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LLM (International Trade and Investment Law in Africa)

Balancing the need for investment and environmental protection: A case study of The Gambia

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Declaration

I **Onyekachi Chidebe Okorie** hereby declare that this mini-dissertation is my work except for references specifically indicated in the text. This mini dissertation is hereby submitted for the award of Legum Magister (LL.M) in International Trade and Investment Law in Africa at the International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria. It has not been previously submitted for the award of a degree at this or any other tertiary institution.

Signed: **Onyekachi Chidebe Okorie**

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Dedication

This work is dedicated to my late grandfather Mr. Christian Chidebe Anyafulu and my late brother Ekenedilichukwu Uzoma Okorie, who did not live to witness this day.

List of Acronyms

ADRS – Alternative Dispute Resolution Service

AU – African Union

ASEAN - Association of South East Asian Nations

BIT – Bilateral Investment Treaty

COMESA – Common Market for Eastern and Southern Africa

ECOWAS - Economic Community of West African States

EIA – Environmental Impact Assessment

FDI - Foreign Direct Investment

GEF – Global Environment Facility

GHG – Greenhouse Gas

IIA - International Investment Agreements

NAFTA - North American Free Trade Agreement

NEMA – National Environment Management Act

PPP – Public Private Partnerships

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Abstract

Investment is globally considered as an expeditious and sustainable method of assuring economic growth and development. The case is no different for The Gambia who has constantly made it its priority to boost its economy and improve the standard of living of its citizens. However, recent economic downturns and global economic instabilities all indicate that The Gambia could be in need of more investment inflows, if her economy is to remain afloat.

One idea that has constantly challenged the validity of investment is the sacrifice the environment is made to bear for its increase. Since 2016, this conflict has been exacerbated by the numerous environmental violations committed by investors and their investments in the country. There has been a collective outcry from the communities affected by these violations and The Gambian government seems to find some difficulty in attending to the complaints of these communities as well as pursuing its desire to increase investment inflows. This research therefore aims to discuss the need to balance investment and environmental protection. To achieve this, it specifically focuses on The Gambia's investment and environmental regimes and examines the ways by which the government can address this conflict. The paper commences by looking into the evolution of both fields and picks out the global attempts that have been made to reconcile the two. It then analyzes the domestic and regional environmental protection regime of The Gambia and assesses its effectiveness in dealing with environmental violations committed by investors. The research further digs into the investment agreements signed by The Gambia and examines whether and how they address environmental and sustainable development considerations. In doing this, it also provides a general overview on how regional and international tribunals view environmental provisions particularly with respect to investment agreements. Finally, this research concludes by proposing recommendations on how The Gambian Government can better balance the two fields as opposed to being placed in a position of choosing one or the other.

CHAPTER ONE- INTRODUCTION

1.1 Background of the study

The 21st Century era has been generous to open up numerous investment alternatives for Africa.[1] There is currently a rush by many foreign governments and private companies to invest in Africa[2] and this is certainly no different in The Gambia, which remains one of the smallest countries in Africa and the smallest country in West Africa. The Gambia is characterized with a unique geographical landscape that sets it on three sides around Senegal and open to the Atlantic Ocean on the fourth.[3] With a land size of 11,300km and a population of 2.1 million people,[4] The Gambia might be the least endowed in matters of mineral resources. From 2018 to 2019, the country has seen a decline in its GDP rate from 7% to 6%.[5] In 2019, the country, had a GDP of USD 1.76 billion which accounts for less than 0.01 percent of the world's economy.[6] Agriculture provides about 41% of the government's revenue. Services, which appears to be on the rise provides 46%, and the Industries contribute 14%.[7] Reports provided by the World Food Programme indicate that The Gambian government has every reason to be worried about the state of its economy. From 2010 to 2015 the poverty rate has grown from 48.1% to 48.6%. In that time span, food insecurity has also risen from 5 to 8% as a result of weak food production systems and the effects of successive shocks such as droughts and floods.[8]

In 2018, The President of the Republic of The Gambia, Adama Barrow called on international investors to take advantage of limitless business opportunities in the country announcing that the country is "open for business".[9] To compound the worry of inadequate investment, the 2020 UNCTAD report on World Investment declared that foreign direct investment in-flows in the

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[1] A Bodomo 'The Globalization of Foreign Investment in Africa; The role of Europe, China and India' First Edition, Emerald Publishing Limited, 2017, 24.

[2] Bodomo n(1 above) 24

[3] S Kora 'Economic development in The Gambia' (22 November 2019) https://medium.com/@s_kora/economic-development-in-the-gambia-1950-1959-3870222263b5 (accessed 1 June 2021)

[4] The World Bank "The Gambia Overview" (28 April 2021) https://www.worldbank.org/en/country/gambia/overview (accessed 1 June 2021)

[5] The World Bank 'GDP Growth Rate- The Gambia' https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=GM (accessed 1 June 2021)

[6] Trading Economics 'The Gambia's GDP' (9 August 2011 – 9 August 2021) https://tradingeconomics.com/gambia/gdp (accessed 1 June 2021)

[7] The World Bank Group *'Overcoming a No-Growth Legacy'* (May 2020) https://documents1.worldbank.org/curated/en/782131589568063735/pdf/The-Gambia-Systematic-Country-Diagnostic.pdf 78 (accessed 1 June 2021)

[8] The World Food Programme 'Gambia' (2 May 2019) https://www.wfp.org/countries/gambia (accessed 1 June 2021)

[9] Pana Press 'President Barrow calls for more Investment' (24 February 2021) https://www.panapress.com/President-Barrow-calls-for-more--a_630680405-lang2.html (accessed 1 June 2021)

country has particularly decreased slightly from USD 33 million to USD 32 million.[10] Owing to the COVID outbreak, the Minister of Finance has also projected a loss of USD 49 million and that economic growth will be reduced to 3.3%.[11]

Sadly, countries in urgent need of investment such as The Gambia are often torn between the need to attract investment and the equally desirable necessity for environmental protection. This idea is perfectly conceptualized in the 'race to the bottom' argument surrounding the field of investment law. In the race to the bottom world, it is argued that decent environmental standards impose high costs on firms in high income economies. To enlarge their presence, these firms relocate to low-income countries whose people are desperate for jobs and income. The government of these low income countries in-turn ignore regulations to promote investment and economic growth, allowing businesses to minimize costs by polluting the environment without penalties.[12]

Since 2016, The Gambia has been host to three fishmeal manufacturing companies namely; JXG Factory, Golden Lead Fishmeal Factory and Nessim Fishmeal Company. As their names suggest, these companies are primarily involved in gathering fishes from the Gambian waters, and grinding them into high protein pellets known as fishmeal. In Sanyang, the south west coastal area of the country, where Nessim fishmeal company is located, it is reported that the company leaves out the waste derived from its manufacturing process on the local beach.[13] Some members of the community uncovered that the company dug pipes underground and channeled its waste directly into the sea.[14] In the southwest coastal strip of the country, a rural town, Gunjur hosts Golden lead fishmeal factory. On the morning of the 22nd of May 2017, the community discovered that one of its lagoons had turned a cloudy crimson, dotted with floating dead fishes. A senior microbiologist examined the samples collected and detected that the water contained double the amount of arsenic and forty times the amount of phosphate and nitrate considered safe.[15] In addition, these communities have also reported their displeasure concerning the foul odour emitted from these factories and the deaths of other sea creatures including whales, turtles and dolphins.[16]

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[10] Santander 'Gambia; Foreign Investment'(July 2021) https://santandertrade.com/en/portal/establish-overseas/gambia/investing-3?url_de_la_page=%2Fen%2Fportal%2Festablish-overseas%2Fgambia%2Finvesting-3&&actualiser_id_banque=oui&id_banque=0&memoriser_choix=memoriser (accessed 25 July 2021)

[11] The U.S Department of State '2020 Investment Climate Statements; The Gambia https://www.state.gov/reports/2020-investment-climate-statements/gambia/ (accessed 1 June 2021)

[12] David Wheeler "Race to the Bottom? Foreign Investment and air pollution in developing countries" 5

[13] Louise Hunt "Fishmeal factory threaten food security in The Gambia" (28 November 2019) https://chinadialogueocean.net/11980-fishmeal-factories-threaten-food-security-in-the-gambia/ (accessed 1 June 2021)

[14] Louise Hunt n (13 above)

[15] BBC "The Factories turning West Africa's fish into powder" (23 March 2021) https://www.bbc.com/future/article/20210323-the-factories-turning-west-africas-fish-into-powder (accessed 1 June 2021)

[16] BBC n (15 above)

Consequently, these events have also stirred up a number of chaotic incidents in the country. In Gunjur, The National Environmental Agency ordered Golden lead fishmeal company to disconnect their waste pipes from the ocean and after months of inaction, the local residents took matters to their hands and disconnected the pipes themselves. The intense feeling of fury still persists within members of the community as Golden lead fishmeal company at the end of May 2018 reinstalled their pipes at the beach; this time at a central spot.[17]

In a 1998 study conducted by the World Bank, it was found that pollution fell as low as 90 percent as income rose from USD 500 to USD 20,000. Co-incidentally, this change occurred in the mid-1980s when China experienced a significant level of growth and increased access to trade and investment.[18] Findings such as these are the more reason governments of countries in dire need of investment neglect their basic obligation to ensure that there are safe policy spaces for investment to thrive in their countries, thereby fulfilling their duty to protect.

The Gambian government is at cross roads. She is a signatory to a number of investment treaties that establish and guarantee the rights of these investors. The National Environmental Agency and the various domestic legislations governing the environment also play a part in this conundrum. It is necessary that the implications of these events be analyzed, examined and a solution be offered to the growing enigma that stands before the government of The Gambia.

1.2 Problem statement

It is quite evident that The Gambia is in pressing need of investment. The President has acknowledged this need and the economy is projected to be on the decline, if investment in-flows are not injected urgently. The Gambia also has a growing industry base which is dominated by fishing. She has hence identified it as a likely area for pumping growth into the economy. The Gambia is currently home to three fishmeal producing companies; JXG Factory, Golden lead Fishmeal Company and Nessim Fishmeal company, all of which partake in the Export Processing Zone incentives offered by the Gambian Investment and Export Promotion Agency. These companies are responsible for a host of environmental degradation acts some of which include; channeling of waste products directly into the beach, infecting the local lagoons with very harmful chemicals, constantly disturbing the public peace with offensive smells emitted during manufacturing and causing the deaths of different sea creatures ranging from whales to turtles and dolphins. It should be assumed that the national authorities of the country addresses issues of this kind. However, they are often constrained by the agreements the Gambian government has signed with the government of these companies, hence the need to balance investment and environmental protection.

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[17] n (16 above)

[18] The World Bank Group 'Accessing Globalization' (April 2000) http://web.archive.org/web/20001013174018/http://www.worldbank.org/html/extdr/pb/globalization/paper4.htm (accessed 1 June 2021)

1.3 Research questions

The major question this research seeks to address is how the need for investment and the protection of the environment can be balanced in The Gambia. To answer this, the topic gives relevance to the following questions;

1. What is the evolving relationship between International Investment law and the protection of the environment?

2. What are the current national legislations governing the Gambian environment and how effective are these regulations?

3. Whether and how the protection of the environment has been taken into consideration in the International Investment agreements signed by the Gambia?

1.4 Objectives of the study

Principally, this study discusses the need to balance investment and the protection of the environment. Specifically, the objectives of this research are to discuss the evolving relationship between international investment law and the environment; and the reasons why investment and the environment must be balanced in The Gambia; to assess the effectiveness of the domestic and regional legislations governing the Gambian environment; to critically examine the investment agreements entered into by The Gambia and look into whether or not they provide for the protection of the environment.

1.5 Significance of the study

This study will contribute to the existing literature on the growing relationship between investment and the environment. However, it presents a distinct perspective by particularly involving the government of The Gambia, its quest in attracting investment and the protection of the environment.

This research also demonstrates the relevance of an often ignored component of our world; of which the environment remains foremost. In the interest of the Gambian government, it also explains how much relevance should be offered to the protection of the environment whilst engaging in the quest to attract investment. It is also significant for the environmental agency of The Gambia as it discusses the state of the Gambian environment and the role of the environmental agency in ensuring the smooth operation of investors in the country. Furthermore, it showcases the value of the environmental agency in ensuring that environmental clauses are incorporated into the International Investment agreements signed by the Gambia.

Most importantly, this study addresses the dilemma often surrounding most developing countries on whether investment outweighs the need to protect the environment and vice versa.

1.6 Literature review

There is sufficient literature to suggest that the interaction between investment and the environment has for so long taken its part on the global discourse about investment opportunities in developing countries.

Jorge E Viñuales in analyzing the historical and evolving relationship between Investment law and the environment observes that as both International investment law and international environment law develop and become more precise and demanding, their interactions will intensify in terms of synergies and conflicts. According to Viñuales, the result of this relationship will eventually birth the following implications; firstly, the operations of investors in an array of sectors from extractive industries to energy production will definitely be affected. The second implication is that the regulatory powers of the state in the environment arena could be circumvented by the legal strait-jacket imposed by the investment disciplines.[19] Mabey and Mcnally approach investment and the environment through the lenses of statistical data and economics and posit that investment can fuel economic development at a scale and pace that overwhelms host country regulatory capacity, resulting in inefficient and irreversible environmental destruction and even potentially a decline in overall welfare.[20] Etsy also analyses the relationship between investor and host countries in environmental law and claims that their relationship will continually progress to the extent that both parties see other as a means of achieving a certain aim. Host countries will be prepared to impose their environmental interest on investors and investors through their investments can equally assist in the anchoring of these environmental guidelines.[21]

In a bid to simplify the linkage between investment and the environment, Mclarney, Zhang and Chung categorize investment as mostly occurring in two folds; The first being pollution havens which occurs when companies from developed countries move their manufacturing operations to countries where environmental laws are weak in order to avoid abatement costs. The second is pollution halo which entails the well-being of local firms in developing countries through technology and efficient management practices.[22]

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[19] J E Viñuales *Foreign Investment and The Environment in International law* (2012) Cambridge University Press, 53

[20] N Mabey and R Mcnally 'Foreign Direct Investment and The Environment' (August 1999) https://www.oecd.org/investment/mne/2089912.pdf (accessed 1 June 2021)

[21] Daniel Etsy 'Private Sector Foreign Investment and the Environment' (1995) 4 Rev Eur Comp & Int'l Envtl L 99 < file:///C:/Users/User/Downloads/4RevEurCompIntlEnvtlL99.pdf > (accessed 11 August 2021)

[22] C Mclarney, X Zhang & EK Chung 'Untangling the evidence about the relationship between foreign direct Investment and The Environment' (2015) 1 *Proceeding for the Northeast Regional Decision Science Institute*

Mabey and Mcnally argue that home country policies in subsidizing foreign direct investment through export credits and aid flows produce a bias towards more environmental damaging investment. Based on their findings, pollution intensive industries are relocating to areas with lower regulatory standards, and often operate to lower standards than in their countries. They further posit that natural resource seeking investors generally have a poor record of environmental management relative to global best practices. The consequence of this is that investors then prevent host countries maximizing returns from their resources thus encouraging over exploitation and unsustainable use.[23]

It is argued by Nnadozie and Njuguna that evidence suggesting that foreign direct investment in Africa is solely determined by natural resource endowment may not necessarily be accurate and that business rules and regulations (investment climate) are more important factors in attracting foreign direct investment in Africa.[24] Wang, Huang, and Zhang argue that environmental regulations have a significant and positive relationship with the green technology spill-over of capital based foreign direct investment.[25] Within the African context, Farole and Winkler also look into the effectiveness of foreign direct investment as a stand-alone concept within this sphere by analyzing the apparel sector in Kenya, Lesotho and Swaziland. They argue that although these countries have greatly benefited from foreign investments, they have been less successful in initiating spillovers to their local economies. They also argue that successful knowledge spillovers in foreign direct investment is based on local conditions and limited to local skills and capabilities.[26]

Cole, Elliott and Zhang strongly contend that environmental regulations greatly affect the location of firms at the margin but that environmental regulation costs are just one of the many costs that firms have to ultimately consider when deciding to relocate to a particular country. They also submit that although foreign direct investment is often between developed countries, there has nonetheless been an enormous flow of investment from developed to developing and newly industrialized countries. Cole, Elliott and Zhang posit that this flow may not necessarily be due to the environmental differences in these jurisdictions.[27]

Using Japan as a study, Kirkpatrick and Shimamoto take the study conducted by Cole, Elliot and Zhang further by arriving at outcomes contrary to the common pollution hypothesis. They observe that Japanese investment was attracted to countries that had committed themselves to a transparent and stable environmental regulatory environment. This implies that the quality of the

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[23] Mabey and Mcnally (n 20)

[24] Emmanuel Nnadozie &Angelica E. Njuguna 'Investment Climate and Foreign Direct Investment in Africa' (2013) http://41.89.10.16/schools/economics/images/Investment_Climate_n_f_in_Africa_AEC_Oct2011_final.pdf (accessed 1st June 2021)

[25] Z Wang, Q Huang, J Hu & Q Huang 'Environmental regulations, Foreign Direct Investment and Green technological progress' (29 January 2018) https://www.mdpi.com/1660-4601/15/2/221 (accessed 1 June 2021)

[26] Thomas Farole & Deborah Winkler *'Making foreign direct Investment work in Sub-Saharan Africa'* (2014) https://openknowledge.worldbank.org/bitstream/handle/10986/16390/9781464801266.pdf (accessed 1st June 2021)

[27] MA Cole, RJR Elliott & L Zhang 'Foreign Direct Investment and the Environment' (2017) https://www.annualreviews.org/doi/abs/10.1146/annurev-environ-102016-060916 (accessed 1st June 2021)

regulatory framework was more crucial to investors in deciding the location of their firms than the level of environmental regulatory measures.[28]

Johnson-Ojewunmi and Akinlo maintain that using the panel vector auto-aggressive model analysis and the panel vector error correction methodologies, Sub Saharan countries need to strike a balance between investment friendly policies and environmental protection policies such that foreign direct investment that will be attracted to the region will be ones that will improve the environmental quality of the region.[29] Hu, Wang and Liam similarly find that with the strengthening of environmental regulations, FDI that initially damaged the host country's ecological environment may change and improve the environment.[30] Hsia then looks into the nature of these laws and contends that the enforcement of environmental regulations on investments have been largely unsuccessful due to their voluntary nature. She calls for the introduction of universal rules capable of triggering obligations as opposed to recommendations that only have discretionary effects.[31]

Viera employs a different perspective to the subject of investment in developing economies and the environment and concludes that the current deregulation and privatization that is often referred to as the Neo-Global Regime (NLR) has significantly added to the destruction of the ozone layer, pollution of water ways and high carbon emissions. He then adds that the deregulation of these rules also gives the developing country a false aggregated demand growth which in most cases cannot be maintained in the long term thus leading to high global unemployment, unleashed destructive competitive processes and weakened government ability to regulate business in the citizen's best interest.[32]

The literature on investment and environmental degradation in Small Island Developing States (SIDS) presents a different approach to the consensus in the field. According to Jugurnath and Emrith, there is no positive relationship between foreign investment and carbon dioxide emissions. This signifies that investment does not lead to an increase in the emission of carbon dioxide and thus has no negative effects on the environment. This is attributed to the fact that investment into these countries is rather viewed as the major sources of cleaner advanced technology and more sustainable modes of production. They further argue that foreign direct

[28] C Kirkpatrick & K Shimamoto 'The effects of environmental regulation on the locational choice of Japanese Foreign direct Investment' (2008) 1 *Applied Economics* 40

[29] Johnson-Ojewunmi and Akinlo 'Foreign direct Investment, Economic growth and Environmental quality in Sub-Saharan Africa' (January 2017) file:///C:/Users/User/Downloads/149252-392760-1-SM.pdf (accessed 1 June 2021)

[30] Hu, J.; Wang, Z.; Lian, Y.; Huang, Q. Environmental Regulation, Foreign direct Investment and Green Technological Progress—Evidence from Chinese Manufacturing Industries. Int. J. Environ. Res. Public Health 2018, 15, 221

[31] S Hsia 'Foreign direct investment and the environment are voluntary codes of conduct and self-imposed standards enough' (2003) 9 Envtl Law 673 file:///C:/Users/User/Downloads/9EnvtlLaw673.pdf (accessed 1 June 2021)

[32] LCA Viera 'The Impact of Foreign direct Investment on Developing Economies and The Environment' (2009) 1 Revista Ingenierias Universidad de Medellin

investment would rather assist Small Island Developing States (SIDS) by ensuring their technological advancement by soliciting lower air pollution.[33]

Awodumi contends that, foreign direct investment in West Africa has had a distinct conclusion from that of Small Island Developing States. Barring Sierra Leone, where investment appears to have boosted environmental protection in the short run, most of West Africa has experienced negative effects from foreign direct investment particularly with respect to environmental protection.[34]

Investment and environmental regulations are also known to conflict under the Investment heading of expropriation. Waelde and Kolo find that in cases where a government has expropriated the company of an investor based on the promulgation of internationally guided environmental rules, it is quite unlikely that the courts will grant compensation in such instances. If however, it was discovered that those environmental guidelines were issued with the intent of protecting domestic companies thus encouraging discrimination, the courts will be more inclined to grant compensation for the expropriation.[35]

In analyzing the impact of investment on sustainable development, Voica, Panait and Haralambie posit that of all factors affecting investment, environmental factors come at the fore. This can be attributed to the current shift in the mindset behind some governmental policies that encourage the transition of more investments into greener ways of conducting business in order to reach greenhouse emission goals.[36]

Alami in looking at the impact of Chinese investments in The Gambia's fishing industry argues that Chinese presence in the Gambia is a trade-off between the government of China and the government of The Gambia. He adds that this relationship has a positive and negative dimension in that it provides long term economic benefits to both nations at the expense of the older and less educated populace who cannot advance with the swiftly evolving and modernized fisheries industry of the Gambia.[37]

Given the works cited above, it is evident that none of these scholars have approached this topic bearing in mind the peculiarities and design of the Gambian economy. Abdallah Alami's work is specifically tailored to the fisheries industry of the Gambia albeit from a socio-economic and historical perspective as opposed to Investment law. This paper looks into how The Gambia can

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[33] B. Jugurnath & A Emrith 'Impact of Foreign Direct Investment on Environment Degradation: Evidence from SIDS Countries' (2018) 2 *The Journal of Developing Areas* 52

[34] OB Awodumi 'Does foreign direct Investment promote environmental efficiency in developing economies? Evidence from Economic Community of West African States' (August 7 2020) https://onlinelibrary.wiley.com/doi/epdf/10.1002/bsd2.137 (accessed August 12 August 2021)

[35] T. Waelde & A Kolo 'Environmental Regulation, Investment Protection and Regulatory Taking in International Law' (2001) file:///C:/Users/User/Downloads/50IntlCompLQ811.pdf (accessed August 7 2021)

[36] MC Voica, M Panait & G Haralambie 'The Impact of Foreign Direct Investment on Sustainable Development' (2015) 89 *Economic Insights – Trends and Challenges* 17

[37] A. Alami 'Changing Tides: The Impact of Chinese Investment on The Gambian Economy' Unpublished Master's Thesis, University of San Francisco, 2020 7

balance its desire to attract investment as well as protecting its environment using the instrumentality of law.

1.7 Research methodology

This study will employ a qualitative desktop research method in discussing the ways in which investment and the protection of the environment can be balanced in the Gambia. The bulk of this research will specifically rely on primary and secondary sources.

Primary sources will comprise the Constitution of the Federal Republic of The Gambia, The National Environment Management Act Cap 72:01, the ECOWAS Supplementary Act 2008, The ECOWAS Common Investment Code 2018, and investment treaties entered into by The Gambia with several countries. Secondary sources will include; journals, papers, online articles, reports, and other sources.

1.8 Limitations of the study

In analyzing the factors arising from the dilemma between investment and the protection of the environment, this study restricts itself to the environmental aspects of the investment treaties signed between The Gambia and other countries, as such it will not undertake a deep dive into all the provisions of these agreements.

The likely event of unwillingness of governmental authorities in providing certain documents will also constrain this work.

1.9 Structure of chapters

Chapter 1

This chapter covers the background to the study, problem statement, thesis statement, research questions, objectives of the study, literature review, methodology and limitations of the study.

Chapter 2

This chapter will discuss how Investment law and the protection of the environment have become almost inseparable in International law. It also plans to use the Gambian fishmeal factories case as a case study.

Chapter 3

This chapter will look into the current domestic and regional environmental protection regime of The Gambia and access its effectiveness in dealing with environmental violations committed by investors.

Chapter 4

This chapter will delve into all the investment agreements entered into by The Gambia and examine whether and how they address issues of the environment and sustainable development.

Chapter 5

This chapter will conclude with best practices and give recommendations.

CHAPTER 2 – THE EVOLVING RELATIONSHIP BETWEEN INVESTMENT AND THE ENVIRONMENT

2. 1 Introduction

The aim of this chapter is to discuss the evolving relationship between investment and the environment. Accordingly, this chapter is divided into three sections. The first section begins with a brief historical account of investment (2.2), investment in the Gambian context (2.3) and its benefits to the nation (2.4). The second section explores the relationship between investment and the environment (2.5). This section also touches on other relatively developing branches of the environment such as: sustainable development (2.6), climate change (2.7) and the protection of biological and cultural diversity (2.8). The third section (2.9) deals with the need for a balance in both fields using the Gambian fishmeal factories as an illustration.

2.2 A brief historical account of investment

International investment law finds its roots in the doctrine of 'state responsibility' in international law.[38] State responsibility in this context, stretches beyond the unlawful or wrongful act of one state to another but towards ensuring adequate standard of treatment for aliens and foreigners. Standard of treatment as used here does not only cover the physical wellbeing of the foreigner but his tangible and non-tangible assets as well. Nonetheless, in the eighteenth and nineteenth century, there was increased exchange of goods amongst merchants within Europe and this propelled the need for traders to migrate beyond their homelands and unto different territories and regions.[39] Accordingly, investment can be traced from two periods: the colonial period (2.2.1) and the post-colonial period (2.2.2).

2.2.1 The colonial period

Generally, there was little to no need to ensure the protection of investors during the colonial period hence little use of the term 'International Investment law'. The reason for this can be found in the nature of colonialism which largely involved political alliances and diplomatic forces of the colonizers and the colonized.[40] In an imperial system where the protection of investors was undertaken by the imperial state, the protection of investors was addressed within the scope of parliaments and courts thus requiring no need for a separate system. However, if the investment was undertaken outside the influence of the colonizers there was need for diplomatic conversations and agreements on the treatment of foreigners within that jurisdiction. The need for diplomatic talks in this period also implied that would be disagreements or breach of the agreed conditions and this led to the use of force and wars as a method of dispute settlement.[41]

[38] M Sonarajah *The International law on Foreign Investment* (2010) 11
[39] K Miles The Origins of International Investment Law (2013) Cambridge University Press 71
[40] Sonarajah (n 38) 19
[41] Miles (n 39) 74

This use of force was in play even after the Second World War and into the post-colonial period. It was thus necessary that some form of consensus be agreed amongst states. At the time, there were two prevailing views on the subject. The first was that; foreigners ought to be given equal treatment as the nationals of a state. The second was that; foreigners should be accorded distinct treatment from that of nationals based on agreed international standards.[42] A clash of these views can be seen in the interaction between the United States and its Latin American neighbours. Whilst the United States had originally experienced its share of complaints and issues from the European states that exported capital to its jurisdiction, its stance on the issue after attaining global economic power was that its Latin American neighbours ought to treat its nationals according to international standards. This view was met with great resistance from its Latin American counterparts who argued that investors and nationals be accorded equal treatment. Although this began a trend of what was to transpire in the field, it should be noted that majority of the issues present at the time concerned the taking of foreign property otherwise known as 'expropriation'.

2.2.2 The post-colonial period

Unlike the colonial period, where there was little to no need to protect foreign investors, the post-colonial period necessitated that investor be protected. This can be attributed to certain events that occurred after colonialism. For purposes of clarity, these events have been divided into four periods.

The first period which was shortly after colonialism left many nations in severe economic and labour crises. As such, newly formed independent states began nationalizing the properties of foreigners all of which was frowned upon by the capital exporting countries. There was hence a push by the capital exporting nations for the protection of investors based on international standards.[43]

In the second period, the wave of nationalism by developing states was lessened as the emergence of the oil industry which numerous developing states were a part of became prominent. This period saw the introduction of collective principles guiding capital importing countries.[44]

The third period was characterized by a flexibility that led to the relaxation of investment policies and conditions. Countries were now more willing to open up their borders to foreign investment. This stance was unique as it was the complete opposite of the hostility that surrounded the field immediately after colonialism.[45]

The fourth period was another witness to the liberalization and flexibility that had inundated the field. This period saw the free flow of capital and other funds from developed states to

[42] Sonarajah (n 38) 21
[43] Z Douglas, J Pauwelyn J Viñuales *The Foundations of International Investment Law* (2014) Oxford University Press 215
[44] Douglas, Pauwelyn, Viñuales (n 43 above) 216
[45] Douglas, Pauwelyn, Vinuales (n 43 above) 218

developing states and vice versa. There was in summary less restrictions regarding the movement of capital amongst states.[46]

2.3 Foreign direct investment in The Gambia – The need for investment

In comparison to local investments, foreign direct investment constitutes majority of The Gambia's investment regime. However, it has had a fairly mixed run in the country. From 2007 till date, FDI has been on a downward slope particularly due to the global financial crisis in 2008, the Ebola outbreak of 2013 and the political instability in the country. Notwithstanding, FDI still absorbs a large role in the Gambian economy representing more than 30% of its GDP stock.[47] The Gambia is an agricultural driven society as 75% percent of its population is either engaged in subsistence or commercial crop farming. This fact is also evident in the 30% assumed by agriculture in the FDI regime of the country. Of late, the services sector has also seen a major boost in the country as it currently occupies over 60% of the country's GDP. Within West-Africa, The Gambia is considered to be a major landing spot for tourists. In 2018, the country recorded a 44.83% increase in its tourism sector accounting for 168 million USD in terms of receipts.[48] Tourism alone also accounts for 11% of the formal jobs created within the country. This is only surpassed by the Government who remains the main employer of labour in the country. There has also been an expanse in the banking sector. It rose from 6.4% in 2004 to 10% in 2013. A similar growth is also visible in the telecommunications sector which currently makes up 12.7 percent of the country's GDP compared to 7.7 percent in 2004.[49]

Nonetheless, the industry sector of the economy which comprise of agro processing, groundnut processing, fruit processing, and of late fish processing has fallen back on this growth sprout. At the moment, the industry sector makes up an estimate of 11 percent of the nation's GDP. The challenges in this sector can be ascribed to infrastructural deficit, regulatory bottlenecks, land and border issues and economic exogenous shocks. As part of its strategy to improve the economic situation of the country, the government has acknowledged that FDI will play a vital role. As such, under its National Development Plan of 2018 -2021, The Gambia aims to utilize regional platforms such as the ECOWAS to "ensure the creation of a single economic space, help trade increase, stimulate economic growth, attract foreign direct investment, and enable domestic producers build up capacity".[50] The government has also set for itself the target of increasing FDI by 5% in 2021.

Compared to other countries within Africa, FDI in the Gambia is considered to be one of the lowest in matters of attractiveness. The Gambia currently falls below the average FDI inflow for countries within the ECOWAS and African LDC's.

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[46] Douglas, Pauwelyn, Vinuales (n 6 above) 219
[47] United Nations Conference on Trade and Development Investment Policy Review: *The Gambia* (2007)
[48] The World Bank 'International Tourism, receipts (% of total exports) The Gambia https://data.worldbank.org/indicator/ST.INT.RCPT.XP.ZS?locations=GM (accessed 20 August 2021)
[49] The World Bank (n 48 above)
[50] The Gambia National Development Plan (2018 -2021)

2.4 Benefits of FDI to The Gambia

For host countries, the benefits of FDI are inexhaustible. The willingness of a country to open its borders to the ideas and establishment of a foreign investor speaks volumes to the current wave of liberalization now active within most countries. For the Gambia, the need for investment seems more appealing than ever before. The following are the proposed benefits of increased FDI to the Gambian economy:

(i) Increased Exports

Studies conducted on the benefits of FDI indicate that increased inward FDI especially, has a co-relation to increased export. This is because the revenue received from the investment places host countries in a position to fully maximize their natural resources or geographical location by producing and exploring more as well creating export processing zones which are known to be one of the most attractive investment schemes today.[51]

(ii) Increased employment

According to economists, decent unemployment rates usually fluctuate between 4 to 5%. In 2019, the unemployment rate in The Gambia was 8.94%. This figure saw a spike in 2020 and was at an all-time high of 9.64%.[52] Increased FDI inflows into the Gambia means that the capacity to put more citizens in gainful employment is enlarged thus leading to economic growth and crime reduction.

(iii) Human capital enhancement

Human capital is essential, not only for the country's ability to attract foreign investment but for the sustenance of capital spillover from investors. Human capital enhancements mostly come in the form of trainings or on-the-job learning. In addition, most investors are also interested in populaces with higher human capital than populaces with lower human capital. Of the 700,000 people in The Gambian labour force, it is reported that 48% are illiterate.[53] Whereas this may lead to mismatches in terms of the supply and demand for skills in the market, increased FDI can be a way of alleviating this issue.

(iv) Technology Transfer

[51] OECD 'Foreign Direct Investment for Development: Maximizing benefits, minimizing costs' (2020 https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf (accessed 20 August 2021)

[52] Aaron O'Neil 'Unemployment rate in The Gambia 2020' https://www.statista.com/statistics/808459/unemployment-rate-in-gambia/ (accessed 20 August 2021)

[53] United Nations Conference on Trade and Development Investment Policy Review (n 39 above)

Most scholars argue that technology transfer is perhaps the most important benefit of FDI. This is because they are an effective platform for the development of ideas, protection of intellectual property and economic development of countries. As a least developed country, FDI would increase the technological spillovers to domestically owned companies within the country.

(v) Economic Diversification

As earlier observed, the agriculture and services industry are the two main components of The Gambia's FDI regime. This indicates that the more diversification within the economy, the more channels of revenue available to the government. The industry sector is on the rise. However, more investment into this and other sectors could widen the revenue stream of the country.

2.5 Investment and the Environment

It has never been in doubt that investment plays a vital role in the economic development of most countries. However, every so often, its side effects question its legitimacy. One of such questions has particularly centered around the damage that investment inflicts on the environment. Over the years, reports have swirled about local communities and populations falling victim to oil spills, emissions from burning fuel, poor waste and storage management, exhaustion of fumes and various harmful chemicals. Unfortunately, developing countries have been the center of these atrocities as their selling point for increased capital inflow is the natural resources domiciled in their region. The clash between these fields has led to a growing nexus that continues to be visible both from an investor-state arbitration and investment policy standpoint. The discourse between international investment law and the environment has also shifted to more sophisticated branches of environmental law such as sustainable development which is now considered as one of the solutions to these issues as well as climate change. It is thus without doubt that this situation calls for a balance between the interest of the 'public' and 'private'.

2.5.1 The evolving relationship between investment and environmental protection

For some time now, trends and history have suggested that economic development always finds its way into fields that are completely unrelated to it. The case is no different with environmental law which originally concerned itself with issues such as water resources, transboundary damages, or the management of useful resources. However, in the 1960's and 1970's there was a slow integration of economic considerations into issues involving the environment. This began with the publication of influential writings such as the grounding of the Liberian tanker or the mercury poisoning of the Mina-Mata population in Japan.[54] Subsequently, it became more

[54] Viñuales (n 19 above) 10

apparent that states needed to have a collective method of integrating both fields. The first outcome of this desire was the United Nations Conference on the Human Environment which also goes by the name of The Stockholm Conference. This conference was originally a product of the 1968 proposal from Sweden and was held in Stockholm from June 5th to June 16th 1972. More than anything, this conference stressed the importance of environmental protection above all other targets. The first proclamation of the Declaration perfectly summarizes the spirit of the agreement. It reads:

> "Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself"[55]

The second outcome which was technically the first outcome in reconciling environmental protection with economic development was the 1992 Rio Conference on The Environment and Development which is also referred to as 'The Earth Summit'. The objective of this conference was to produce a broad agenda and a new blueprint for international action on environmental and development issues that would help guide international cooperation's and development policies in the twenty-first century.[56] This conference was also responsible for advocating that sustainable development was a goal that all nations should strive to achieve. However, it has been argued by many commentators that whilst this conference has to a great extent assisted in solving this conflict, economic considerations still persist ahead of environmental protection.

Notwithstanding, a new scheme which was outlined at the World Summit on Sustainable Development (WSSD) in Johannesburg, 2002. This scheme was particularly focused on the role of the private sector in the protection of the environment. Unlike the preceding conferences that involved the creation of new treaties, this conference was specifically interested in the implementation of the targets set out in the previous treaties. The implementation instruments agreed in this conference included amongst other things, the use of Public Private Partnerships otherwise known as PPPs, environmental project finance and other market mechanisms.

There is currently a new development in the field and many scholars consider it as the way to the future. In 2012, there was another World Environmental Summit which also goes by the name of Earth Summit 2012 or the Rio + 20. The highlight of this conference involved the launch of the Sustainable Development Goals (SDGs) as well as the Millennium Development Goals (MDGs). Amongst other things, these conference particularly emphasized the need for a 'green economy'

[55] Declaration of the United Nations Conference on The Human Environment (1972)
[56] The United Nations 'United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3- 14 June 1992' https://www.un.org/en/conferences/environment/rio1992 (accessed 20 August 2021)

and the need to establish a framework for sustainable development.[57] The ideology behind the 'green economy' is that wherein in the past, states would ensure that the protection of the environment and economic development stood side by side, states would now be required to only entertain businesses that ensure that the protection of the environment is foremost in their agenda as opposed to profit-making. Achieving this goal would entail the desertion of many large companies that contribute to the pollution of the environment. However, it has been debated amongst many that the enforcement of this goal may be more difficult than expected as many companies in lucrative industries stand a chance of closing down their operations.

2.5.2 The interaction between investment and the environment

There are two sides to the relationship between investment and the environment. In many ways, these two sides can be considered as both positive and negative. Positive in the sense that investment, especially foreign investment can serve as a transmitter for the transfer of technology which could ultimately be useful in promoting the idea of a clean environment. On the negative side, most investment leads to the pollution of the environment. However, before expanding on both sides of the argument. It is important that we briefly examine the 'Race to The Bottom' argument which largely typifies a part of the investor-state dynamic in this subject.

2.5.3 The 'Race to The Bottom' argument

Currently, the race to the bottom narrative has come into use as being a perfect illustration of the power dynamics involved in the balance between investment and the environment. The race to the bottom argument states that- 'in a bid to attract more direct investment, developing states especially, feel the need to lower their environmental standards to serve as incentives for more capital inflow'[58]. This is because large multinational enterprises are always on the lookout for major incentives thus, it is believed that by relaxing certain environmental regulations, the process of attracting more investors is made easier. Although there are strong contentions from economists that there is little to no influence of environmental regulations in the attraction of investment, the literature on the topic nonetheless proves that majority of the states that are victim to environmental degradation or damage somewhat engage in the relaxation of their legislation. Whereas international law has been used as an instrument to work out issues of this kind, it is difficult to expect that it's influence on the behavior of states on issues of its regulation within its jurisdiction is substantial. As a result, victims of environmental degradation have no choice but to refer to domestic courts or international human rights systems. The status quo also grants states the discretion to engage with their natural resources however they please. This principle is well summarized in Principle 2 of the Rio Declaration, which was signed at the end of the UN Conference on Environment and Development held in 1992:

> 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own

[57] The United Nations 'United Nations Conference on Sustainable Development, 20-22 June 2012, Rio de Janeiro' https://www.un.org/en/conferences/environment/rio2012 (accessed 20 August 2021)
[58] S Di Benedetto *International Investment law and the Environment* (2013) Edward Elgar Publishing 5

environmental and development policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'.

Often times, the effects of the 'race to the bottom' practice can be quite devastating for states and the communities affected. An example would be the Bhopal tragedy which was India's first industrial disaster. This tragedy occurred as a result of the accidental release of methyl isocyanate (MIC) gas from a Union Carbide pesticide plant located in the city.[59]

2.5.4 Synergy- The positive interaction between investment and the environment

According to Viñuales, there is a way in which the interaction between investment and the environment becomes positive. This method is demonstrated in what he terms 'synergies' that involve the creation of laws whether hard or soft to strongly complement the economic development of a country as well as its environmental protection. Although they mostly come in the form of soft instruments that guide the actions of companies. An example of a hard instrument speaking to this synergy is the OECD statement on 'Harnessing Freedom of Investment for Green Growth'. This instrument focuses on how international investment policies can assist countries in achieving green growth and partly on issues concerning dispute settlement. However, the most common form of these synergies are 'soft' in nature and this can be attributed to the discretionary nature of environmental law. Forms of soft regulation include;

a. Environmental Project Finance

Environmental project finance has come to refer to the allocation of funds to businesses and projects that promote the protection of the environment above other things. It could also entail the financial or technical assistance granted to domestic environmental agencies in ensuring that they uphold the protection of the environment. One organization involved in this is the global environmental facility (GEF) which was established on the eve of the 1992 Rio Earth Summit to help eradicate environmental problems. The organization has been restructured numerous times, the most recent occurring in May 2010.[60] It has over forty donor countries and a funding that is replenished every four years.[61] The GEF also has trustees like the World Bank who assists in the mobilization, disbursement, monitoring as well as the preparation of the financial report of its funds. The primary purpose of the GEF is to provide new and additional grants and concessional funding to meet the agreed incremental costs of measures to achieve agreed global environmental benefits in the following areas: biological diversity, climate change, international waters, land degradation: primarily desertification and deforestation, chemicals and waste.[62] Accordingly, four strategies can be distilled from the GEF's 'Strategy to engage with the Private Sector'. The first is indirect engagement which involves promoting the activities of pro-environment firms by creating market conditions to the country receiving the GEF fund. The second type is 'direct engagement' which involves the GEF directly providing funds to the

[59] Benedetto (n 50 above)
[60] Viñuales (n 19 above) 42
[61] Global Environmental Facility 'Funding' https://www.thegef.org/about/funding (accessed 20 August 2021)
[62] Global Environmental Facility 'About us' https://www.thegef.org/about-us (accessed 20 August 2021)

private company. The third type of engagement involves the GEF acting as co-financiers for a particular project. The fourth type of engagement is undertaken by opening up the channels of procurement through activities such as advertisement.[63]

b. Environmental PPPs

Following the WSSD conference in Johannesburg 2002, it was agreed that public private partnerships should be used a vehicle for the financing of environmentally friendly projects.
They can be grouped under three categories namely: the use of the private sector to mobilize financial resources and help implement environmental targets, the use of the private sector communication purposes, and developing initiatives that would assist in ensuring the compliance of environmental principles for the private sector.[64]

According to the WSSD preparatory documents, PPPs include the following characteristics: participation (public sector, business or civil society): interdependence (this entails the need for collaboration amongst sectors): openness and flexibility (being adaptable to the changing nature of the relevant issues); subsidiarity (assigned the problems to those best equipped and able to solve them) and complementarity (this involves unity amongst the participants).[65] The supervision of partnership projects was also committed to the Commission on Sustainable Development (CSS) established at the 1992 Rio Conference on Environment and Development. So far, the Commission has been of great benefit to many countries and private industries as it has been responsible for registering over 180 global PPPs, 69 regional PPPs, and 79 sub-regional PPPs.[66]

2.5.5 Conflicts – The negative interaction between investment and the environment

Viñuales contends that there are two kinds of conflicts arising from the interaction between investment and the environment. On one hand are conflicts that could arise as a result of international obligations that have root in international investment law and international obligations that have root in environmental law. He refers to this kind of conflicts as 'Normative Conflicts'. On the other hand, are conflicts that arise from obligations enshrined in different legal systems. Whereas different scenarios may occur in investment disputes, the most common scenario involves environmental measures that affect an investor who claims that the measure is in breach of an international obligation by the state.[67] This kind of conflict is known as 'Legitimate Conflict'. For better understanding, these concepts will be treated with examples.

Normative conflicts v Legitimate Conflicts

[63] Viñuales (n 19 above) 43
[64] Viñuales (n 19 above) 49
[65] C Streck 'The World Summit on Sustainable Development: Partnerships as New tools in Environmental Governance' (2002) 63, 67
[66] Viñuales (n 19 above) 49
[67] Viñuales (n 19 above) 29

Normative conflicts are used to indicate that a state has to accede to an international environmental norm which delegates to it, the obligation to act in a specific way. In other words, there must be an international obligation requiring the state to adopt a specific conduct. However, these norms come in varying degrees. For instance; Article 4(5) of the Basle Convention on the Control of transboundary movements of Hazardous wastes and their disposal provides that: '[a] Party shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party'. This means that, should a host state decide to enact domestic legislations adhering to the provisions of this act, it would be said that it was abiding by international environmental obligations. However, the reality is that many international environmental norms come in less commanding requirements and offer more discretion to states. An example would be Article 6 of the Convention on Biological Diversity which states that:

> 'Each Contracting Party shall, in accordance with its particular conditions and capabilities:
>
> (a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, inter alia, the measures set out in this Convention relevant to the Contracting Party concerned; and
>
> (b) Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies'

From the reading of this provision, it is clear that a broader discretion is given to States as to whether they can develop national strategies and plans for the sustainable use of the environment or not. Whereas these provisions give a sense of how the nature of the mandatory and discretionary nature of international environmental law, the summary of both conflicts is that; normative conflicts often involve a clash between specific rules contained in treaties and specific rules arising out of general international law. Legitimate conflict on the other hand, involves a clash between investment agreements and domestic laws.

2.6 Investment and Sustainable Development

With the recent developments in this field, it is difficult to speak on environmental law without addressing sustainable development. Interestingly, the history of sustainable development is closely connected to that of environmental law. The sequence of events that contributed to the merging of environmental law and investment can also be ascribed as forming part of the building blocks of sustainable development. However, the period between the Stockholm conference of 1972 and the Rio conference of 1992 was most crucial to the establishment and development of sustainable development.[68] In between these two conferences, the UN General assembly in 1983 established 'Brundtland Commission Report'. Chaired by the then Norwegian

[68] D Tladi '*Sustainable Development in International law: An Analysis of Key Enviro- Economic Instruments'* (2007) ABC Press 24

Prime minister Gro Harlem Brundtland, the Brundtland commission was primarily interested in four activities:

a. To propose long-term environmental strategies for achieving sustainable development by the year 2000 and beyond;
b. To recommend ways in which the concern for the environment may be translated into greater co-operation among developing countries and between countries at different stages of economic and social development and lead to the achievement of common and mutually supportive objects that take accounts of the interrelationships between people, resources, environment and development;
c. To consider ways and means by which the international community can deal more effectively with environmental concerns; and
d. To help define the shared perceptions of long term environmental issues and the appropriate efforts needed to deal successfully with the problems of protecting the environment. [69]

The Brundtland report defines sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. From the perspective of the Commission, this definition entails two elements:

a. That the essential needs of the world's poor must be given priority and
b. That the idea of limitations imposed by the state of technology and social organization on the environment.[70]

More often than not, sustainable development is viewed in three pillars; the economy, environment and society. Some view it as: economic, social, and natural. Others categorize the pillars into: natural, social and economic. Regardless of the pillars one chooses to view the subject, the central idea behind sustainable development is that the current global design of economic development and economic growth is highly likely to affect people, communities and the environment in the long run. Thus, the purpose of sustainable development is to adjust this trend, and make development processes more consistent with social and environmental considerations.
The Brundtland report also identifies issues in sectors such as; population, food security, species and ecosystems, energy, industry and human urban settlements, poverty. For purposes of emphasis, the Brundtland report also shows its significance by recognizing that environmental and developmental issues are interwoven when it states that: *Ecology and economy are becoming ever more interwoven locally, regionally, nationally, and globally into a seamless net of causes and effects.*[71]

2.6.1 The 2030 Agenda for sustainable development and Agenda 2063

[69] Reports of The World Commission on Environment and Development: Our Common Future
[70] Tladi (n 68) 24
[71] Reports of The World Commission on Environment and Development (n 69)

In 2015, members of the United Nations converged at the United Nations Sustainable Development summit where it was agreed that a 2030 Agenda for sustainable development would be adopted by the countries present. Amongst its principles and commitments is the acknowledgement that the agenda derives inspiration from the Universal declaration of human rights, International human rights treaties, The Millennium declaration, the 2005 World Summit Outcome, the prior meetings and summits held concerning the subject and the Rio declaration on Environment and development.[72] Interestingly, the 2030 Agenda also recognizes the significance of private finance by international public funders towards this goal. Funding in this sense is known by the name 'Leverage'. Leverage is the process by which international public funds are allocated to projects or initiatives to help cut down the risk that the private sector may assume from the project promoters.[73] The process of leveraging under sustainable development is quite similar to the process described earlier under the environmental law regime where organizations such as the global environmental facility (GEF) assist the private sector in achieving these goals.

The 2030 Agenda contains numerous goals that cut across sectors and fields. However, regarding the relationship between investment and the environment the following goals are most vital. Goal 12 deals with ensuring sustainable production and consumption patterns, goal 13 involves taking urgent action to combat climate change and its impact, goal 14 involves conserving and sustainably using the oceans, seas and marine resources for sustainable development, goal 15 involves protecting, restoring and promoting sustainable use of terrestrial ecosystems, sustainably managing forests, combating desertification and halting and reversing land degradation and biodiversity loss, goal 16 deals with promoting peaceful and inclusive societies for sustainable development, providing access to justice for all and building effective, accountable and inclusive institutions at all levels and goal 1 seeks to strengthen the means of implementation and revitalizing the global partnership for sustainable development. [74]

It is also worth noting that the 2030 Agenda also refers to the 'Addis Ababa Action Agenda' adopted at the Third International Conference on Financing for development as a cardinal part of the 2030 Agenda. The Addis Ababa action also addresses investment and sustainable development by referring for instance that investments align with public goals by providing that: '[*we] will develop policies and, where appropriate, strengthen regulatory frameworks to better align private sector incentives with public goals, including incentivizing the private sector to adopt sustainable practices, and foster long-term quality investment'.*

With the understanding that some of these goals will be challenging to accomplish, there has been the creation of certain schemes that will assist in its accomplishment. One prominent scheme is UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD). Launched in 2012, by the World Investment Report and UNCTAD, this program aims at gathering investment policies, and the economic, social and environmental aspects of development. In addition, it focuses on three main themes which are; the core principles for investment policy making, national investment policy guidelines and several policy options to design international investment agreements.

[72] The United Nations '*The 2030 Agenda for Sustainable Development'*

[73] The United Nations Environment Programme *'International Investment Agreements and Sustainable development'* (2018)

[74] The United Nations (n 72 above)

Within Africa, there has also been developments from the African Union on ways to collectively foster sustainable development within the continent. The most recent and perhaps most exciting has come in the form of the Agenda 2063 which was agreed upon on the fiftieth anniversary of the African Union. The first aspiration of the Agenda is to create an Africa based on inclusive growth and sustainable development.[75] To achieve this, the AU has set a first ten-year implementation plan which outlines specific targets on the ways of achieving this goal. To achieve the first aspiration, the AU has set its priority on areas such as sustainable natural resource management, biodiversity, security climate resilience and natural disaster preparedness and prevention.[76]

2.7 Investment and Climate Change

As earlier observed, the reigns of investment have expanded beyond the environment. Infact, many view issues involving climate change as a sub-set of environmental law. Whilst this is true to a great extent, the Intergovernmental Panel on Climate Change defines climate change to be 'a change in the state of the climate that can be identified by changes in the mean and/or the variability of its properties and that persists for an extended period usually decades or longer'.[77] The United Nations Framework Convention on Climate Change (UNFCCC) describes climate change as 'change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods.'[78] Currently, there are two approaches to enforcing climate change within the investment regime. The first is the 'regulatory approach' which is currently the predominant method of enforcement and the second is the human rights approach which is currently an emerging method of enforcement.

The regulatory approach

Enforcement of climate change using the regulatory approach is majorly undertaken through the Kyoto Protocol or the UNFCCC. Within these frameworks, there are three main methods of implementing climate change. The first is the cap and trade system which is characterized by four main components: The presence of an overall cap in the GHG emissions of the participating entities, emission reduction commitments equally distributed amongst states, the trading of emission entitlements within states and other types of emission quotas within the cap.

The second method of enforcement involves the use of a command and control regulation system which contain certain technical requirements for the production and operation of certain activities. Usually, the command and control regulations do not only concern issues such as GHG emission but also operational and construction standards. A typical example would be the

[75] The African Union 'Agenda 2063'
[76] The African Union Commission Agenda 2063 First ten-year implementation Plan 2013 - 2023
[77] The Intergovernmental Panel on Climate Change 'Special Report: Global Warming' https://www.ipcc.ch/sr15/chapter/glossary/ (accessed 20 August 2021)
[78] The United Nations Framework Convention on Climate Change

'EU Climate and Energy Package' which also contains the 'Fuel Specification Directive' that guides both the suppliers and consumers of fuel.

The third method is often referred to as differentiation measures. The reason for this is because they sometimes present themselves in various formats that might involve a blend of both the cap and trade system and the command and control regulation system. Nonetheless, they could come in the form of carbon taxes/duties and climate related subsidies.[79]

The human rights approach

The enforcement of climate change from the human rights perspective can be understood from two angles. The first is centered on the moral ideology behind human rights and the use of equity for the distribution of emission rights. This perspective also advocates for the consideration of developing countries who are often the victims of climate change in the share of emissions. The second perspective is quite similar to the regulatory approach since it involves holding states and corporations accountable by ensuring that climate change and human rights mechanisms are respected and adhered to.[80]

2.8 Investment and the protection of Biological and Cultural Diversity

The protection of biological and cultural diversity is another overlooked aspect of the relationship between investment and the environment. As the name suggests, biological and cultural diversity is made of two components. First, biological deals with treaties such as The International Convention for the Regulation of Whaling that focuses on certain species such as whales, turtles etc, or treaties concerning a group of species like the Convention on the Conservation of Migratory Species of wild animals or even ecosystems such as The Protocol on Environmental Protection to the Antarctic. The second component which deals with the cultural angle of things relates to individuals and groups. An example of a treaty governing this would be the International Convention on Civil and Political Rights.

Quite frequently, disputes arising from the protection of biological and cultural diversity are predominant within indigenous societies where the matter for dispute does not solely concern land and territorial rights but biological rights of the species that are uniquely habitat in that environment.[81]

2.9 The need for a balance – The case of the Gambian fishmeal factories

In more ways than one, The Gambia has become an illustration of the conflict that exists between investment and the protection of the environment. On the one hand is the reality that: The Gambia needs investment hence the reason for investment promotion being at the fore of the Gambian government's policies. On the other hand, is evidence that certain foreign corporations

[79] Vinuales (n 19 above) 253
[80] n 19 above
[81] n 19 above

within the industry sector of The Gambia are guilty of inflicting harm on the Gambian environment. These violations were caused by three fishmeal producing companies namely; JXG Factory, Golden Lead Fishmeal Company and Nessim Fishmeal Company. Their violations range from water pollution to air pollution and the death of several creatures that depend on the environment for survival. The communities affected by these violations have persistently made complaints to both the national environmental agency and the central government whose unresponsiveness to the situation has been dissatisfactory. Legally, very little progress has been made on the issue as the only development was an out-of-court settlement of 25,000 USD between the companies and the national environmental agency.[82]

The question before the Gambian government now becomes 'Can one need be sacrificed for the advancement of the other?' In other words: should advancing investment come at the expense of the protection of the environment and vice versa? This question is not one to be guessed at. As observed under the 'race to bottom' argument, questions of this nature are more difficult for developing countries since their economic realities put them in a place where only one of these needs is made priority. Nonetheless, advancing environmental consideration and economic development should not be an either-or proposition. The conferences and treaties geared towards finding a solution to this problem all indicate that balancing both needs is possible and that appears to be an attractive and sustainable path for the Gambian government.

2.10 Conclusion

This chapter has demonstrated the significance of investment as a tool for economic growth and development in The Gambia. Some of the reasons for this assertion include the economic landscape of The Gambia as well as its current technological and human constraints. This chapter has also shed some light on a not-so recent development within investment law which is its relationship and interaction with environmental law.

The increasing awareness of states to the ever-changing reality of both fields has led to the desire of ensuring that both fields co-exist peacefully. Ensuring that balance is a dilemma before several developing states particularly The Gambia. As a method of inquiring into the viability of this balance, the following chapter will seek to address the domestic and regional protection of The Gambian environment as well as its effectiveness.

[82] Africa News 'Chinese Company to pay $25,000 bind for polluting Gambian Waters' https://www.africanews.com/2017/06/30/gambia-chinese-fishmeal-factory-settled-out-of-court-case// (accessed 20 August 2021)

CHAPTER 3 – AN EVALUATION OF THE CURRENT DOMESTIC AND REGIONAL ENVIRONMENTAL PROTECTION REGIMES OF THE GAMBIA

3. 1 Introduction

This chapter aims to look into the current domestic and regional environmental protection regime of The Gambia and assess its effectiveness in dealing with environmental violations committed by investors. It first discusses the main domestic instruments governing environmental protection (3.2), environmental provisions in sectoral legislations (3.3), the institutions tasked with protecting the environment (3.4), the methods of environmental enforcement (3.5) and the impediments of environmental enforcement in The Gambia (3.6). It also looks into the instruments catering for environmental protection by the ECOWAS (3.7) and discusses some of its challenges (3.8).

Quite frequently, domestic legislations and their enforcement demonstrate the extent to which the protection of the environment is viewed in certain countries. Achieving higher environmental standards from a global perspective begins with an evaluation of the domestic laws guiding different states. Not only is this because states are often the recipients of environmental degradation and disasters but also because states are legally conferred with the power to enforce and prosecute breaches of set environmental standards. Studies conducted on the benefits of domestic environmental regulations highlight that they greatly improve air and water quality and can lead to the reduction of the emission of greenhouse gases thus preventing certain terminal illnesses and increasing life expectancy.[83] As is the case in most countries, the environmental protection regime of The Gambia is characterized by the presence of certain legislations and enforcement agencies. As such, to fully evaluate this regime, this Chapter will evaluate the domestic, regional legislations and institutions guiding the protection of The Gambian environment.

3.2 Domestic instruments governing the protection of The Gambian environment

The main instruments governing the protection of the Gambian environment are domestic in nature. The domesticity of these instruments also imply that they possess the most influence in shaping the state of the Gambian environment. These instruments are;

3.2.1 The Constitution of the Republic of The Gambia

In nearly all countries, the constitution is regarded as the highest law of the land from which all other laws are emanate from. This spirit of supremacy also runs in The Gambian Constitution which provides in section 4 that: ‘The constitution is the supreme law of The Gambia and any other law found to be inconsistent with any provision of the constitution shall to the extent of its

[83] W. B Gray ‘Environmental Regulations and Business Decisions’ (September 2015) https://wol.iza.org/uploads/articles/187/pdfs/environmental-regulations-and-business-decisions.pdf (accessed 1 September 2021)

inconsistency be void'.[84] This provision implies that all other national laws are to comply with the provisions of The Gambian constitution, absence of which declares that particular law void.

The protection of the environment from the provisions of the constitution can be understood from three perspectives. The first is the power bestowed on the National Assembly to create laws for the local government that concern the preservation of the environment.[85] The second angle is from the standpoint of citizens and their duties. According to the constitution, it is the duty of citizens to protect and conserve the environment of The Gambia.[86] The third angle tackles the matter from a broader scale by providing in section 215 that 'the protection of the environment of the nation for posterity and the co-operation with other nations and bodies to protect the global environment must be a policy that the state should pursue'. It can thus be inferred from this provision that The Gambian government is obliged to pursue the initiatives and targets set in conferences such as 'The Earth Summit' as it relates to the protection of the domestic and global environment.

3.2.2 National Environment Management Act (NEMA)

The National Environment Management Act remains the principal document for environmental protection in The Gambia. This is founded on the fact that it is the only document that addresses environmental concerns from a more integrated perspective as opposed to the sectoral perspective which was the case before its first enactment in 1987. Similar to The Constitution, this act also delegates the duty to protect the environment to every person. The preamble of the act also indicates the desire of the government in ensuring that all sorts of pollution are completely eradicated. The Act aims to achieve this by following the polluter-pays principle in environmental law which involves the polluter taking responsibility for the cost of pollution.

The Act also makes mention of environmental planning which it defines as long and short term planning that accounts for environmental issues.[87] Environmental planning is meant to be effectuated through an Action plan known as The Gambia Environment Action Plan (GEAP)[88]. The purpose of GEAP is thus to identify key environmental issues and strategies for preventing, controlling or mitigating any delirious effects on the environment and the conservation of any sustainable use of natural resources. Recognized within the act is also the need to conduct effective environmental impact assessment. Environmental impact assessment is defined within the act as a systematic examination conducted to determine whether or not an activity may have adverse effects on the environment.

The Act also acknowledges other important aspects of environmental protection such as: environmental impact assessment, environmental audit, and environmental standards, all of

[84] The Constitution of The Republic of The Gambia (1997) Section 4
[85] The Constitution Section 192 (3)
[86] The Constitution Section 220 (1)
[87] National Environmental Management Act 13 of 1994 Section 2
[88] National Environmental Management Act 13 of 1994 Section 20

which fall under the functions of the National Environmental Agency which will be discussed subsequently.

3.2.3 Hazardous Chemicals and Pesticides Control Management Act

Hazardous chemicals are defined in this act to mean chemicals that have a likelihood of causing adverse effects or injury to human health or the environment.[89] For purposes of control, the Act delegates the duty of monitoring and controlling imports, manufactures, distribution storage and the disposal of chemicals and pesticides in the country to the management board. The management board is also responsible for preparing guidelines on the environmental sound handling and use of chemicals and pesticides. This Act also provides for a registrar of chemicals and pesticides. Amongst other things, the functions of the registrar are the maintenance and periodic publication of pesticides registers including a list of clear and banned chemicals and the implementation of internal notification schemes relating to chemicals and pesticides through prior informed consent.[90] The Act also gives power to the Ministers to consult with the board or come up with measures to prohibit the use of certain harmful chemicals or pesticides.[91] Within the act, the manufacturing, selling, formulation and importation of decomposed or deteriorated chemicals that are harmful to the environment are prohibited.

3.2.4 Environmental protection (Prevention of Dumping) Act

This act contains provisions that concern the prevention of the dumping of industrial waste for the protection of the environment and all connected matters. Its origin can be traced to the Basel Convention of 1998 which was focused on the protection of human health and the environment against the adverse effects of hazardous waste. The Act mandates the Minister to make consultations with the National Assembly after which regulations providing for the following will be met: regulations on the standards of storage, recycling, handling or disposal of waste, regulations on the issue of special permits for the purpose of dumping waste produced from any source in The Gambia, regulations on the monitoring of the conditions of the waters under The Gambia and regulations on the protection of the environment from the dumping of environmental pollutants[92]. From a close reading of this section, one can also observe that the penalties attached under this act follow the polluter pays principles. It provides that persons found violating this rule will be charged with monetary compensation which includes making good of the environmental damage and compensating people and communities affected.[93]

3.2.5 Ozone Depleting Substances Regulation

[89] Hazardous Chemicals and Pesticides Control and Management Act, 1994 Section 2
[90] Hazardous Chemicals and Pesticides Control and Management Act, 1994 Section 8
[91] Hazardous Chemicals and Pesticides Control and Management Act, 1994 Section 24
[92] Environmental Protection (Prevention of Dumping) Act 15 of 1988 Section 3
[93] Environmental Protection (Prevention of Dumping) Act 15 of 1988 Section 5

The Ozone depleting substances regulation of The Gambia is a product of the Vienna Convention for the protection of the Ozone layer of 1985 and the Montreal Protocol on Substances that Deplete the Ozone Layer, of 1987. The aim of the former convention was to create a framework agreement in which States agree to cooperate in relevant research and scientific assessments of the ozone problem, to exchange information and to adopt 'appropriate measures' to prevent activities that harm the ozone layer.[94] The aim of the later convention was to stop the production and import of ozone depleting substances and reduce their concentration in the atmosphere to help protect the earth's ozone layer. [95] Under the Vienna Convention, states are obliged to adopt legislative and administrative measures in harmonizing the appropriate policies to control, limit, reduce or prevent human activity that have adverse effect to the ozone layer. It is from this obligation and the provision of section 37 of NEMA that this act was created. Amongst other things, this act outlines a list of prohibited substances and equipment's that could negatively impact the ozone layer.

3.2.6 Environmental Quality Standards Regulations

Before the creation of this act, environmental standards had been mentioned in NEMA. Consequently, this regulation was derived from the environmental criteria and standards mentioned in NEMA and the recommendations of the environmental agency. The Act establishes a board consisting of the executive director of the agency, the principal public health officer, the environment quality programme officer, the registrar of pesticides and representatives from the Gambian Chamber of Commerce, industry, the department of state for trade, industry and employment and the department of water resources.[96] Schedule I of the act contains the different air and water quality standards and Schedule II provides for the parameters and techniques for water and air quality monitoring.

3.2.7 Environmental (Discharge Permits) Regulations

Similar to the environmental quality standards regulation that deduces its powers of the provisions of NEMA, the environmental discharge permits regulations derive its power specifically from the listed prohibited materials and substances meant to control pollution and the recommendations of the Agency. This regulation contains a list of dangerous and prohibited materials and the processes involved in the application of a discharge permit to the agency. Accordingly, the Agency must consider the following, if it were to issue or refute a permit:

a. The ambient environmental quality standards prescribed under any environmental quality standards regulations made by the agency: and

[94] United Nations Environment Programme 'The Montreal Protocol on Substances that Deplete the Ozone Layer' https://ozone.unep.org/treaties/montreal-protocol (accessed 1 September 2021)
[95] United Nations Environment Programme 'The Vienna Convention for the Protection of the Ozone Layer' https://ozone.unep.org/treaties/vienna-convention (accessed 1 September 2021)
[96] Environmental Quality Standards Regulations 1999, Section 2(1)

b. The available options for reducing environmental damage, taking into account
    i. The risk to the environment or human health
    ii. The financial costs and
    iii. The best practice available in comparable situations elsewhere in Africa and other developing countries.[97]

Noncompliance to this Act is guided by the polluter pays principle where he/she bares the costs including those incurred by the Agency.

3.2.8 Anti-littering Regulations

Littering is defined in this regulation as the deposit of litter in a public place or a place that is visible to any extent from a public. It can be deduced that this act improves environmental sanitation, hygiene and public health by making acts of indiscriminating littering of solid and liquid waste an offense. The crux of the regulation includes the establishment of the different types of litters in public places, some of which consist of: litters thrown by persons in vehicles, litters in parks, urination in public places etc. It also deals with the duty of vehicle owners in preventing the creation of litters and the function of the agency, department of health services and the local authorities in curbing littering.[98] This regulation has also been responsible for the monthly nationwide cleaning exercise locally known as "Set-Settal" which helps in maintaining the environmental hygiene of the country.

3.2.9 Ban on Plastic Bags Order

In 2015, the national environment management council and the national environmental agency adopted the ban of plastic bags order. Plastic bags is defined in the act as 'a synthetic industrial product with low density composed of numerous chemical molecules, which is mostly used in the packaging of various products such as food, water, produce, powders, ice magazines, chemicals, wastes etc.[99]

Notwithstanding, the order makes exceptions to the use of plastic packaging materials which will be dependent on the list of packaging materials gazetted by the chairman. It also provides some flexibility by stating that persons who require plastic bags for exceptional use may apply to the agency with the relevant supporting official documents.

[97] Environment Management (Discharge Permit) Regulation, Section 4
[98] Anti-Littering Regulations 2007, Section 9
[99] Ban on Plastic Bags Order 2015, Section 2

3.3 Sectoral Legislations

Legislative environmental protection in The Gambia is not only contained in the acts, orders or regulations within the purview of the national environmental agency. There are also certain sectoral acts that govern environmental protection in The Gambia. For instance:

The Public Health Act empowers the minister to ensure the maintenance of proper sanitary conditions of the premises, the institution of measures for ensuring the purity of water supply, the prevention, abatement or removal of nuisances and insanitary conditions on premises, the collection, removal and sanitary disposal of rubbish, night soil, and other offending matters and the inspection and sanitary conditions of beaches and swimming pools in the interest of the public health.[100] Another important act is the Continental Shelf Act 1965 which was created to make provisions as to the exploitation and exploration of the Continental shelf. It was guided by the Convention of The High Seas adopted in Geneva on the 29th April 1958. To ensure safety of navigation, this act requires the minister's consent for the following activities; the construction or alteration of improvements of any work under or over any part of the seabed in a designated area, the deposition of any object or any materials from any part of the seabed and the removal of objects or materials from any part of the seabed. The act also provides for the discharge of oil from a vessel, pipeline or as a result of any operation incurred during the exploration of a sea bed.[101] It can be implied that this provision protects biological species especially aquatic species which could be gravely affected by oil spills.

Quite recently, environmental violations have also been known to emerge from highly sophisticated activities performed on the land like the mining of extractives. In 2005, The Gambia enacted The Mines and Quarry Act to deal with the exploration of minerals for carrying out mining and quarrying operations and other connected matters. It provides that the retention of licenses may be undertaken subject to certain conditions of which one is the protection of The environment of The Gambia.[102] Similarly, the issuance of permits is also subject to the protection of The environment. Petroleum, which is a lucrative mineral worthy of mining is covered in the Petroleum (Exploration, Development and Production Act). Amongst other things, this Act advocates for the prevention of the release of any hazardous substance from the petroleum operations of companies into the environment. It also mandates the secretary of state to ensure that applicants seeking licenses and permits conduct an environmental impact assessment.[103] The Act further stresses on the need to notify the Minister whenever a dangerous substance or material has been released into the environment as well as the need for steps to be taken to contain such materials to avoid having to cause damages. Similar to other Acts, this act also operates under the polluter pays principle where persons responsible for the environmental damage are required to pay for the costs. Finally, this act makes mention of the environmental protection act and the national environmental management act as standards for the assurance of the safety of the environment.

[100] Public Health Act 1 of 1989, Section 3
[101] Continental Shelf Act 1 of 1965 Section 5
[102] Mines and Quarry Act 7 of 2005, Section 3
[103] Petroleum (Exploration, Development and Production Act) 2004, Section 8

Biodiversity and Wildlife is a branch of the environment that requires utmost care and caution. This has hence propelled the need for 'protected areas' which are essentially clearly defined geographically spaces, recognized, dedicated and managed through legal or other effective means.[104] Under the Biodiversity and Wildlife Act, the exploitation of resources in a protected area shall be subject to the national environmental management Act and no. 13 of the 1994 regulation created within the same act. Connected to this, is also the Fisheries Act, which guarantee the safety of the aquatic bodies, this Act prohibits the release of any diseased on infected organism from any aquaculture establishment into the natural environment. It also provides that the director may require the license of a person who fails to comply with a provision of the National Environmental Act or any other law intended to protect the environment.[105]

3.4 Institutions responsible for the protection of The Gambian Environment

The institutions responsible for the administration and enforcement of the legislations protecting The Gambian environment are established by The National Environment Management Act (NEMA). The Act grants these agencies the power to formulate policies and strategies to enforce and control their implementation. These institutions include:

3.4.1 The National Environmental Management Council (NEMAC)

Launched in 1993 and established by the National Environment Management Act, NEMAC is a governmental council that comprises of the president who is the chairman of the council, the ministers responsible for natural resources, agriculture, local government and lands, health and social welfare, finance and economic affairs, trade, industry and employment and an executive director for the council.[106] The responsibilities of the council include: acting as the policy making organ of the Agency, coordinating all policies, whether by the government or the private sector which have or are likely to have a significant impact on the environment, the integration of environmental considerations in all aspects of social and economic planning, the harmonization of the plans and policies of the various sectors dealing with the environment, promoting the use of renewable sources of energy and the conservation of traditional sources, the supervision of the works of the agency, the commission and publication of studies on the environment as well as promoting public awareness of the environment, and adopting the standards and guidelines proposed by the Agency.[107]

3.4.2 National Environment Agency (NEA)

[104]International Union for the Conservation of Nature 'Protected Areas' https://www.iucn.org/theme/protected-areas/about (accessed 1 September 2021)
[105] Fisheries Act 20 of 2007, Section 57
[106] National Environmental Management Act 13 of 1994 Section 6
[107] National Environmental Management Act 13 of 199 Section 7

The National Environmental Agency was also created by NEMA and its functions include; the implementation of the policies of the council on the environment; to liaise with the various ministries, departments, and agencies of Government on all issues relating to the environment and ensure that environmental concerns are integrated into all spheres of national planning and project implementation; to liaise with the private sector, inter-governmental organizations, nongovernmental organizations, governmental agencies of other states on all issues relating to the environment; to prepare proposals for environmental policies and strategies for the Council; to initiate legislative proposals, standards, guidelines, and regulations.[108]

Furthermore, they further have the task of undertaking studies and submitting reports and recommendations to the Council on matters that are likely to have an impact on the environment. They are also mandated to promote the public awareness of environmental issues through gathering, analyzing and disseminating information about the environment and publishing periodic reports on the state of the environment. Environmental audit is another vital function of the Agency as it lays the compliance mechanism for ensuring that terms and conditions of approved projects are implemented. The duty to undertake project audit falls on the project developer who is to submit a project report to the Agency upon completion of the project and the Agency is to subsequently conduct periodic audit of the approved project. It is also within the mandate of the agency to ensure at all times that the environmental standards agreed with the lead departments concerning air quality, water quality, effluent discharges, noise, smell etc are maintained at all times.[109]

Perhaps most important amongst the functions of the Agency is the oversight and regulation of the Environmental Impact Assessment procedure. As mentioned earlier, environmental impact assessment is mandatory for products that are out of structure or usually involve major changes to the land.

3.4.3 Technical Advisory Committee (TAC)

The complex and sometimes technical nature of environmental protection has necessitated the need for a team of highly experienced individuals to guide and assist the agency in its duty of ensuring adherence to the already established environmental legislations. Accordingly, NEMA has made provisions for the technical advisory committee (TAC) whose functions are to advise the Agency on any issue which may be deferred to it, review the achievements of the goals and targets given by the Council to the Agency, to review and advise the agency on the environmental impact assessment of any project, to review and advise the agency on any environmental plans, standards and guidelines.[110] It should also be noted that the executive director of the Agency is the chairperson of this committee.

3.4.4 Technical Working Groups (TWG)

[108] National Environmental Management Act 13 of 199 Section 10
[109] National Environmental Management Act 13 of 199 Section 10
[110] National Environmental Management Act 13 of 199 Section 13

The purpose of technical working groups is to advise and assist the Agency in conducting the affairs. Their assistance mostly come in the form of programmes and program units that are organized to amplify the works of the Agency. At the moment, they are mostly prevalent within the environmental impact assessment angle where they assist the Agency by carrying out on-field assessment of projects seeking environmental approval. Nonetheless, their creation is at the discretion of the Executive Director who has been empowered by NEMA to establish them for certain purposes.[111]

3.4.5 Local Environment Committees (LECs)

To locally enforce environmental protection, NEMA created the Banjul Environment Committee which is a Committee of the Banjul City Council and a Kanifing environment committee which is a committee of the Kanifing Municipal Council. The functions of the LECs are to integrate environmental considerations into all plans, projects, and strategies of the Area Council, the City Council or the Municipal Council; to co-ordinate the activities of the Agency relating to the management of the environment and natural resources within their jurisdiction; to initiate and promote by-laws relating to the environment to be adopted by the various municipalities, to co-ordinate with the Agency and other ministries dealing with the environment, to co-ordinate the village or ward environment committees; to receive reports from village environment committees or ward committees; to integrate the views of the public, through wide consultation, into environmental policies and decisions; to develop a local environment plan as provided for in section 21; and prepare a state of the environment report for the area under its jurisdiction at such intervals and in such form as may be prescribed.[112]

3.4.6 Non-Governmental Organizations (NGOs) Co-ordinating Structures

International and national coordination of non-governmental organizations is undertaken by The Association of Non-Governmental Organizations (TANGO) and Non-Governmental Organization Affairs Agency (NAA). At the moment, there are 175 registered members of these organizations in The Gambia.[113] Nonetheless, only a few are committed to the protection of the environment.

3.4.7 The Courts

The enforcement of environmental regulations in The Gambia is also undertaken by the courts. Whereas NEMA nor the Agency provides for the establishment a special environmental law court, following the announcement of the Anti-littering regulation, an environmental court was established in the Kanifing Magistrate Court to preside over littering cases in the country.[114]

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[111] National Environmental Management Act 13 of 199 Section 16
[112] National Environmental Management Act 13 of 199 Section 19
[113] The Association of Non-Governmental Organizations https://www.thegirlgeneration.org/organisations/association-non-governmental-organisations-tango (accessed 1 September 2021)
[114] United Nations Environment Programme '*Environmental Courts and Tribunals: A guide for policy makers*' https://wedocs.unep.org/bitstream/handle/20.500.11822/10001/environmental-courts-tribunals.pdf (accessed 1 September 2021)

3.5 Enforcement of environmental legislations in The Gambia

As earlier observed, there are various institutions responsible for the enforcement and administration of environmental legislations in The Gambia. An understanding of this thus begs the question: how exactly are these laws are enforced? Are there ways of enforcing environmental legislations?
Generally, law enforcements can be grouped into two categories: formal and informal methods of enforcement. The formal method of enforcement usually involves the full backing of the law and a strict layout of the rights, privileges and requirements necessary to get an individual prosecuted. The informal method on the other hand is believed to be less strict and involves little to no punishment. An accumulation of these methods has led to a summary of environmental enforcement in The Gambia, and they are:

3.5.1 Administrative enforcement

Regulatory agencies are empowered by their enabling legislations to ensure that the rules for which they were created are properly enforced. It is from these legislations and their creations in the form of agencies that this form of enforcement is founded on. The general consensus is that administrative enforcement becomes effective where strict supervision cannot curb violation. This is because, whereas strict supervision is considered a more effective method of enforcement, there is a possibility that violations could occur in their presence. Hence, administrative enforcement ensures that statements from public bodies are given the force of law which guarantees the severity of their breach as opposed to mere statements without force.

In The Gambia, the National Environment Management Act (NEMA) has empowered the Agency with the administrative enforcement of environmental laws and that right is apparent under the following instances:

Part VIII of the Act relating to pollution control, prohibition of the discharge of materials, substances and oil into the environment provides that the owners of the vehicles, vessels or storage facilities from which these discharges occur are to mitigate the impact by:

a. Notifying the Agency of and other public officers of the discharge
b. Commence the necessary clean-up operations using the best available methods
c. Complying with any such operations that the Agency may give

It further provides that the Agency may seize or dispose of the production or storage facility or vessel until all mitigation measures are taken.

Another instance would be Part IX of the Act concerning inspection analysis and records. Under this section, the executive director of the agency can grant an environmental inspector the power to: effect the seizure of any vessel, motor vehicle or manufacturing plant that is found to cause environmental harm, to issue an improvement notice requiring the occupier of any manufacturing plant or other activity to cease any activities deleterious to the environment. Likewise, under the EIA regulations, the Agency is empowered to issue a stop notice to a project

that was undertaken without the environmental approval of the Agency. Furthermore, developers who have already been granted an environmental approval can have their approval revoked if it is proven that there has been: noncompliance with the conditions set in the approval, substantial modification of the operation of the project which could also mean substantial environmental impacts or consequence of substantive undesirable effect not contemplated in the approval.

3.5.2 Criminal Sanctions

Criminal sanctions unlike administrative methods are a more complex and laborious form of enforcement. This is because they usually involve a deliberate violation of a law or commission. As such, proving such violations require a process of information gathering that can be quite challenging. Whereas they can be quite cumbersome and extremely laborious, they are viewed as the most effective way of enforcing laws. They mostly come in the form of imprisonments of culpable persons, imposition of a monetary fine or both imprisonment and fines. However, under environmental laws, they come in the form of community service, environmental audits and remediation.

According to NEMA and other regulations governing The Gambian environment, there are instances where criminal liability can arise from the breach of a provision. Nonetheless, it is imperative to note that these offences are strict liability in nature, meaning that an omission or commission is enough to prove breach as opposed to the usual elements of a crime which would involve proving the mental element (mens rea). Accordingly, NEMA and other subsidiary laws provide for general offences, offences relating to environmental impact assessment, environmental standards, environmental records and pollution.

Moreover, it is also possible that these criminal sanctions be imposed through the courts. As provided under section 60 of NEMA, apart from monetary fines which is most prevalent in these cases, the court may order that the cost of disposing a substance or equipment be borne by an accused person or that the convicted person restore the environment to its natural state.

3.5.3 Alternative Dispute Resolution

Alternative dispute resolution has become widely known as a faster means to access justice globally. They largely involve the use of peaceful out-of-court methods of settling disputes. In international law, their use as a method of enforcement can be traced to Article 33 of The United Nations Charter which provides that disputes should be settled through pacific means such as negotiations, inquiry, mediation, conciliation, arbitration and adjudication by a judicial institution apart from resorting to regional agencies or arrangements. In environmental law, clause 5 of the United Nations Framework Convention on Climate Change (UNFCCC) makes reference to ‘conciliation’ upon the request of a party, whilst clause 6 provides details on the constitution of a conciliation commission.

In The Gambia, alternative dispute resolution as a means of enforcement has not been fully explored, as opposed to other countries like South Africa where, the South African Environmental Protection Agency published a policy in 1978 on the ADR’s role in

environmental disputes.[115] However, The Gambia does have an Alternative Dispute Resolution Act (2005) which provides for the conditions to use ADR as well as the acknowledgement of the UNCITRAL Arbitration rules, The United Nations Convention on The Recognition of foreign Arbitral Awards 1958, and the UNCITRAL conciliation rules 1980 as forming part of the Act.

3.6 Impediments to the enforcement of environmental legislations in The Gambia

The attraction and maintenance of investment in The Gambia is guided by The Gambia Investment and Export Promotion Agency Act, 2015 (GIEPA). According to the Schedule 1, Part II of the Act, an investor or investment enterprise must take necessary and appropriate measures to ensure the protection of the natural environment in accordance with the National Environmental Management Act 1994 and all other related environmental laws. In other words, apart from the National Environmental Management Act, there is an obligation on investors to adhere to the other laws listed in (3.2 and 3.3) when dealing with the protection of the environment. Clearly, one can also view from the laws listed earlier that the absence of environmental protection legislations may not necessarily be the issue for The Gambia. According to the Environmental Performance Index, The Gambia ranks 166th out of a possible 180 countries when it comes to environmental protection. [116] There are various reasons for this reality, but the following can be attributed as the main reasons:

3.6.1 Unjustifiable Government Interference

Whereas the first republic of The Gambia has been commended on the idea of initiating environmental protection policies and the second republic has been commended on taking it even further by introducing implementation policies for these legislations, such as The Gambia Environment Action Plan, it is without doubt that the government also has a role in the ineffective enforcement of these legislations. One of such government actions has been its interference in environmental matters in the country. In 2017 for instance, the National Environmental Agency filed a suit against Golden Lead Import and Export Company Limited which is involved in the manufacturing of fish pellets otherwise known as 'fish-meal'. It was reported that the company was engaged in the illegal discharge of its industrial waste into the ocean and lagoons in the country. However, the Agency, in performing its functions of ensuring environmental protection ordered that the factory close down its operations and disconnect the pipes it connected to the ocean. After the closure was effected, the Minister of Trade, Employment and Regional Integration went to the factory and ordered that its operations be resumed on the basis that the closure of the company was not in the 'economic interest of the country' as the company provided employment for the citizens of the country. In addition, there was also an announcement from the Director of Press at the State House that the State was withdrawing all its charges against the company. This was after the company had denied the

[115] M. Bank & C.M Bank 'Settling Environmental Disputes using Alternative Disputes strategies and the impact on Tourism activities in South Africa' (2017) 3 African Journal of Hospitality, Tourism and Leisure 6
[116] Environmental Performance Index https://epi.yale.edu/ (accessed 1 September 2021)

counts of pollution levied against it in the court.[117] This process then led to an out-of-court settlement of 25,000 USD which is miniscule compared to the environmental damage inflicted on the community in which Golden lead was established. Another example of unjustifiable government interference regarding environmental enforcement would be when the ban on plastic bags was effected. The Mayoress of the City of Banjul obstructed the enforcement of this ban on the basis that her office was not formally notified of the ban. She ordered the non-enforcement of the ban in the city.[118]

3.6.2 Inadequate Technical Capacity

Technical capacity is vital for the effective enforcement of environmental legislations. It involves the presence of capable personnel and equipment's crucial to the enforcement of environmental legislations. In The Gambia, one can make the conclusion that there is a lack of the required technical capacity necessary to ensure the effective enforcement of environmental legislations.
Regarding capable equipment's for instance, Part VI of NEMA mandates the Agency to come up with a criteria and measurement of environmental quality. The Agency is required to co-operate with the necessary lead departments in ensuring that minimum standards for environmental quality in general and those outlined in the Act are achieved. This objective was followed by the enactment of the Environmental Quality Standard Regulation 1999. Nonetheless, the enforcement of this legislation has been a challenge. Asides the National Water Quality Laboratory operated by The Department of Parks and Wildlife Management, there is currently no functional environmental laboratory in the country to test the quality of drinking water which is a part of ensuring environmental quality standards.

3.6.3 Political Instability

It has been argued that political instability can often determine the success or failure of a sectoral regime and the environmental protection regime is no exception as political instability can often lead to chaos and social upheaval in the country. According to a research conducted on biodiversity conservation, it was observed that national governance played a key role in environmental changes caused or influenced by people.[119] If funneled to The Gambian environmental regime, this study appears true as The Gambia experienced some success in 2015 when the order on the ban of plastic bags was initiated but this success was cut short as the country experienced a political impasse following the presidential elections in late 2016.

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[117] 'NEA Sues Golden Lead Company to Court' *Foroyaa* https://foroyaa.net/nea-sues-golden-lead-company-to-court/ (accessed 3 September 2021)
[118] L Samateh 'Legal framework for environmental management in The Gambia: A critical appraisal' Unpublished Master's thesis, University of The Gambia, 2019 73
[119] T Amano, T Szekely 'Successful conservation of global water birds populations depends on effective governance' (January 2018) https://www.researchgate.net/publication/321947760_Successful_conservation_of_global_waterbird_populations_depends_on_effective_governance (accessed 1 September 2021)

3.6.4 Role Conflicts

There appears to be a clash in the functions of some of the institutions responsible for environmental protection in The Gambia. This has grave effects particularly regarding the required moments for these institutions to interfere. An example would be the Marine Pollution Act (MPA) of 2013 which mandates the Maritime Administration to take charge of activities within the marine environment, whilst NEMA has extensive provisions on the protection on the coastal and marine environment. As such, it is quite possible to envisage a clash between the institutions responsible for upholding both legislations.

3.6.5 Lack of Awareness

Environmental considerations will always be taken likely, if there is a lack of awareness about its importance. It has been argued that the lack of awareness can led to indifference as a result of which the violation of the environment laws become more of a general rule as opposed to an exception in a country.[120] However, NEMA does provide for The Agency to make publications and adopt measures and strategies to promote public awareness on environmental issues.[121] Until this is achieved, environmental protection would always remain a major barrier in The Gambia.

3.6.6 Constraints in data collection

According to a report by The United Nations Statistics Division, it was uncovered that one major constraint of effective environmental enforcement in The Gambia is the cumbersome procedure involved in collecting data concerning the state of the Gambian environment. They attributed this issue to the lack of funds required to conduct surveys, the inadequate training of field workers and the lack of skilled personnel in collecting, analyzing and interpreting environmental data[122]. Furthermore, a recent investigation conducted by 'Changing Markets' also proved that the government had no records of fish-meal and fish oil production or exports despite the companies operations in the country. [123]

3.6.7 Inadequate public participation

Public Participation is a central aspect of the environmental impact assessment procedure. This is because it offers members of the community an opportunity to express their concerns and provide input on the project intended to be established on their land. Although public participation is covered in Section 16 of The Gambia's EIA regulations, the case involving the

[120] L Samateh 'Legal Framework for environmental management in The Gambia: A critical appraisal' Unpublished Master's thesis, University of The Gambia, 2019, 79

[121] National Environmental Management Act 13 of 199, Section 48

[122] United Nations Statistics Division *State of The Environment Statistics in The Gambia* https://unstats.un.org/unsd/environment/gambia.pdf (accessed 1 September 2021)

[123] Changing Markets *Fishing For Catastrophe 2019* https://changingmarkets.org/wp-content/uploads/2019/10/CM-WEB-FINAL-FISHING-FOR-CATASTROPHE-2019.pdf (accessed 1 September 2021)

fishmeal companies prove that, section 16 was not fully complied with. The affected members of the community claim that on no occasion did the companies make consultations with them regarding the establishment or enviro-social impacts of the company. [124]

3.7 Regional Protection of The Gambian Environment

Environmental protection is not only covered in domestic legislations and their institutions. In West Africa, the past decade has indicated a shift in the way the environment is considered in investment activities, and the major pioneer of this move has been the Economic Community of West African States (ECOWAS).
The Economic Community of West African States (ECOWAS) is a regional economic bloc of 15 West African states namely: Benin, Burkina Faso, Cape Verde, Cote d'Ivore, The Gambia, Ghana, Guinea, Guinea –Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. Before 2008, there was no provision regarding the protection of the environment. However, the reverse is the case as environmental protection has been included in certain documents for the adoption by states.

In 2008, the ECOWAS embarked on a journey of creating a framework for the protection of the West African environment. This journey was marked by the creation of a document known as The ECOWAS Environmental Policy and a Supplementary Act setting out the scope and guiding principles of the agreement. The reason for the creation of this policy is founded on the 80% of rural livelihoods counting on the state of the environment for their survival.[125] It was also discovered that the living conditions of these rural populace was not inhabitable considering the serious environmental and climatic conditions they faced. Accordingly, the aim of the policy is to achieve: good governance and sustainable use of natural resources; national policies and regulations that would address industrial pollution, urbanization and waste disposal; efficient resource management aimed at poverty reduction ; the general improvement of the livelihood of the people, advocacy to combat ignorance, and provision of information and communication technology; the adaptation and orientation of institutional bodies in order to effectively organize and optimize synergies and partnerships and the promotion of social equity in national policies of member states.[126]

In addition, the policy aims to solve problems such as: land degradation and erosion, loss of biodiversity through deforestation, degradation of rivers and lake resources, degradation of coastal marine ecosystems, problems of urban and industrial pollution and health and the environment.

In 2013, the ECOWAS commission began implementing these policies by improving environmental governance and capacity building, promotion of sustainable resource management

[124] Chinese Fishmeal Factory A threat to Gambia's Coastal Communities *Fair Planet* December 2019 https://www.fairplanet.org/story/china-fishmeal-factory-a-threat-to-gambia%E2%80%99s-coastal-communities/ (accessed 1 September 2021)
[125] Economic Community of West African States Environmental Policy
[126] ECOWAS Environmental Policy

for the enhancement of the sub-regional economy in due respect of the environment and promotion of an improved management of pollution, nuisance and hazardous wastes. Interestingly, the implementation of these policies has been largely successful as the ECOWAS launched another programme known as 'Monitoring for Environment and Security in Africa' (MESA). Together with the environmental policies, these programmes have been responsible for: the availability of infrastructure and a database for the observation of the earth in ECOWAS countries, the development of expertise that is largely acknowledged in the sub-region and contribution to enhance decision making by politicians in monitoring agricultural harvests across the services made available by the project. [127]

3. 8 Challenges of environmental enforcement in the ECOWAS

Despite some of the recent successes of the ECOWAS in implementing its environmental policies, there are hurdles that need surmounting in order to ensure the complete achievement of the ECOWAS's environmental goals. A few of these hindrances have also been highlighted by the ECOWAS in its environmental policy as 'constraints' that could prevent the achievement of the objectives set out in the document:

3.8.1 Poverty: Poverty is generally considered as a major hindrance for development in Africa. However, it appears to be worse in West Africa. Compared to other regions of the African continent, poverty is most extreme in West Africa, with more than 30% of its population living on less than $1.90 a day.[128] According to the UN Human Development Index, most West African countries fall within the low level of human development, barring Ghana which falls within the medium level of human development.[129] Whereas the poor are often the recipients of environmental damage, they could also be the creators, if their status forces them to deplete natural resources to survive.

3.8.2 Persistence of Conflicts: West Africa is believed to have hosted most of the conflicts that have rocked the African continent in the last century. Nigeria for instance endured a civil war that lasted three years and claimed over two million lives. Liberia also faced its own internal conflict in a civil war that lasted from 1989 to 1997.[130] Conflicts of this nature could affect the environment and wildfire. For instance; when oil fields are aflame, carbon dioxide is released into the atmosphere and this is harmful to the environment and the natural habitats living in it[131].

3.8.3 Ignorance and a lack of awareness: Without effective mechanisms on the benefits of a safe environment, actors and perpetrators of environmental violations will continue to inflict harm on

[127] Economic Community of West African States '*Adaptation to Climate, Security and Development Changes*': 2013 Annual Report
[128] Oxfam International 'West Africa: Extreme inequality in numbers' https://www.oxfam.org/en/west-africa-extreme-inequality-numbers (accessed 1 September 2021)
[129] United Nations Development Programme 'Human Development Index 2020' http://hdr.undp.org/en/2020-report (accessed 1 September 2021)
[130] E – International Relations 'Conflicts in West African States' https://www.e-ir.info/2013/03/15/conflicts-in-west-african-states/ (accessed 1 September 2021)
[131] ICRC 'Natural environment: neglected victim of armed conflicts' https://www.icrc.org/en/document/natural-environment-neglected-victim-armed-conflict (accessed 1 September 2021)

communities that need a clean and sound environment for their survival. The quest to making environmental protection paramount begins with the state and many of them such as: The Gambia, currently face difficulties in transmitting the importance of environmental protection to the public.

3.8.4 Unstable climatic conditions: One of the effects of climate change is the global inconsistency in the world's climatic conditions. Whereas West Africa is considered as one of the least emitters of greenhouse gases, it is believed to be a region that has been gravely affected by recent changes in the climate. This particularly affects the ECOWAS in developing environmental schemes that are specifically suited for the region.

3.9 Conclusion

Maintaining elite environmental standards and protection is an inclusive process that begins and ends with the state. In other words, it is the obligation of the state to create and enforce effective environmental legislations. This chapter has evaluated the domestic and regional environmental regime of The Gambia by analyzing the extant legislations and institutions responsible for the protection of The Gambian environment. Whereas the environmental regime of The Gambia appears to have the necessary laws, enforcement of these laws seems to be the issue from the domestic and regional perspectives. The next chapter will delve into the investment agreements entered into by The Gambia to examine whether and how they address issues pertaining to the environment and sustainable development.

CHAPTER 4 – ASSESSING THE GAMBIA'S INVESTMENT AGREEMENT FOR ENVIRONMENTAL AND SUSTAINABALE DEVELOPMENT CONSIDERATIONS

4.1 Introduction

The aim of this chapter is to determine whether and how the protection of the environment and sustainable development has been incorporated into investment agreements signed by The Gambia. Accordingly, this chapter begins with a brief understanding of international investment agreements and their types (4.2), environmental considerations in investment agreements signed by The Gambia (4.3), and the enforcement of environmental provisions in investment agreements from a regional and international perspective (4.4).

In chapter two, it was observed that the bulk of The Gambia's investment regime is foreign direct investment. It is a process that involves the residents of one country (the source country) acquiring ownership of assets for the purpose of controlling the production, distribution and other activities of a firm in another country (the host country).[132] Two elements must be present to categorize an investment as foreign direct investment. They are 'Control' and 'Controlling Interest'. 'Control' in this context implies that one is central to certain decisions made within the organization for example: the appointment of members of the board of directors whereas 'Controlling Interest' is generally understood to mean that an investor has a minimum of 10% shareholding interest in the investment.[133]

4.2 International Investment Agreements

As noted above, foreign direct investment revolves around the idea of an individual from one country acquiring ownership of assets in another country mainly for the purpose of control. However, acquiring these assets requires an express form of protection that creates certain rights and expectations for both parties during the length of the investment. This express protection is what is often referred to as international investment agreements (IIA). From a broad perspective, international investment agreements reflect the agreed position of a state to another state or a state to an investor with legal obligations and a duty to conform to their provisions. Unlike other fields which often have an overarching international framework or convention dealing with general issues, there is no general convention governing investment. As such, international investment agreements are the only means to understanding the spirit, objective and scope of an investment. International investment agreements mostly come in two forms which are: bilateral investment treaties and regional/plurilateral agreements with investment provisions.

On one hand are; bilateral investment treaties which constitute the bulk of international investment agreements. Since 1960, there has been more than 2,300 bilateral investment

[132] IA Moosa *Foreign direct Investment: Theory, Evidence and Practice* (2004) Anthony Rowe Limited 1
[133] Moosa (n 132 above) 1

concluded.[134] The primary focus of BITs is investment protection which involves the protection of investments from nationalization or expropriation, assurances of free transfer of funds and the repatriation of profits, and provisions for non-discrimination in the treatment of foreign investors. One reason for the preference of BITs to other types of IIA's is the flexibility they offer in adapting to special circumstances. Bilateral investment treaties have also gained prominence because they provide the parties with the opportunity to set out definite norms that would apply to investments by states and their nationals in each other's territory. They are also quite uniform in their principles but contain slight variations suited to cater for the desire of the parties involved. They have also been the most cited in investment arbitrations compared to the other forms of IIA's.

International investment agreements could also come in the form of regional/plurilateral agreements governing a limited group of countries as opposed to all countries. Regional agreements are quite difficult to come by as they often involve a high degree of unity and co-operation and the presence of supranational institutions. A classic case for regional/plurilateral integration is the European Community which is now known as the European Union. The original ideology behind the union was the liberation of capital and the elimination of discriminatory measures that could affect this liberalization. Overtime, the union has covered investment and its effect on third countries. The Common Market for Eastern and Central African States (COMESA) which was originally intended to promote regional integration through trade and development of natural and human resources for the benefit of all people in the region has extended its mandate to the creation of a common investment area. COMESA's common investment area agreement which guides this common investment area is meant to be a promotional tool to guide member states in harmonizing best practices in investment and the facilitation of private sector development.[135]

At the moment, the forms of regional agreements that affect investment do not involve the level of integration found in the European Union or COMESA. NAFTA for instance, is a regional agreement which covers developed countries but has a possibility of covering other countries. Whilst NAFTA remains a free trade zone, it also makes provisions for investment. The recently concluded framework on the ASEAN investment area is another example as it does not provide for international investment alone. The aim of the agreement is to promote investment in the area through the co-operation of the countries in the region in the liberalization of investment regulations, the provision of national treatment to all investors in the countries involved, increased transparency and an inter-state dispute settlement system.[136]

In addition, the two types of IIA's discussed above, another gateway for investors into a particular country is through state contracts. Whilst, they do not constitute the major forms of IIA's, they are becoming increasingly used in the field of investment. A state contract is a contract made between the state or one of its entities with a foreign national or a legal person of

[134] Trade and Investment Rules 'Latin American Perspectives' https://repositorio.cepal.org/bitstream/handle/11362/4406/1/S2006605_en.pdf (accessed 3 September 2021)
[135] Common Market For Eastern and Southern Africa: Investment Agreement for the COMESA Investment Area.
[136] Framework Agreement on The ASEAN Investment Area

foreign nationality.[137] An entity of the state in this context could mean; an organization created by statute within a state and is granted control over an economic activity. State contracts are mostly used by developing countries in the natural resources sector. These agreements are sometimes referred to as 'concession agreements'. The logic behind state contracts is that since a foreign investor is seeking access and power to exploit the natural resources of a particular country, it is only procedural that it enters into an agreement with the state or one of its entities. In some instances, state contracts may be provided for within multilateral agreements, regional or plurilateral agreements or bilateral investment treaties. On the flip side, it is also possible that they stand alone and constitute the IIA's by themselves.

4.3 Environmental concerns in investment agreements signed by The Gambia

Over and above the reality that investment agreements outline the various commitments of the parties during the time span of the investment, it is also worth inquiring whether environmental concerns are incorporated in investment agreements from a global perspective. In 2011, a study was conducted by the Organization for Economic Co-operation and Development (OECD) on environmental considerations in investment agreements. The study surveyed the use of environmental references in a sample of 1,623 international investment agreements in 49 countries which is roughly half of the global investment treaty population. It was uncovered that an estimate of 133 IIA's or 8.2% of the sample size, contained some form of environmental language.[138] This report proves that environmental considerations have been either absent or largely missing from investment agreements.

Over the years, The Gambia has signed numerous investment agreements in the form of bilateral investment treaties with Morrocco[139], Taiwan,[140] Guinea[141], Mauritania[142], The Netherlands[143], Qatar,[144] Spain,[145] Switzerland,[146] The United Kingdom,[147] Turkey,[148] and Ukraine.[149] It is also party to various regional/plurilateral agreements with investment provisions such as; The ECOWAS Supplementary Act, The Pan African Investment code which is the first continental investment agreement concluded by the African Union and The ECOWAS Common Investment Code which was adopted in 2018. According to the study conducted by the OECD, there are seven ways in which environmental considerations can been included in investment agreements.

[137] UNCTAD: International Investment Agreements, Key Issues Volume 1
[138] OECD Working Papers on International Investment *Environmental Concerns in International Investment Agreements: A Survey*
[139] The Gambia's Bilateral Investment Treaty with Morocco
[140] The Gambia's Bilateral Investment Treaty with Taiwan
[141] The Gambia's Bilateral Investment Treaty with Guinea
[142] The Gambia's Bilateral Investment Treaty with Mauritania
[143] The Gambia's Bilateral Investment Treaty with The Netherlands
[144] The Gambia's Bilateral Investment Treaty with Qatar
[145] The Gambia's Bilateral Investment Treaty with Spain
[146] The Gambia's Bilateral Investment Treaty with Switzerland
[147] The Gambia's Bilateral Investment Treaty with the United Kingdom
[148] The Gambia's Bilateral Investment Treaty with Turkey
[149] The Gambia's Bilateral Investment Treaty with Ukraine

In many ways, these seven ways can be viewed as methods of balancing investment and environmental protection. The aim of this section is thus to utilize the seven ways considered by the OECD in assessing whether and how investment agreements signed by The Gambia provide for environmental considerations.

4.3.1 General reference to environmental concerns in Preambles

From the study, it was uncovered that the first method of incorporating environmental considerations in investment agreements was through the Preamble. The Preamble of an agreement contains an introductory or expressional statement that defines the purpose and underlying spirit of the agreement. The Gambia has no provisions for environmental protection in the preamble of any of her bilateral investment agreements. This can be attributed to the status of The Gambia as a least developed country seeking to improve its economy through the channels of investment. Countries such as The Gambia that fall within this bracket might feel that inserting environmental provisions in its investment agreement could discourage investors from investing thus limiting her chances of growing the economy. The only agreement that makes references to environmental provision in its preamble is the ECOWAS Common Investment Code which provides:

> DESIRING to ensure that trade and environmental policies are mutually supportive in furtherance of sustainable development; [150]

The preamble of the Pan African Investment Code also reads

> TAKING into account the Sustainable Development Goals (SDGs) and the Investment Policy Framework for Sustainable Development of the United Nations Conference on Trade and Development (UNCTAD)

There is also a case to be made that the objectives and definitions of investments offered in some of these Acts could also be a crucial method of gauging environmental considerations in investment agreements. For instance, it is the objective of the Pan African Investment Code to facilitate and protect investments that foster the sustainable development. The objective of the ECOWAS Supplementary Act is also to promote investment that supports sustainable development in the region. Whereas these sections do not directly fall within the Preamble of the agreement, they corroborate the preamble of the agreement, by offering a sense of the motivations behind the agreements.

4.3.2 Right to Regulate – reserving policy space for environmental regulations

The right to reserve policy space for environmental regulations is the oldest form of environmental language used in investment agreements. It can be traced all the way to the 1985 bilateral investment treaty between China and Singapore. It usually bestows the right to protect

[150] The ECOWAS Common Investment Code and Policy

and regulate the environment on a party. Till date, these kind of clauses remain the most frequent in investment agreement. Within The Gambia's investment regime, these clauses can only be found in The Gambia's bilateral investment treaty with Taiwan and Turkey. Article 15 of The Gambia's BIT with Taiwan provides:

> Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this agreement shall be construed to prevent a contracting party from adopting or maintaining measures, including environmental measures:
>
> (a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
> (b) necessary to protect human, animal, or plant life or health; or
> (c) relating to the conservation of living or non-living. exhaustible natural resources.[151]

Article 5 of The Gambia's Investment treaty with Turkey similarly provides:

> Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any non-discriminatory legal measures:
> (a) designed and applied for the protection of human, animal or plant life or health, or the environment;
> (b) related to the conservation of living or non-living exhaustible natural resources.[152]

4.3.3 Reserving policy space with respect to certain treaty provisions

It is also possible that environmental considerations are reserved for a specific purpose that may be expressed in the treaty. The most common forms of this are contained in performance requirements and national treatment exceptions

a. Performance requirements

Host governments can control the activities of foreign investors by imposing certain restrictions on the performance of their duties. However, none of The Gambia's investment agreement contain such a provision.

b. National treatment exceptions

The principle of national treatment posits that a foreign investor will not be accorded treatment that is least favourable to those accorded to nationals. However, states can insert national treatment exceptions which will give retroactive effects to new exceptions to national treatment made for the purposes of protecting the environment. Asides Article 10 of the Pan African

[151] The Gambia's Bilateral Investment Treaty with Taiwan
[152] The Gambia's Bilateral Investment Treaty with Turkey

Investment Code, this type of provision is absent in all of The Gambia's investment agreements. Article 10 reads:

> Any regulatory measure taken by a Member State that is designed and applied to protect or enhance legitimate public welfare objectives, such as national interests, public health, safety and the environment, does not constitute a breach of the National Treatment principle.

4.3.4 Precluding non-discriminatory regulation as a basis for claims of indirect expropriation

In this scenario, the state would preclude claims for compensation on the basis that it took an action necessary to protect the public good. The reason for inserting this provision is because there is a possibility that the investor views such an action as discriminatory, thus requiring compulsory compensation from the state. Of all The Gambia's investment agreements, only the Pan African Investment Code makes a similar provision in Article 11 by providing that:

> A non-discriminatory measure of a Member State that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute an indirect expropriation under this Code.[153]

4.3.5 Environmental matters and investor-state settlement dispute

This kind of provisions mostly concern procedural issues in investor-state disputes dealing with environmental matters. The agreement could use a language allowing or barring a party from using a particular procedure in the dispute settlement process. However, none of The Gambia's investment agreement contains such provisions and this could be particularly detrimental to the country considering the possibility of investors and their investments being liable for environmental violations.

4.3.6 Not lowering standards – discouraging the relaxation of environmental standards to attract investment

To maintain decent environmental standards, certain states include clauses that prohibit the relaxation of environmental standards as an incentive to attract investment. These clauses are perhaps the most important as they are created to ensure that the regulatory agencies responsible for upholding environmental standards within the country, work effectively with no privileges in mind. Amongst all The Gambia's bilateral investment treaties, only one provides for such as important clause. The Gambia's BIT with Turkey provides:

> Convinced that these objective can be achieved without relaxing health, safety and environmental measures of general application as well as internationally recognized labour rights.[154]

[153] The Pan African Investment Code

[154] The Gambia's Bilateral investment treaty with Turkey

This provision is also catered for in two of The Gambia's regional/plurialteral investment agreement.

Article 20 of The ECOWAS Supplementary Act equally provides that:

> Member States recognize that it is inappropriate to encourage investment by relaxing domestic labour, public health, safety or environmental measures and thus shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in their territories, of an investment.[155]

Article 37 of The Pan African Investment Code states:

> In this regard, Member States shall not encourage investment by relaxing or waiving compliance with domestic environmental legislation. If a Member State considers that another Member State has encouraged such relaxation or non-compliance, it may request consultations with the other Member State and the two Member States shall consult with a view to avoiding any such encouragement. [156]

4.3.7 General promotion of progress in environmental protection and co-operation

Some investment agreements contain clauses that promote environmental protection without necessarily making it the objective of the agreement. This sort of provision is not found in any of The Gambia's bilateral investment treaties. However, Article 2 of the ECOWAS Common investment code provides states that one objective of the agreement is to promote, facilitate, and protect investment that foster sustainable development of the region and in particular, the Member State in which the investment is located. [157]

4.3.8 Presence of legality clauses

Whilst this does not constitute part of the seven methods outlined by the OECD, it is arguable that the legality clause could be the future mechanism used in the incorporation of environmental provisions in investment agreements. A legality clause is a provision used to conform investments in accordance with the laws of the host state. Accordingly, legality clauses are used to determine either the existence of an investment or the legality or illegality of an investment.[158] In addition, there are consequences to the presence or absence of a legality clause in an investment agreement. Should a legality clause be present in an investment agreement, any dispute arising from the investment automatically moves beyond the jurisdiction of an

[155] The ECOWAS Supplementary Act
[156] The Pan African Investment Code
[157] The ECOWAS Common Investment Code and Policy
[158] David Khachvani 'Legality of Investment' 20 July https://jusmundi.com/en/document/wiki/en-legality-of-investment (accessed 3 October 2021)

investment tribunal to that of the host state, provided that such a violation is contained within the scope of the investment agreement. Nonetheless, should the violations fall outside the scope of the treaty, the jurisdiction of the tribunal is not affected. On the other hand, there are controversies surrounding the absence of a legality clause. Some tribunals have argued that the absence of a legality clause limits the powers of the host state, whilst others argue that it does not. Interestingly, all of The Gambia's investment agreements contain legality clauses. Following the principles discussed above, The Gambia should be able to make use of its municipal powers in prosecuting investors found guilty of violating its environmental laws. However, its powers are significantly constrained as environmental protection is not catered for particularly in most of The Gambia's bilateral investment agreements, as such the powers of the investment tribunal is not affected.

From this study, asides The Gambia's bilateral investment agreement with Turkey and Taiwan, the word 'environment' or 'sustainable development is absent from its bilateral investment agreements with other countries. On the flip side, her regional/plurilateral agreements contain some environmental provisions, nonetheless they also lack certain key clauses that could foster the balance between investment and environmental protection.

4.4 Enforcement of environmental provisions in investment agreements

Since investment agreements generally outline the terms and guiding principles of an investment, the enforcement of environmental considerations captured within the agreement thus becomes the question for both the investor and state. Generally, states use the various domestic mechanisms within their jurisdiction to enforce these provisions. However, it is highly likely that disputes concerning the enforcement of these provisions arise from an investor and state perspective. Accordingly, this section explains through disputes how environmental provisions are enforced from a regionally and international scale.

4.4.1 Enforcement of environmental provisions from the perspective of the ECOWAS Community Court of Justice

Since the ECOWAS Supplementary Act and the ECOWAS Common Investment Code provide for the protection of the environment. It would follow that the ECOWAS community court of justice becomes the key enforcer of these laws by virtue of its power to preside over cases. According to Article 10 of the Supplementary Protocol, the ECOWAS community court is open to;

i. Individuals on application for relief for violation of their human rights

ii. Individuals and corporate bodies to determine whether their rights have been violated by an ECOWAS official

iii. Member states and the Executive secretary, to bring an action against a state for failure to fulfil treaty obligations

iv. Member states, the council of ministers and the Executive secretary for determination of the legality of an action to the ECOWAS agreements

v. ECOWAS staff who have exhausted remedies under the ECOWAS rules and regulations and

vi. Member states national courts who may request to refer an issue related to the interpretation of the ECOWAS agreements to the community court of justice.[159]

It is also worth noting that unlike the African Court on Human People's Rights which requires a party to exhaust domestic remedies before making an appearance, an aggrieved party can appear before the ECOWAS court without following such requirement.

The ECOWAS community court of justice is rarely used as an avenue for the adjudication of investor-state dispute. This is based on the current controversy on the jurisdiction of the ECOWAS supplementary act. By default, the Act should only apply to intra-ECOWAS investors, but a close reading of the supplementary act suggests that the Act could also extend to non-ECOWAS investors. This is well illustrated in Article 1(d) of the Act which provides for the definition of an investor. An investor is defined in the act as any individual or company of any member state of ECOWAS. This aspect of the definition speaks to intra-ECOWAS investors. The definition also goes on to define an investor as 'any company that has invested or is making an investment in the territory of a member state'.[160] The contradiction with this definition arises when one contrasts it with the definition of a company offered in Article 1(a) of Act. According to Article 1(a) of the Act, a company means any corporate entity, constituted or organized under the applicable law of any ECOWAS member state, whether or not for profit and whether privately or governmentally owned or controlled. When compared with the second part of the definition offered in Article 1(d), it appears that a non ECOWAS investor who constituted his/her company without using the applicable law of any ECOWAS member state cannot profit from some of the protection offered in the Act, despite his/her investment being in the territory of an ECOWAS member state.

Whereas this is yet to be settled, the general consensus is that non- ECOWAS investors do not usually accede to the ECCJ as the court for the settlement of their disputes except and unless it is worded in the investment agreement. This reality also speaks to the shortage of environmental disputes generally lacking at the regional level. Nonetheless, as decided in a ground breaking case between SERAP v NIGERIA & 8 ORS.[161] The ECCJ seems to have adopted the method of holding both the state and the investor liable for environmental breaches committed within the region. In this case, the government of Nigeria was unanimously found guilty for the abuses of certain oil companies against the Niger Delta people of Nigeria. The Court also found Nigeria to have violated Article 21 and 24 of the African Charter on Human and People's Rights which deals with the right to natural wealth and the right to a general satisfactory environment respectively. The Court found Nigeria guilty for its failure to establish effective laws and institutions to regulate the activities of these companies. This case distills the importance of the

[159] The Economic Community of West African States Supplementary Protocol
[160] The ECOWAS Supplementary Act
[161] *Serap v Nigeria and 8 others* ECCJ (14 December 2012)

state as the primary enforcer of environmental legislations. Although the State is not usually the perpetrator of these violations, it can be complicit of these activities by failing to perform its obligations of protecting, fulfilling and respecting the rights of its citizens.

4.4.2 Enforcement of environmental provisions from the perspective of the International Centre for the Settlement of Investment disputes

At the moment, there are no records of The Gambia as an applicant or respondent in any international investment dispute concerning the environment. Whereas, this does not nullify The Gambia as a potential claimant or respondent before an international investment tribunal. There is a litany of cases that demonstrate the nature of express environmental considerations in investment agreements. The interpretation of investment treaties is generally guided by Article 31 to Article 34 of the Vienna Convention on the law of treaties. Article 31, which provides for the general rule of interpretation provides that a treaty is to be interpreted in good faith and in accordance with the general meaning given to the terms of the treaty in their context and in light of their object and purpose.[162] This method of interpretation is known as the 'textual approach' and it is the most common mode of interpretation used in investment tribunals. The term 'context' as used in this term does not indicate that the treaty is to be given a historical or political perspective, but that interpretation should be based on the terms of treaty.

A recent string cases indicate this reality. For instance, in the case between Al Tamimi v Oman: Al Tamimi was a US investor who operated a machinery in Oman without the necessary permits for housing and uprooted trees amongst other things. Oman subsequently terminated Al Tamimi's lease agreement upon which Al Tamimi claimed for indirect expropriation and breaches of the minimum standard of treatment obligations under the US – Oman FTA. The tribunal considered a provision that reserved the state's ability to ensure that investments were undertaken in an environmentally sensitive manner and an environmental chapter in the investment treaty. In 2015, the tribunal held that because the treaty placed a high premium on environmental protection, Al Tamimi had breached a fundamental standard in agreement which was the protection of the environment. [163]

In a similar case involving Perenco v Ecuador,[164] Perenco was an oil and gas company situated in the Amazon rainforest and involved in the extraction of oil and gas. Perenco initially filed a claim that Ecuador's imposition of a windfall profit tax and subsequent takeover of Perenco's oil extraction activities constituted a violation of the France Ecuador BIT. Ecuador brought a counter claim against Perenco claiming environmental damage and breaches of Ecuador's environmental laws. Although the tribunal ordered that Ecuador pay some compensation to Perenco, Perenco was also ordered to pay a sum of 54 million USD to Ecuador for the environmental damages caused.

[162] The Vienna Convention on the law of treaties
[163] *Adel A Hamadi Al Tamimi v Sultanate of Oman* (3 November 2015) Case No. ARB/11/33
[164] *Perenco Ecuador Ltd v Ecuador and Empresa Estatal Petroleos del Ecuador* (27 September 2019) Case No. ARB/08/06

The recent case between Ero Oco and Columbia[165] perhaps offers the best dynamic on this issue. Canadian Company Ero Oco acquired exploration rights for the mining of gold in the Paramos region of Columbia in the mid 1990's. In 2010, the state enacted its first laws prohibiting mining on the Paramos region. Whilst Eco Oro and other mining companies got exemptions from this law, in 2016 the constitutional court of Columbia revoked these exemptions claiming that environmental protection superseded economic rights acquired by private persons. At the time of this judgement, Eco Oro had not begun mining gold from the region. It was also reported that in 2011, the Columbian Ministry of Environment had rejected Eco Oro's impact assessment. In 2016, the company filed a suit at ISCID claiming 764 million USD in compensation. ISCID ruled in favour of Eco Oro claiming that Columbia had breached the minimum standard of treatment encapsulated in Article 805 of the free trade agreement between Canada and Columbia, despite the same agreement also providing for environmental protection. This case emphasizes that the presence of environmental considerations in investment agreements may not be necessarily be a sufficient means for its enforcement. Infact, it was uncovered from the ISCID judgement that the 2011 rejection of Eco Oro's impact assessment wasn't necessarily a result of the mining prohibition but a presence of environmental technicalities. The ISCID case also uncovered that although the constitutional court had prohibited mining in the Paramos region, the State did not do so, hence leading investors to believe that mining could still be undertaken in the region. As such, it is important that The Gambia ensures a cohesive relationship with the bodies involved in the protection of its environment. As seen in this case, a slight miscommunication between the institutions responsible for environmental protection could serve as a solid claim for investors to evade the obligation of ensuring adequate environmental standards.

4.5 Conclusion

The process of drafting and concluding investment agreements must become a process that involves a great deal of caution and analysis. For The Gambia, this is particularly important for the sole reason that investment agreements shape the conduct of the state and investor during the duration of the investment. This chapter has evaluated whether and how the protection of the environment has been incorporated in investment agreements signed by The Gambia. The evaluation has proved that whereas environmental protection is contained in regional/plurilateral investment agreements, they are greatly lacking in bilateral investment treaties entered with other countries. The next chapter will recapitulate the research agenda of this study, summarize the main points from each chapter and conclude by making recommendations.

[165] *Eco Oro Minerals Corporation v Republic of Columbia* (9 September 2021) Case No. ARB/16/41

CHAPTER 5 – CONCLUSIONS AND RECOMMENDATIONS

5.1 A recapitulation of the research agenda

Investment and the protection of the environment are distinct fields that contain their fair share of nuances and complexities. This distinctiveness holds true for The Gambia who has for so long chosen to pursue one at the expense of the other. However, the events that have transpired in the country since 2016 all point towards the need to balance both fields. This research was therefore aimed at: (i) discussing the evolving relationship between international investment law and the environment and the need to balance both fields in The Gambia (ii) accessing the effectiveness of the domestic and regional legislations governing The Gambian environment and (iii) inquiring into investment agreements signed by The Gambia to look into whether and how they provide for the protection of the environment.

5.2 Summary of key points

Chapter one contained a background of the study, a broad overview of the research objectives, research significance, research methodology, research significance and the chapter's layout.

Chapter two which is technically the first substantive part of the study laid out the evolution of investment, starting from the colonial to the post-colonial period. It also discussed investment in the Gambian context as well as the benefits it accrues to the nation. This chapter also found that the relationship between investment and the protection of the environment have majorly come in the form of conferences establishing certain documents and obligations on the state and the investor. This chapter also uncovered that the protection of the environment is also inclusive of concepts like sustainable development and climate change. The chapter then concluded by discussing the need for a balance using the case of the Gambian fishmeal factories.

Chapter three then advanced to inquire the viability of this balance by looking into the domestic and regional protection of The Gambian environment. In this chapter, it was discovered that there are infact sufficient laws and regulations governing the Gambian environment. However, implementation of these instruments has been a challenge for the local agencies tasked with enforcing these laws and the regional body in the institution of the ECOWAS who has recently made it a priority to ensure environmental protection within all member states.

Chapter four engaged in a critical analysis of environmental provisions in investment agreements signed by The Gambia. It considered environmental considerations from a global perspective before narrowing it down to The Gambia. This assessment highlighted a general absence of environmental provisions investment agreements signed by The Gambia, particularly in her bilateral investment treaties which are perhaps the most common form of investment agreements. To look into the effects of environmental provisions in investment agreements, this chapter also analyzed the enforcement of environmental provisions in investment agreements using regional and international disputes.

Chapter five then makes a recapitulation of the research agenda, a summary of the key points from the research and recommendations.

5.3 Recommendations

One central idea that runs throughout the analysis undertaken in the previous chapters is that the process of balancing the need for investment and the protection of the environment in The Gambia must be primarily executed on two fronts: the domestic and international level. The following recommendations are designed to tackle the issues encountered on both fronts

5.3.1 Recommendation one

As noted in chapter three, governmental interference is a major impediment on the enforcement of environmental legislations in The Gambia. For the most part, these interferences are unjustified and they consequentially limit the ability of the National Environmental Agency in carrying out their functions. One could also come to the conclusion that unjustified interferences of these nature could give rise to bribery and corruption, which has a ripple effect that could spread across the governmental arms of the nation. Another negative consequence of governmental interference in environmental matters is the dearth of environmental disputes in the country. At the moment, there are hardly any domestic environmental precedent setting disputes that speak to the need to protect the Gambian environment. As seen in the case of the fishmeal companies, the government opted for an out-of-court settlement of USD 25,000 which is miniscule compared to the violations caused on the communities in which they reside. From an international perspective, most of The Gambia's disputes at the International Center for the Settlement of Disputes are currently discontinued and none speaks to the protection of the environment from an investment angle. To curb this, The Gambian government would need to limit its activities on environmental issues in the country and let the environmental agencies mandated to tackle these issues perform their functions. The environmental agencies would also need to be fearless in bringing offenders of environmental legislations to the book and ensure that adequate compensation is awarded to the parties affected by these breaches.

5.3.2 Recommendation two

There appears to be a lack of transparency with the National Environmental Agency to the general populace. The affected communities of the fishmeal company's violations claim that they were never invited to offer their inputs concerning the establishment of these companies, pursuant to section 19(3) of the EIA regulation. The Agency on the other hand, claims that the companies conducted an environmental impact assessment.[166] However, the documents containing the said assessment were never released to the public and the communities were never invited to offer their input. One of two outcomes is possible from these given facts: It is either the companies never conducted an impact assessment or the National Environmental Agency is

[166] The new humanitarian 'Gambians fight Chinese fishmeal factory as fish prices soar' https://deeply.thenewhumanitarian.org/oceans/articles/2018/07/12/gambians-fight-chinese-fishmeal-factory-as-fish-prices-soar-stocks-fall (accessed 27 September 2021)

unwillingly to release it to the public. Co- incidentally, this lack of transparency is also connected to the constraints encountered in data collection regarding the Gambian environment. To alleviate this, the agency will have to develop a concrete and reliable database where all information regarding the environment is made available to the public.

5.3.3 Recommendation three

Barring The Gambia's BIT with Taiwan and Turkey, there is an absence of the word 'environment' and 'sustainable development' in its agreement with most countries. To remedy this, the Gambia would have to reform all of its treaties BIT's. Fortunately, South Africa[167] and Nigeria[168] who also reformed their BIT's can serve as concrete examples on the procedures involved in this activity. The Gambia would also need to mold its BIT's after treaties that prioritize the environment and sustainable development, such as the Nigeria –Morrocco BIT and The IISD Model investment agreement.

5.4 Conclusion

Balancing the need for investment and the protection of the environment is an issue besieging numerous nations. The past decade has seen The Gambia on the negative end of this discourse. To curb this, The Gambia needs to strengthen its domestic agencies in order to ensure that investors comply with the required environmental standards. The Gambia would also need to reform most of its investment agreements and create ones that are reflective of environmental and sustainable development considerations. The effects of this balance would propel change, not only for The Gambia but Sub-Saharan Africa as a whole.

[167] South Centre 'International Investment Agreements and Africa's structural transformation: A perspective from South Africa' https://www.southcentre.int/wp-content/uploads/2015/08/IPB4_IIAs-and-Africa%E2%80%99s-Structural-Transformation-Perspective-from-South-Africa_EN.pdf (accessed 27 September 2021)
[168] Kingsley Alu 'Nigeria begins reform of International Investment Agreements' https://www.bilaterals.org/?nigeria-begins-reforms-of (accessed 27 September 2021)

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The ECOWAS Supplementary Act

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The Gambia's Bilateral Investment Treaty with Morocco

The Gambia's Bilateral Investment Treaty with Qatar

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The Gambia's Bilateral Investment Treaty with Switzerland

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The Gambia's Bilateral Investment Treaty with The Netherlands

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The Gambia's Bilateral Investment Treaty with Ukraine

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