention, *supra* note 43. Emphasis mine.

<sup>578</sup> Stephen Schwebel, "A BIT about ICSID" (2008) 23 Foreign investment LJ 1 at 5.

<sup>579</sup> Nigeria – U.K. BIT, *supra* note 41, Article 8, Nigeria – Netherlands BIT, *supra* note 41, Article 9 and Nigeria – Italy BIT *supra* note 41, Article 8.

Notwithstanding, this thesis argues that a few amendments to the provisions of the relevant BITs, which this thesis discusses later, could enable the government to enforce their provisions.

A good starting point for determining whether the Nigerian government can bring a claim against an IOC is to examine the jurisdictional competence of investment tribunals under the ICSID Convention to entertain such matter.<sup>580</sup> Article 25 of the ICSID Convention extends the jurisdiction of an investment tribunal “to any legal dispute arising directly out of an investment, between a contracting state [and] a national of another contracting state, which the parties to the dispute consent in writing to submit to the [tribunal].”<sup>581</sup> A critical review of this provision evinces that there are four conditions for an investment tribunal to assume jurisdiction under the ICSID Convention, to wit: “the dispute must be of a legal nature,” “which directly arises out of an investment,” “involving a contracting state and a national of the other contracting state” and “parties must consent in writing.” It is not difficult to assume that the establishment of the first and third conditions may not pose a challenge.<sup>582</sup> Issues of environmental and human rights protection are legal, and they would involve “a contracting state and a national of the other contracting state.” However, the other two conditions would undoubtedly require further examination to determine whether an investment tribunal could assume jurisdiction over a claim brought by the Nigerian government against an IOC for the violation of its BIT obligation.

Regarding the second condition, according to Laborde, the operative word is “investment”<sup>583</sup> as the subject matter of the claim must be shown to arise from the investment. Environmental degradation and human rights violations discussed in this thesis arguably arise from the operations of O&G investments in the Niger Delta. A leading case where the nature and scope of

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<sup>580</sup> An investment tribunal set up under the ICSID Convention is not the only forum for investment arbitration as there are others such as arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL), namely, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014 (UNCITRAL Rules). It is not clear whether the UNCITRAL Rules envisage that states could initiate a direct claim against an investor as its Article 1 (4) merely shows that an investor-state investment dispute arising from a breach of a BIT provision may be initiated for the protection of investment without more. Be that as it may, this thesis focuses on the ICSID system because all relevant Nigeria BITs make reference to it as an appropriate forum for settlement of disputes. Besides, only the Nigeria – Italy, *supra* note 41, Article 8 (2) (b) makes reference to investment arbitration under the UNCITRAL Rules but equally offers an option for disputing parties to approach investment tribunals under the ICSID Convention.

<sup>581</sup> ICSID Convention, *supra* note 43.

<sup>582</sup> Laborde, *supra* note 576 at 103.

<sup>583</sup> *Ibid.*

“investment” are examined is *Salini v. Morocco*.<sup>584</sup> The arbitral tribunal outlined four elements that a party must satisfy to ensure that the requirement of ‘investment’ is satisfied. These are a contribution of money or assets, risk, duration and contribution to the development of the host state. Although it is the foreign investor who often proves these elements to establish the jurisdiction of an investment tribunal, there is no cogent reason why the same test would not apply where the host state is a claimant<sup>585</sup> since the Executive Directors of the World Bank argued that “*the provisions of the [ICSID] Convention should be equally adapted to the requirements of both [the investor and host states] cases.*”<sup>586</sup> Yet again, there is not much doubt that IOCs have contributed a significant amount of money or assets in their investments in the O&G sector in Nigeria, substantially bear risks that are associated with their investments and have been operating in Nigeria for a significant length of time.

Furthermore, it must be shown that the investments of IOCs contribute to the development of the state. If it cannot be shown that the IOCs’ investments ensure development in the host state, then such investments are not entitled to be protected by a BIT as they cease to qualify as an investment.<sup>587</sup> Therefore, it is unlikely that a foreign investor would advance an argument that it does not make positive developmental impacts in a host state,<sup>588</sup> much less IOCs that take pride in having a good international reputation. Assuming without conceding that an IOC would advance an argument that it does not contribute to the development of Nigeria to deny the government access to an investment tribunal, such could easily be defeated with a proof of the economic development that investments in the O&G sector have brought to Nigeria. As noted in section 2.4 of chapter 2, the fact that the revenue from the O&G sector accounts for sixty-five percent of Nigeria’s entire revenue<sup>589</sup> could be sufficient proof of the economic contribution of the investments in the sector to Nigeria.

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<sup>584</sup> *Salini Costruttori SpA and Italstrade SpA v The Kingdom of Morocco* (2001) Case No ARB/00/04 (International Centre for Settlement of Investment Dispute) (Arbitrators: Maitre Robert Briner, Maitre Bernardo Cremades and Ibrahim Fadlallah).

<sup>585</sup> Laborde, *supra* note 576 at 104.

<sup>586</sup> ICSID Convention, *supra* note 43. Emphasis mine.

<sup>587</sup> M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2015) at 152 [Sornarajah].

<sup>588</sup> Laborde, *supra* note 576 at 104.

<sup>589</sup> See the analysis of the economic value of the O&G sector in section 2.4 of chapter two. See also NEITI Report, *supra* note 335.

Another relevant question to analyze is whether a human right or environmental dispute ‘directly’ arises out of an investment. Given that neither a direct human right nor an environmental dispute has ever been submitted to investment arbitration, no investment tribunal has grappled with this question. That notwithstanding, this thesis argues that the environmental and human rights issues being discussed directly arise from the operation of IOCs’ investment. Besides, this thesis contends that Article 25 of the ICSID Convention is not the only provision that an arbitral tribunal considers in order to determine its jurisdiction. Instead, it should consider the provisions of a BIT to determine whether there has been a breach and whether it has jurisdiction to determine such breach. Indeed, priority should be given to BIT provisions as they often refer to the jurisdiction of an investment tribunal to determine legal disputes arising between a state and an investor with respect to the latter’s investment.<sup>590</sup>

The last and most challenging condition for the Nigerian government to satisfy under Article 25 of the ICSID Convention is the requirement that an IOC shall consent in writing before a claim could be made against it. The requirement of consent is significant because the legitimacy of an arbitrator is determined by the validity of the parties’ consent.<sup>591</sup> While Nigeria’s BITs that form the focus of this thesis explicitly express the consent of the Nigerian government for claims against it by a foreign investor,<sup>592</sup> the same cannot be said about foreign investors in favour of the government. As IOCs are not parties to BITs, it would not have been possible for IOCs to express their consent in BITs. This is further complicated by the fact that it is unlikely for an IOC to agree to a claim against it by the government for a breach of a BIT clause after a dispute arises. In this vein, the possibility of the government bringing a claim against an IOC before an investment tribunal becomes greatly diminished. Describing the seeming deadlock posed by this situation, Paulson had expressed that “the tables could not be turned: the defendant [the host state] could not have initiated the arbitration”<sup>593</sup> without the consent of the foreign investor.

It is not all despair for the Nigerian government in this regard, however. Considering the importance of this enforcement model for the protection of the environment and human rights of the Niger Delta communities, this thesis looks beyond the traditional consent system in BITs

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<sup>590</sup> Nigeria – U.K BIT, *supra* note 41 Article 8.

<sup>591</sup> Sornarajah, *supra* note 590 at 139.

<sup>592</sup> Nigeria – U.K BIT, *supra* note 41, Articles 8 and 9 and the Nigeria – Netherlands BIT, *supra* note 41 respectively.

<sup>593</sup> Jan Paulson, “Arbitration without Privity” (1995) 10 Intl Center for Settlement Investment Dispute Rev at 232.

where unilateral consent is often given by the host states. Since there is no requirement that ‘consent in writing’ must be contained in the BIT, the government could obtain consent from an IOC through a separate agreement.<sup>594</sup> Given that investment in the O&G sector in Nigeria involves several investment contracts including oil mining leases and oil prospecting licences, this thesis argues that IOCs’ consent should be obtained through an investment contract between the Nigerian government and the respective IOCs. While making a similar point, Schreuer expressed that a host state could obtain consent to a treaty-based arbitration from investors through an investment agreement (which may form part of the licensing process) as a precondition for investment.<sup>595</sup>

Following Schreuer’s argument, this form of consent would require the relevant IOC to agree to treaty-based arbitration that could take place in the future since such consent would serve as a condition for investment in the O&G sector. Interestingly, “consent may be given” to the jurisdiction of an investment tribunal under the ICSID Convention for “future disputes arising from the investment operation” as well as for existing disputes.<sup>596</sup> Indeed, a report has it that the majority of the arbitration cases under the ICSID Convention between parties are grounded on an agreement to arbitrate future disputes.<sup>597</sup>

Obtaining the written consent of IOCs’ for arbitration under the ICSID rules through investment contracts between IOCs and the Nigerian government may be problematic from a practical perspective. This is because most of the investment contracts have been concluded, and IOCs are already operating their investments in Nigeria. Therefore, obtaining a written consent from the IOCs operating in Nigeria through investment contracts as proposed by Schreuer would require the Nigerian government to renegotiate the terms of its investment contracts with the IOCs after the expiration of the existing ones. The renegotiation of Nigeria’s investment contracts is possible, considering that they are usually valid for some time. Investment contracts in Nigeria’s

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<sup>594</sup> Consent in writing can be given through BIT, national legislation, multilateral treaty and a direct agreement between the parties. See generally, UNCTAD, “Dispute Settlement: International Centre for Settlement of Investment Disputes” (2003) online: <[unctad.org/en/Docs/edmmisc232add2\\_en.pdf](http://unctad.org/en/Docs/edmmisc232add2_en.pdf)> [UNCTAD].

<sup>595</sup> Christopher Schreuer, “Consent to Arbitration” in Peter Muchlinski, Federico Ortino and Christoph Schreuer, ed, *The Oxford Handbook of International Investment Law* (Oxford, New York, Auckland: Oxford University Press, 2008) cited in Laborde, *supra* note 576 at 111.

<sup>596</sup> UNCTAD, *supra* note 594 at 7.

<sup>597</sup> *Ibid.*

O&G sector include the joint venture, production sharing contracts and service contracts.<sup>598</sup> Nigeria's *Petroleum Act* provides information regarding oil prospecting licences and oil mining leases.<sup>599</sup>

Regarding the licences and leases under the *Petroleum Act*, while the duration of oil prospecting licences does not exceed the period of five years, the validity period for an oil mining lease does not exceed twenty years.<sup>600</sup> Although the contents of these investment contracts are not published so that their actual durations are known,<sup>601</sup> it is beyond contestation that they are determinable and renewable.<sup>602</sup> Therefore, the Nigerian government may obtain written consent to the jurisdiction of an arbitral tribunal under the ICSID rules from an IOC upon the expiration and renewal of the relevant IOC's investment contract. Renegotiating investment contracts fall within the scope of the framework of this thesis, which demands the renegotiation of Nigeria's BITs, and would prove a significant step towards addressing the environmental and human rights issues that confront the Niger Delta communities.

A closely related jurisdictional issue is whether Nigeria's BITs confer standing on the government. For a host state to have a right to arbitrate against an IOC, the dispute resolution clause in a BIT must not only confer standing on a foreign investor but also on the host state.<sup>603</sup> At present, only the Nigeria – U.K BIT confers a right to arbitrate on both the Nigerian government and the IOCs,<sup>604</sup> while the Nigeria – Netherlands<sup>605</sup> and the Nigeria-Italy<sup>606</sup> BITs confer a right to arbitrate on IOCs without an equivalent right on the government. On the strength of their provisions, the fact that the government obtained consent through an investment contract, as argued above, does not by itself vest on the government the right to arbitrate.<sup>607</sup> It is, therefore, the argument of this thesis that there should be a firm expression of the right to

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<sup>598</sup> Omoregbe, *supra* note 98 at 50 – 3.

<sup>599</sup> *Petroleum Act* *supra* note 186, section 2.

<sup>600</sup> First Schedule to the *Petroleum Act*, *ibid*, sections 6 and 10.

<sup>601</sup> Rob Pitman & Anne Chinweze, "The Case for Publishing Petroleum Contracts in Nigeria" (2018) at 1 – 2, online (pdf): Natural Resources Governance Institute < [resourcegovernance.org/sites/default/files/documents/the-case-for-publishing-petroleum-contracts-in-nigeria.pdf](https://resourcegovernance.org/sites/default/files/documents/the-case-for-publishing-petroleum-contracts-in-nigeria.pdf) >.

<sup>602</sup> For an extensive analysis of the types of investment contracts and their duration in Nigeria's O&G sector, see Omoregbe, *supra* note 98.

<sup>603</sup> Laborde, *supra* note 576 at 106.

<sup>604</sup> Nigeria – U.K BIT, *supra* note 41, Article 8.

<sup>605</sup> Nigerian – Netherlands BIT, *supra* note 41, Article 9.

<sup>606</sup> Nigeria – Italy BIT, *supra* note 41, Article 8 (2).

<sup>607</sup> Laborde, *supra* note 576 at 106.

arbitrate on the part of the government of Nigeria in BITs. This proposition is not a new practice in the system of BITs. The U.S.-Argentina BIT offers an excellent example of the expression of the right to arbitrate where it provides that, “once an investor concerned has so consented, *either party to the dispute may initiate arbitration* in accordance with the choice so specified in the consent.”<sup>608</sup> Adoption of a similar provision in Nigeria’s BITs confers the right to arbitrate on the government and consequently activates the jurisdiction of investment tribunals under the ICSID Convention.

Having examined the feasibility of investment tribunals assuming jurisdiction in a claim brought by the Nigerian government, the thesis also considers the substantive basis for such a claim. Substantive basis refers to the cause of action upon which the government could rely. In other words, in circumstances where the consent of the IOC to arbitrate is not a general agreement to submit all kinds of dispute to investment arbitration, an investment tribunal under the ICSID Convention would only assume jurisdiction if it is established by the claimant “that the facts it alleged if proven, could constitute a violation of the [BIT].”<sup>609</sup> Imposing obligations relating to environmental protection and human rights on IOCs offers a cause of action under a BIT. In the context of the Niger Delta, a concern which was raised regarding the failure of the Nigerian government to make claims against the IOCs before an investment tribunal (as a result of the lack of obligation for IOCs in BITs),<sup>610</sup> although there are several environmental and human rights concerns,<sup>611</sup> would be addressed. The next section considers the second enforcement option, which applies to the people of the Niger Delta.

#### 4.3.2 Niger Delta Communities’ Claims in the Home States of IOCs

Another possibility that this thesis proposes for the enforcement of the IOCs’ obligations in BITs is the home state enforcement option. In their work, VanDuzer, Simons and Mayeda analyzed this enforcement mechanism against TNCs. They recognized that the challenges which confront developing host states such as Nigeria in regulating foreign investors could ultimately lead to a lack of accountability for environmental damage and human rights violations, and therefore,

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<sup>608</sup> *Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment*, 14 November 1991 (entered into force 20 October 1994), Article VII.

<sup>609</sup> *Iberdrola Energia S.A. v Republic of Guatemala*, (2012) Case No ARB/09/5, paras 306, 323 -373 (International Centre for Settlement of Investment Dispute) (Eduardo Zuleta, Rodrigo Oreamuno and Yves Derains).

<sup>610</sup> Ejims, *supra* note 133 at 363.

<sup>611</sup> *Ibid.*

present a lack of adequate means of remedy for the victims.<sup>612</sup> This thesis draws from their work and argues that in addition to the compliance mechanism proposed in the last section, IOCs' obligations in Nigeria's BITs could be enforced by the Niger Delta communities through a complementary provision for civil liability of the IOCs in their home states.<sup>613</sup> The relevant BITs could expressly provide that IOCs that engage in environmental and human rights violations should be liable in their home states. That is to say that the impacted communities can choose either to pursue their claim in Nigeria or an IOC's home state.

In explaining the framework, VanDuzer, Simons and Mayeda argued that the imposition of civil liability on IOCs in their home states for the violation of a BIT obligation is a viable means of improving compliance with environmental and human rights standards in host states.<sup>614</sup> According to their study, such civil suits which may be brought against IOCs for either their acts or complicity with the government of Nigeria in violating human rights as well as causing environmental damage, perhaps, provide the sole avenue for redress directly involving victims such as the Niger Delta communities, given the current weak domestic mechanisms and processes for addressing the adverse impacts of investments.<sup>615</sup>

Given the transnational nature of such litigation, instituting civil claims against IOCs for their unethical conduct in Nigeria would expose them to reputational risk as IOCs, especially the ones with international brands like Shell and Chevron, prefer to brandish an image as being socially responsible. Furthermore, the potential damage to their reputation and the financial costs of such suits, even where they are unsuccessful, may likely deter IOCs from future misconduct while operating in Nigeria.<sup>616</sup> Moreover, a favourable outcome resulting from such transnational litigation for the victims of the Niger Delta communities would undoubtedly provide a remedy for environmental pollution as well as a human rights violation.

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<sup>612</sup> VanDuzer, Simons & Mayeda, *supra* note 525 at 364.

<sup>613</sup> Nigeria – Morocco BIT, *supra* note 500, Article 20 provides for similar liability of an investor in its home state. Thus, it provides that: “investors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.”

<sup>614</sup> VanDuzer, Simons & Maayeda, *supra* note 525 at 380.

<sup>615</sup> *Ibid.*

<sup>616</sup> *Ibid.*



The case of *Bodo v Shell Petroleum Development Company* (Bodo Case) captures this point.<sup>617</sup> On 23 March 2012, members of the Bodo community (a Niger Delta community), numbering about 15,000, brought a claim in a London High Court seeking compensation for two oil spill incidents that occurred in 2008 and 2009. Among others, their claims are with regard to losses suffered to their health, land and livelihood. The plaintiffs provided evidence in support of the fact that the relevant pipelines ruptured because they were neglected and poorly maintained by SPDC, a Nigerian subsidiary of the parent company – Shell United Kingdom. Despite alleging that the cause of the oil spills was sabotage and theft by the members of the Bodo community, Shell admitted responsibility and agreed to pay a sum of £55 million for an out-of-court settlement for cleaning up the spill and as damages. Consequently, a clean-up operation by the Bodo Mediation Initiative (with an international reputation), which was sponsored by the Dutch Government, was also established.<sup>618</sup>

Although the compensation is considered inadequate given the severity of the damage and the length of time it took Shell to settle the case,<sup>619</sup> the outcome of this case represents the value that imposing obligations as well as a corresponding civil liability on IOCs in BITs could provide to the Niger Delta community. Assuming a full trial commenced, the London High Court would have set significant legal precedence clarifying the position of the English courts in corporate human rights and environmental lawsuits.<sup>620</sup> However, it is vital for Nigeria’s BITs to provide for IOCs’ obligations in clear terms because given the transnational nature of the suit, the outcome of the Bodo Case, had it gone to full trial, would be unpredictable as a result of challenges concerning cross-border litigation. Hence, there is a need to address the scope of IOCs’ obligations towards environmental and human rights protection and clarify their legal liability in BITs.

#### 4.3.2.1 Reconciling the Controversy Over Extraterritorial Jurisdiction in International Law

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<sup>617</sup> *Bodo Community v The Shell Petroleum Development Company of Nigeria Ltd*, (2014) EWHC 1973 TCC.

<sup>618</sup> Business & Human Rights Resource Centre, “Shell lawsuit (Re-oil spills & Bodo community in Nigeria)” (May 2018) online: <https://www.business-humanrights.org/en/shell-lawsuit-re-oil-spills-bodo-community-in-nigeria>.

<sup>619</sup> Amnesty International, “Nigeria: Long-Awaited Victory as Shell Pays Compensation for Oil Spills” (7 January 2015) online: <https://www.amnesty.org.au/nigeria-shell-oil-spill-victory/>.

<sup>620</sup> Elodie Aba, “Shell & the Bodo Community: Settlement vs. Litigation” (12 January 2015) online: <https://www.business-humanrights.org/en/shell-pays-%C2%A355-million-out-of-court-settlement-to-nigerian-bodo-community-over-oil-spills#c108687>.

As demonstrated in the previous section, the essence of insisting that investors, including IOCs, should have obligations relating to environmental protection and human rights in Nigeria's BITs is partly to enable the impacted host communities of the Niger Delta to make claims against the IOCs in their home states' courts. The necessity of exploring home states' courts as a forum for enforcing these obligations is partly due to the problems facing access to justice in Nigeria. These conundrums are explained as "judicial obstacles" ranging from endemic corruption in Nigeria's judiciary,<sup>621</sup> a turn towards economic approach instead of human rights and environmental approach by the Nigerian courts to the lack of resources by the impacted communities to pursue their claims. All of these show that a lot should be done domestically, as already acknowledged in this thesis. Often, the lack of resources could be addressed in IOCs' home states as victims in the impacted communities can "obtain the services of lawyers in a position to represent them" on a *pro bono* basis.<sup>622</sup> This section engages the debate regarding the extraterritorial jurisdiction of states to regulate TNCs in respect of their activities that pollute the environment and violate of human rights.

A classic illustration of violations of human rights that may involve home state jurisdiction is where a subsidiary of a TNC that is domestically incorporated in another state pollutes the environment, such as the case of IOCs in Nigeria.<sup>623</sup> The controversy in this scenario touches upon the powers of the governments and courts of UK, Italy and United States, for instance, to either legislate or adjudicate over the activities of SPDC, Agip and Chevron Nigeria Limited respectively in Nigeria that violate human rights of the Niger Delta communities on the basis that the Nigerian IOCs are subsidiaries of their parent companies, which are headquartered in these countries.

A prominent legal justification for exercising extraterritorial jurisdiction<sup>624</sup> is hinged on the principle of nationality. For the nationality principle to be activated, there should be a link between the home state and the person (natural or legal) that is being regulated. This extends to

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<sup>621</sup> Eghosa O. Ekhaton, "Improving Access to Environmental Justice under the African Charter on Human and Peoples' Rights: The Roles of NGOS in Nigeria" (2014) 22 African J Intl & Comparative L 63 at 63.

<sup>622</sup> Richard Meeran, "Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States" (2011) 3 City U Hong Kong L Rev 1 at 10.

<sup>623</sup> Markus Krajewski, "The State Duty to Protect against Human Rights Violations through Transnational Business Activities" (2018) 23 Deakin L Rev 13 at 15.

<sup>624</sup> By Jurisdiction, this thesis refers to the prescriptive jurisdiction of a state which encompasses both the powers to make laws and for its courts to adjudicate over matters that occurred outside of its territory.

the conduct of the national of a country outside the territory of the regulating state.<sup>625</sup> A critical issue, however, is to determine the nationality of IOCs, especially considering that they are subsidiaries that are incorporated under Nigeria’s domestic laws, while their parent companies are registered in other states. While there are nuances in respect of state practice in this regard,<sup>626</sup> it is generally accepted in public international law that a TNC’s nationality could be the country where its head office is located or the state of incorporation.<sup>627</sup>

Despite this established principle of international law, it has been argued that as a general rule a state may not rely solely on the “nationality principle” to regulate the activities of a subsidiary, which has a different legal personality in another country.<sup>628</sup> At best, such states may only regulate the parent companies of the foreign subsidiaries in a way that indirectly imposes specific conduct on the latter.<sup>629</sup> This thesis disagrees with this view on the basis that it is not supportable by any known judicial pronouncement, mainly as nationality is a legally acceptable, as well as a “domestically, regionally and internationally recognized basis of jurisdiction” for the regulation of activities occurring either wholly or partly outside the territory of a state.<sup>630</sup> The view that there is no problem for a subsidiary of a parent company to be treated as having the nationality of the parent company based on “nationality principle” remains tenable because legally and strictly speaking, it is an extension of the parent entity.<sup>631</sup>

Moreover, in the context of international investment law, a foreign investor that operates in a host state is considered a national of the other contracting state. This explains why the Nigeria – Netherlands BIT defines a national of the Netherlands as a legal person constituted under the law of the Netherlands.<sup>632</sup> The reference to nationality in Nigeria’s BIT with the Netherlands, to take but one example, suggests that a Nigerian subsidiary company like SPDC shares the same nationality with the parent company in the Netherlands, and this should allow Netherlands’ law

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<sup>625</sup> Currie et al, *supra* note 124 at 499.

<sup>626</sup> While common law states such as the United Kingdom and United States of America accord nationality on the ground of incorporation within their territories, civil law states such as Italy and Netherlands consider the country where a corporation has its seat of management as its nationality – see Seck, *supra* note 48 at 187.

<sup>627</sup> Currie et al, *supra* note 124 at 505. See also the reasoning of the court in *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, [1970] ICJ Rep 3 at 71.

<sup>628</sup> Seck, *supra* note 48 at 187 – 8.

<sup>629</sup> *Ibid* at 188.

<sup>630</sup> Simons & Macklin, *supra* note 33 at 300.

<sup>631</sup> *Ibid* at 299.

<sup>632</sup> Nigeria – Netherlands BIT, *supra* note 41, Article 1 (b) (iii).

to regulate SPDC's operation in Nigeria.<sup>633</sup> Therefore, this thesis argues that an IOC that is protected under a BIT has at least a dual nationality, which comprises of its host and home states. The implication is that a home state's reliance on the 'nationality principle' to regulate the extraterritorial conduct of a TNC is strengthened by the fact that under BITs such TNC can be regarded as its national.

Though controversial, another doctrine that may permit extraterritorial control of corporations is the "effects principle," which has been explored by the U.S. to assert jurisdiction over actions that do not necessarily have a link with its territory, but which has economic effects in the U.S.<sup>634</sup> Relying on this doctrine, Zerk argues that human rights and environmental regulation by home states are justifiable as a failure to regulate in this manner undermines their reputation.<sup>635</sup> Also, the "principle of universality" could be a third basis for the regulation of TNCs by home states. The nature of the act in question determines whether such action falls within this category of regulatory basis in international law.<sup>636</sup> The commission of a recognized international crime by a TNC notwithstanding the location of the offence justifies the jurisdiction of not only the TNC's home state but also of all countries. However, given the nature of human rights that are violated as discussed in chapter 2, it is doubtful whether the home states of the IOCs in Nigeria can rely on the universality principle to justify their regulation of IOCs.

It seems that from the analysis above, the "nationality principle" provides the most reliable and viable basis for the home states of IOCs in Nigeria to regulate as well as adjudicate over the misconduct of IOCs for the advancement of environmental and human rights standards. Perhaps, the nationality principle was the basis for the enactment of the ATCA by the U.S.,<sup>637</sup> which has been applied to cross-border litigations, including the IOCs' human rights violations in Nigeria.<sup>638</sup> However, as several U.S. administrations have expressed diverse opinions on whether the ATCA applies to human rights litigation in the U.S. domestic courts, and considering that the

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<sup>633</sup> *Ibid.* Therefore, under the BIT, an investor in Nigeria whose origin is Netherland is a national of Netherland. Of course, it is also not out of place to argue that such investor is a national of Nigeria given that it is incorporated in Nigeria. Also note that SPDC is a Nigerian subsidiary co-owned by a British-Dutch oil company under the name Royal Dutch Shell with their headquarters in Netherlands and incorporated in the U.k as the British Petroleum. See <https://www.shell.com.ng/about-us/what-we-do/spdc.html>.

<sup>634</sup> Currie et al, *supra* note 124 at 497.

<sup>635</sup> Zerk, Crawford & Bell, *supra* note 570 at 110.

<sup>636</sup> Currie et al, *supra* note 124 at 511.

<sup>637</sup> ATCA, *supra* note 50.

<sup>638</sup> *Kiobel v Royal Dutch Petroleum Company*, *supra* note 52.

U.S. courts have demonstrated restraint in deciding whether the ATCA applies to human rights and environmental issues, particularly after the Supreme Court decision in *Kiobel v Royal Dutch Petroleum Company*,<sup>639</sup> it is difficult to sustain an argument that in practice, there is a recognized basis for extraterritorial jurisdiction of courts in the U.S., for instance. As argued earlier in this thesis, the recent work of John Ruggie appears to doubt the appropriateness of the ‘nationality principle’ regarding the power of home states to exercise extraterritorial functions. His commentary on Principle 2 of the United Nations Guiding Principles on Business and Human Rights stipulates as follows:

At present, states are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a *recognized jurisdictional basis*. Within these parameters, some human rights treaty bodies recommend that home states take steps to prevent abuse abroad by business enterprises within their jurisdiction<sup>640</sup>

While this expression initially seems neutral, it appears that according to Ruggie’s view, there is yet no legal obligation on other states to exercise extraterritorial powers regarding the activities of IOCs in Nigeria.<sup>641</sup> A critical evaluation of this commentary through the lens of the interpretation of the treaty bodies demonstrates that Ruggie’s opinion does not reflect the intention of the international human rights treaties.<sup>642</sup> This is because the Office of the High Commissioner for Human Rights interprets the General Comments of the Committee on Economic, Social and Cultural Rights (CESCR) as imposing extraterritorial legal obligations on states to prevent corporations over which they wield influence from violating human rights in other countries.<sup>643</sup> General Comment No 14 of the CESCR regarding the right to health states that “states parties have to ... prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal and political means.”<sup>644</sup> Similarly, the General Comment No 24 of the Committee on CESCR states that “the extraterritorial obligation to protect requires state parties to take steps to prevent and redress infringements of

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<sup>639</sup> Rachel Chambers, “An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct” (2018) 14 Utrecht L Rev 22 at 33. See also, *Kiobel v Royal Dutch Petroleum*, *ibid* at 1659.

<sup>640</sup> UNGP, *supra* note 115 at 4 [Emphasis mine].

<sup>641</sup> Davitti, *supra* note 118 at 60.

<sup>642</sup> *Ibid* at 61.

<sup>643</sup> Human Rights Council, “Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights” 15 January 2009, A/HRC/10/61 at para 86.

<sup>644</sup> General Comment No 14, *supra* note 285, para 39.

covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the state where the harm occurs are unavailable or ineffective.”<sup>645</sup>

Scholars have also argued that Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>646</sup> which provides for the general obligation of states, contains no reference to a particular form of jurisdiction, but includes an obligation [including an implicit extraterritorial obligation] on states to take measures either individually or through cooperation, in order to fully realize the ICESCR rights.<sup>647</sup> On this basis, others contend that the failure of a home state to regulate the “human rights-violation” behaviour of its national’s foreign subsidiary gives rise to international responsibility where the home state has ratified a BIT with the host state.<sup>648</sup>

In light of the comments of the CESCR, it is predicted that change was imminent in respect to the classical view due to the increasing recognition of interdependence of states, and a strong inclination “within legal doctrine to insist on the need to impose on states an obligation to seek” extraterritorial control “to the extent that they may exercise influence.”<sup>649</sup> Therefore, although the pronouncements of the CESCR are significant as they offer a desirable interpretative value to human rights treaties,<sup>650</sup> they are yet to crystalize into the position of international law that has either been adopted or recognized through ratification or as customary international law.

Whatever the position of existing international law, the obligations relating to environmental and human rights protection in the BITs that this thesis argues confer consequential civil liability on IOCs in their home states for a breach by making the basis for jurisdiction explicit. This thesis argues that at the minimum, the ratification of BITs that have these obligations and civil liability

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<sup>645</sup> General Comment 24, *supra* note 19, para 30.

<sup>646</sup> ICESCR, *supra* note 9.

<sup>647</sup> Fons Coomans, “The Extraterritorial Scope of the International Covenant on Economics, Social and Cultural Rights in the work of the United Nations Committee on Economic, Social and Cultural Rights” (2011) 11 Human Rights LR 1 at 31.

<sup>648</sup> Robert McCorquodale & Penelope Simons, “Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights” (2007) 70 Modern LR 598 at 605 [McCorquodale & Simons].

<sup>649</sup> Olivier De Schutter, “Sovereignty-plus in the Era of Interdependence: Towards an International Convention on Combating Human Rights Violations by Transnational Corporations” (2010) CRIDHO Working Paper No 2010/5 at 20.

<sup>650</sup> Davitti, *supra* note 118 at 61.

for IOCs in their home states represents Ruggie’s view as it is a *jurisdictional basis* for international law to recognize the extraterritorial powers of home states to regulate and adjudicate over claims brought in their jurisdictions against the activities of IOCs in Nigeria.<sup>651</sup> This is so because the absence of a clear international obligation, among other issues, makes it difficult for the home states to assume extraterritorial jurisdiction.<sup>652</sup> What this means is that where there is a clear obligation, which may arise through an international agreement between two countries, one of the countries should be able to exercise extraterritorial adjudicative jurisdiction over matters initiated by the citizens of the other consenting state.<sup>653</sup> This consent may readily be given through BITs, which provide either an *ad hoc* or permanent agreement for states to exercise extraterritorial powers.<sup>654</sup> Indeed, customary public international law relating to extraterritorial adjudicative jurisdiction of states may allow states to adjudicate over events that occurred in other states provided there is consent.<sup>655</sup>

#### 4.3.3 Reviewing the Practicability of the Extraterritorial Mechanism

As shown in the previous section, an express provision for a civil liability of IOCs in their home states that is projected in this thesis will preclude the controversy related to extraterritorial jurisdiction. However, there are a few other legal hurdles to this enforcement model, but they are not intractable. The discussion of these legal obstacles intends to deflate arguments about the legal impracticability of extraterritorial adjudicative mechanisms. Already, the model proposed by this thesis which is for the BITs to also provide for civil liability of the IOCs in their home countries has obviated most of these challenges including the challenges that would otherwise be presented by the doctrines of “separate legal personality” and *forum non conveniens* (FNC). This means that a claim by the host communities for compensation for breach of a BIT obligation is more likely to succeed.<sup>656</sup>

The first problem is related to the complexity of the organization of TNCs. Since TNCs are structured as separate legal entities operating in different jurisdictions, the problem is the

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<sup>651</sup> See Emphasis *supra* note 640, where Ruggie contends that states could exercise extraterritorial jurisdiction if there is a recognized jurisdictional basis.

<sup>652</sup> Simons & Macklin, *supra* note 33 at 7.

<sup>653</sup> For more details on the meaning of “adjudicative” jurisdiction, see Currie *supra* note 124 at 476.

<sup>654</sup> Coughan, *supra* note 571 at 24.

<sup>655</sup> Currie, *supra* note 124 at 477.

<sup>656</sup> VanDuzer, Simons & Mayeda, *supra* note 525 at 385.

difficulty in attaching liability to the appropriate entity,<sup>657</sup> as there is no regulation that governs their interconnected transactions. The corporate doctrines of “separate legal entity” and [“limited liability”] incentivize “jurisdictional arbitrage,” which protects TNCs from legal accountability as related to the pollution of the environment and by implication, adverse human rights effects.<sup>658</sup>

Over the years, there has been an attempt to hold parent companies liable for the misconduct of their subsidiaries in other jurisdictions, but this has been disparaged by a U.K court as an attempt to “pierce the corporate veil” by separating shareholders from the company.<sup>659</sup> Given that corporations are seen as individual entities, a parent company is not generally liable, by the fact that it is a shareholder in its subsidiary.<sup>660</sup> This is a well-established principle of common law that is rooted in the age-long case of *Salomon v Salomon* (Salomon Case).<sup>661</sup> Therefore, this principle may be safely relied upon to defeat the claim of the Niger Delta communities against an IOC.

However, over the years, allegations in the U.K. and Canada focus on the direct negligence of a parent company in the violations of human rights and environmental pollution by its subsidiary to circumvent the effect of the principle in Salomon Case.<sup>662</sup> In *Choc v Hudbay Minerals*, contrary to the pre-trial motion that challenged the claim of the plaintiff on ground of lack of cause of action, the Ontario Superior Court of Justice affirmed that there was a disclosure of a reasonable cause of action in negligence on the part of Hudbay minerals – the parent company.<sup>663</sup> This is because the pleadings disclose the elements of duty of care owed by the parent company,<sup>664</sup> and if proved, could lead to the liability of the defendant (parent company) for the violation of human rights at the Hudbay’s mining project in Guatemala operated by the defendant’s subsidiary. However, at the trial, it is expected for the court to determine the extent (if any) of the liability of the defendant, who the plaintiff claims was the agent of its subsidiary at the material time.

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<sup>657</sup> *Ibid* at 381.

<sup>658</sup> Janet Dine, “Jurisdictional Arbitrage by Multinational Companies: A National Law Solution?” (2012) 3 J Human Rights & the Environment 44 [Dine].

<sup>659</sup> *Adams v Cape Industries*, 1990 BCLC 479.

<sup>660</sup> VanDuzer, Simons & Mayeda, *supra* note 525 at 387.

<sup>661</sup> *Salomon v Salomon* (1897) AC 22.

<sup>662</sup> *Bodo v Shell Petroleum Development Company*, *supra* note 620. See also *Choc v. Hudbay Minerals Inc.*, (2013) ONSC 1414.

<sup>663</sup> *Choc v. Hudbay Minerals Inc.*, *ibid*, para 70.

<sup>664</sup> *Ibid*, para 75.



Attempting to solve this problem, Dine has suggested that the “enterprise liability” principle should be embraced by home states to hold the parent and the subsidiary jointly liable for the latter’s environmental pollution and human rights violations (provided there is an equity ownership by the former in the latter), thereby, treating them as a juridical unit.<sup>665</sup> While this argument potentially advances this enforcement framework, the modest approach of this thesis is that the Nigerian subsidiaries should be held solely liable for the breach of a BIT obligation. Of course, this is because most of the IOCs in Nigeria are financially capable of bearing whatever damages awarded against them. However, where it can be shown that an IOC in Nigeria does not have the financial capacity to assume liability, Dine’s “enterprise liability” theory could be adopted by the home courts of an IOC to hold the relevant parent company jointly liable with the IOC. This means that the parent companies and their subsidiaries could be sued jointly but liability will be attached to only the subsidiary where applicable.

This model appears similar to the outcome in the London case of *Bodo v Shell Petroleum Development Company*, which was earlier discussed considering that the court ruled that it has jurisdiction to hear the matter which was against SPDC – a Nigerian subsidiary of Shell.<sup>666</sup> In the case, Shell Global noted that the Nigerian subsidiary (SPDC) which was sued in the London court, would pay the settlement agreement sum of £55 million to the Niger Delta community.<sup>667</sup> As the legal counsel in the case argued, the basis for this model is to demonstrate that IOCs’ parent companies could have a significant role to play in ensuring that the operations of their subsidiaries neither degrade the environment<sup>668</sup> nor violate human rights as the transnational nature of the litigation attracted the attention of Shell Global - the parent company. Nevertheless, adopting this option through a BIT may not appeal to the Nigerian government as it has equity stakes in the Nigerian subsidiaries. But it is expected that if serious measures are to be taken to

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<sup>665</sup> Dine, *supra* note 658 at 64 – 9.

<sup>666</sup> See chapter four, section 4.3.2 above. See also *Vedanta Resources PLC v Lungow* (2019) UKSC 2017/0185 at para 146 where the UK Supreme Court held that a UK court has jurisdiction over the parent company over serious environmental pollution committed by its Zambian subsidiary in Zambia on the basis that the parent company, Vedanta has “the necessary financial standing to pay out any damages that are recovered”.

<sup>667</sup> Shell Global, “Shell’s Nigerian Subsidiary Agrees £55 Million Settlement with the Bodo Community” (January 2015) online: <[www.shell.com/media/news-and-media-releases/2015/shells-nigerian-subsidiary-settlement-with-bodo-community.html#vanity](http://www.shell.com/media/news-and-media-releases/2015/shells-nigerian-subsidiary-settlement-with-bodo-community.html#vanity)  
[aHR0cHM6Ly93d3cuc2hlcGwuY29tL2dsb2JhbC9hYm91dHN0ZWxsL2l1ZGhhL25ld3MtYW5kLW11ZGhhLXJlbGVhc2VzLzlwMTUvc2hlcGxzLW5pZ2VyaWFuLXN1YnNpZGhhcnktc2V0dGxlbWVudC13aXRoLWJvZG8tY29tbXVuaXR5Lmh0bWw>](http://www.shell.com/media/news-and-media-releases/2015/shells-nigerian-subsidiary-settlement-with-bodo-community.html#vanity).

<sup>668</sup> Business and human Rights Resource Centre, “Shell & the Bodo community – settlement vs. litigation” online: <https://www.business-humanrights.org/en/shell-the-bodo-community-%E2%80%93-settlement-vs-litigation>.

address the misconducts of IOCs, the government should prioritize the rights of its citizens over financial gain.

Another problem with the enforcement framework is related to a legal cause of action. In the first place, a majority of the home states of the IOCs, including the U.K., do not have a specific law that supports a cause of action for violation of human rights and environmental pollution, which results from the activities of investors in other jurisdictions.<sup>669</sup> At best such claims could be framed as negligence.<sup>670</sup> Furthermore, as we have seen earlier, the ATCA could allow plaintiffs to make claims that are related to extraterritorial activities of IOCs, which either pollute the environment or violate human rights, but claims under ATCA must also be framed as tortious claims. As Zerk expressed, although it is conceivable to view negligence claims against TNCs from the perspectives of a violation of human rights and environmental degradation, it is not completely correct to describe a tort-based litigation as a human rights litigation because a cause of action under a domestic law is required to be shown instead of a breach of international law.<sup>671</sup> What this means is that there should be a commitment from the relevant home states towards compelling IOCs to respect their obligations in BITs. The home states are expected to take reasonable steps in this regard. There should be a requirement for the home states to enact domestic laws enabling a cause of action for a remedy in respect of a breach of environmental and human rights-related obligations in their courts<sup>672</sup> and not necessarily tied to the law of tort.

Relatedly, a widely recognized potential problem associated with the home state enforcement mechanism is the theory of FNC. Essentially, a home state of an IOC has the discretion to refuse jurisdiction over a transnational claim for a breach of the BIT obligations by the IOCs on the basis that it is more convenient to bring such claim in a Nigerian court. Modern trend demonstrates, however, that foreign courts are more inclined to deny the application of the doctrine of FNC. Recently, a U.K. court held that the principle could not be allowed to defeat its jurisdiction over claims which result from environmental harm, alleged human rights violations and civil torts in African countries by a subsidiary of a British corporation.<sup>673</sup> This is because several years earlier, the Supreme Court of the U.K. developed the law in this regard and had

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<sup>669</sup> VanDuzer, Simons & Mayeda, *supra* note 525 at 380.

<sup>670</sup> *Ibid.*

<sup>671</sup> Zerk, James Crawford & John Bell, *supra* note 570 at 305.

<sup>672</sup> McCorquodale & Simons, *supra* note 648 at 623.

<sup>673</sup> *Lungowe v. Vedanta Resources* [2017] EWCA Civ 1528.

consequently held that the court must always consider whether the claimant could establish that substantial justice may not be done if it were to proceed against the TNC in its host state.<sup>674</sup>

Also, the doctrine mostly has no place in Europe,<sup>675</sup> as the European Court of Justice (ECJ) had held that the national courts of the European Union (EU) have no power to dismiss proceedings based on FNC.<sup>676</sup> Given that the decision of the ECJ is binding on all courts of the EU, this thesis argues that the issue posed by the doctrine of FNC in respect of transnational litigation no longer exists in the U.K. and other EU countries. This thesis, however, agrees with the research of the International Institute for Sustainable Development that one of the ways to ensure that the doctrine of FNC does not interfere with the enforcement of IOCs' obligations in their home states is to explicitly provide in Nigeria's BITs that the parties shall ensure that their domestic courts do not deny jurisdiction based on the doctrine of FNC or "any similar judicial rule in the party's" court.<sup>677</sup>

#### 4.4 Conclusion

Several conclusions can be made from the analysis in this thesis. First, the Niger Delta communities have been victims of environmental pollution and human rights violations due to the operations of IOCs in their region. The IOCs that operate in Nigeria's O&G sector continue to flare gas as well as cause oil spillage in the Niger Delta communities since 1956 when oil was discovered in commercial quantity in the region. The thesis examined how oil spillage and gas flaring violate the human rights of the Niger Delta people. These human rights are the right to a healthy environment, right to life, right to health and rights to water and food that are guaranteed under several international human rights instruments. Apart from the violation of these rights through environmental pollution, the thesis also examined the involvement of the IOCs in the violation of the human rights of the Niger Delta people by the Nigerian government. The thesis argued that the complicity of IOCs in instances where the Nigerian government used military force to suppress the protests of the Niger Delta people against the environmental pollution caused by IOCs in their region amounts to a violation of human rights by IOCs.

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<sup>674</sup> *Connelly v RTZ Corporation Plc* (1998) AC 854.

<sup>675</sup> Bernasconi-Osterwalder et al, *supra* note 164 at 30.

<sup>676</sup> *Owusu v Jackson*, (2005) ECR I-1383.

<sup>677</sup> Bernasconi-Osterwalder et al, *supra* note 164 at 31.

Secondly, the survey of Nigeria's environmental laws and regulations reveals that there are regulatory gaps and that there is a pressing need for the Nigerian government to adequately protect the environment of the Niger Delta communities by improving its domestic regulation. Such improvement at the domestic level by the Nigerian government will indirectly ensure that the human rights that are being violated by environmental pollution in the Niger Delta region are protected.

But beyond the need to improve Nigeria's domestic laws, this thesis examined the value that international law could offer in ensuring that IOCs are held accountable for environmental pollution and human rights violations. The thesis discussed several efforts that are being made at the international level to address both environmental pollution and human rights violations caused by TNCs, including IOCs that operate in Nigeria's O&G sector. A review of several international instruments such as the UNGC, UNGP and OECD Guidelines reveals that the existing international law regime does not impose an enforceable obligation on IOCs. Instead, it tends to encourage IOCs to refrain from acts that pollute the environment and violate the human rights of the people of their host communities in their business operations. These instruments have not deterred IOCs' contribution to environmental degradation and human rights violation. Consequently, the thesis argued that there should be an imposition of obligations relating to environmental and human rights protection on IOCs in the Nigeria's relevant BITs that could enable both the Nigerian government and the Niger Delta communities to seek redress for environmental pollution and human rights violation in their region. The justification for this argument is partly based on the fact that IOCs' activities violate several international human rights, including civil, economic, social, and environmental rights, and therefore, international instruments such as BITs should be explored to ensure their accountability.

Considering that imposing obligations on IOCs in BITs will require the renegotiation of Nigeria's BITs, the thesis also argued that Nigeria's BIT clauses such as the clause regarding expropriation and the FET clause should be amended and expunged respectively. This is because the obligations owed to IOCs by the Nigerian government under these clauses in Nigeria's BITs may be breached if the Nigerian government takes a serious step to regulate the environment domestically and therefore may attract the payment of large compensation to the IOCs. The

arguments of this thesis to amend the clause regarding expropriation and expunge the FET clause in Nigeria's BITs are based on state practice and various decisions of investment tribunals.

As the central argument of this thesis is to impose obligations regarding environmental and human rights protection on IOCs in Nigeria's BITs, the thesis also examined potential challenges to the argument. First, it examined the possible lack of political will by the Nigerian government and the home states of IOCs to adopt the argument of this thesis, and argued, among others, that considering the favourable state practice towards making environmental and human rights considerations in BITs, the Nigerian government and the home states of IOCs are likely to impose the relevant obligations in Nigeria's BITs. Second, the thesis examined the potential impact of imposing obligations regarding environmental and human rights protection on IOCs on the national treatment clause in Nigeria's BITs. The thesis argued that the national treatment clause should also be amended to address their possible impact on the argument of this thesis. Thirdly, the thesis discussed the debate over the status of corporations, including IOCs as subjects of international law, and agreed that corporations are subjects of international law with rights and obligations under existing international law regimes. Therefore, the thesis argued that obligations relating to environmental and human rights protection could be imposed on IOCs.

The thesis also argued that not only should obligations relating to environmental and human rights protection be imposed on IOCs in Nigeria's BITs but also that the obligations should be enforced against IOCs for their breach. The thesis examined potential mechanisms for enforcing the obligations relating to environmental and human rights protection against IOCs. The thesis argued that these obligations could be enforced against IOCs in one of two ways. First, it argued that these obligations could be enforced within the current investment arbitration mechanism under the ICSID Convention. The examination of Article 25 of the ICSID Convention demonstrates that investment tribunals could assume jurisdiction over claims brought by the Nigerian government against IOCs for a breach of their obligations under Nigeria's BITs. However, the thesis also argued that for the jurisdiction of an investment tribunal to be triggered, the Nigerian government should renegotiate its investment contracts with IOCs in order to include a written consent of IOCs to investment arbitration if they breach the obligations regarding environmental and human rights protection in Nigeria's BITs. This thesis limits its argument that the Nigerian government could enforce a breach of IOCs' obligations regarding

environmental and human rights protection only to investment arbitration conducted under the ICSID Convention. This is deliberate considering that the scope of this research is limited. Further research is necessary to determine the extent to which the argument of this thesis could be transposed to investment arbitration under other rules such as the United Nations Commission on International Trade Law rules.<sup>678</sup>

The thesis also argued that, alternatively, the obligations relating to environmental and human rights protection could be enforced by the impacted host communities in IOCs' home states. In advancing this argument, the analysis of the potential challenges to the enforcement of these obligations in IOCs' home states by the Niger Delta people was undertaken. The thesis argued that the possible challenges, such as the age-long principles of separate legal personality and FNC, are not intractable. The thesis concluded that in addition to imposing obligations on IOCs, there should be a provision for IOCs' civil liability in their home states in Nigeria's BITs that will enable the Niger Delta communities institute claims in the domestic courts of IOCs' home states for a breach of obligations relating to the environment and human rights protection. This thesis is confident that the renegotiation of Nigeria's BITs to incorporate these obligations, as well as enabling their enforcement, would substantially deter the IOCs from future pollution of the environment and the violation of human rights of the Niger Delta people.

The framework that is outlined in this research connects with the argument that BITs should be explored to harness sustainable development, especially in weak governance regions such as Nigeria. It further demonstrates that although BITs have been severally criticized by scholars for their negative impacts on developing countries such as Nigeria, they could be explored for the benefit of the Niger Delta communities. Imposing and enforcing IOCs' obligations in BITs could significantly improve IOCs' accountability towards environmental pollution and human rights violations in the Niger Delta region. However, as examined, relevant commitments are required from both the Nigerian government and the IOCs' home states in order to overcome political and legal impediments that could confront the enforcement of obligations relating to human rights and the environment against IOCs as proposed in this thesis.

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<sup>678</sup> UNCITRAL Rules, *supra* note 580.

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