7 Implementing environmental rule of law in the mining sector in Kenya: An assessment of the *Cortec Mining* case

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1 Introduction

The efficacy of the law is predicated not just on the clarity of its content but also on the extent to which it is accepted and implemented. The implementation process requires a robust framework, institutions and resources for interpretation and enforcement. Without this law, it will remain abstract and incapable of addressing the societal challenges and causing the transformation and order for which it was designed. Without effective enforcement, the default characteristic of entities subject to the law will naturally resist the rule of law. Irrespective of which aspect of the law, criminal or civil, the principle of the rule of law embodies the normative device that directs the course of social interaction and legal intersections in any society. The principle of the rule of law is central to instilling a consciousness of order and adherence to a supreme governing system in every facet of human existence that comes under the watch of justice. An express examination of the thoughts of AV Dicey concerning the rule of law can produce several interpretations with conjoining elements that are credible enough for definition. But, beyond the basic understanding of what the rule of law means, there are intrinsic considerations that weigh on how the same principle ensures access to justice is guaranteed where the political instrument needed to protect the sanctity of the rule of law is relatively weak, particularly at the domestic level. In jurisdictions where the political will is strong enough to respect the rule of law, other factors may puncture the essence of the political will and capacity to ensure the enforcement of the rule of law. Some of these factors include institutional deficits and procedural excesses. Enforcing environmental laws remains a challenge in most developing countries because of these factors, which

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can be drawn, in some cases, from the political configuration and context of the legal system and the institutions administering justice in those systems, thereby undermining the environmental rule of law.

While the importance of the rule of law in the operation of democracies has been acknowledged for a considerable time, its connection to environmental management has only recently become a focus of scholarly attention. In 2013, the UNEP Governing Council adopted a resolution explicitly surging promoting of environmental rule of law as a critical strategy for realising sustainable development. A core aspect of that process required supporting governance measures of accountability. This chapter discusses a robust dispute resolution mechanism as one of the prerequisites for entrenching the environmental rule of law. It argues that sustainable development will remain elusive unless access to environmental justice is guaranteed and secured.

The argument is developed based on the Kenyan experience with its mining license issuance process regarding the exploration and extraction of rare earth in the Mrima Hills in the Coastal coastal parts of Kenya. This study evaluates the circumstances and reasoning behind the revocation of the license granted to Cortec Mining Company for the exploration and extraction of rare earth minerals. It delves into the subsequent legal conflicts that unfolded within the Kenyan judicial system and were subsequently brought before the International Centre for Settlement of Investment Disputes. The chapter analyses the roles of the Kenyan judiciary and international justice mechanisms in reinforcing the environmental rule of law in the mining sector, based on international concerns around transparency and accountability in the extractive industry. Its central argument is the importance of focusing on national and international approaches and fora in the quest for access to justice as a pathway to sustainable development.

For Africa, the rule of law and related concepts offer hope and caution in an environment replete with extreme complexity and historical trauma.[1] Kenya has a relatively young mining sector compared to other African countries. Although the continent has vast deposits of minerals and other natural resources, Kenya is not among the top mineral-rich countries.[2] While small-scale mining happened in Kenya for years, the discoveries

1 M Mutua 'Africa and the rule of law' (2016) 23 *SUR-International Journal on Human Rights* 159.

2 Rising Africa '10 most mineral-rich countries in Africa' (2017) https://www.risingafrica.org/storiescountry/10-most-mineral-rich-countries-in-africa/ (accessed 19 November 2023).

of oil in the past decade led to expectations that Kenya was joining the list of oil-producing countries[3] and thus elite mineral-rich countries.[4] After the discovery, several other natural resources in different parts of the country,[5] such as titanium, coal, niobium, rare earth, gold, and oil, were discovered.[6] This discovery has resulted in increased interest from foreign investors and expectations by citizens and the country that the economic situation and living conditions will dramatically increase.[7] At the same time, the reality of the Dutch disease effect that discoveries and exploitation of extractives portend for any country[8] coupled with negative human rights, labour, and environmental implications loomed.[9] The expansion of extractive industries in Kenya and other African countries is characterised by escalating social, political, technological, and ecological risks.[10] In addition, natural resource availability and exploitation lead to conflicts that call for the necessity and existence of robust and just conflict management systems.[11] This will ensure that environmental justice is achieved and sustainable development is maintained. To understand conflict management in the Kenyan extractive industry, one must know the main factors contributing to these conflicts, including[12] lack of

3 C Odote & S Otieno 'Getting it right: Towards socially sustainable exploitation of the extractive industry in Kenya' (2015) 1 *East African Law Journal* 202-221at 202.

4 C Odote 'Environmental implications of the extractive sector in Kenya: Challenges and way forward' in J Osogo Ambani *Drilling past the resource curse: Essays on the governance of the extractives in Kenya* (2018) 169-190 at 170.

5 M Omolo & G Mwabu 'A primer to the emerging extractive sector in Kenya: Resource bliss, dilemma or curse' (2014); see also E Mutua 'Adequacy of Kenya's legal framework on large scale extractive industry in addressing interests of local community' (2018) 14 *The Law Society of Kenya Journal* 120.

6 As above.

7 R Mulwa 'You are what you eat: Kenya's probable economic outcomes in light of mineral discoveries' in PK Mbote & C Odote (eds) *Blazing the trail: Professor Charles Okidi's enduring legacy in the development of environmental law* (2019) 413-429; M Kariuki 'Reflections on managing natural resources and equitable benefit sharing in Kenya' (2019) 15 *The Law Society of Kenya* ; see also J van Alstine et al 'Resource governance dynamics: The challenge of "new oil" in Uganda' (2014) 40 *Resources Policy* 48; K Emmanuel 'Mining law and sustainable development: Lessons from selected cases in Africa' in P Kameri-Mbote & C Odote (eds) *Blazing the trail: Professor Charles Okidi's enduring legacy in the development of environmental law* (2019).

8 Mulwa (n 7).

9 Odote (n 4).

10 Kariuki (n 7); see also Van Alstine et al (n 7); Emmanuel (n 7).

11 Mutua (n 5).

12 Mutua (n 5) 141-143; see also P Kameri-Mbote & C Odote 'Courts as champions of sustainable development: Lessons from East Africa' (2019) 10 *Sustainable Development Law & Policy* 9; J Bogere 'Transparency and accountability in Kenya's extractives sector' (2020).

information and public awareness,[13] lack of public participation,[14] politics and interests,[15] and high expectations by the community.[16]

Despite the critical Kenyan mining sector, it has been long forgotten, even though mining activity in the country has existed for over five decades.[17] Between 2011 and 2014, the mining sector contributed about 1 per cent of the country's GDP.[18] This was due to outdated laws and archaic geological statistics, which caused the country to fail to benefit from its mineral resources.[19] Clear evidence of the forgoing was seen in the Fraser Institute annual mining survey report of 2014, where Kenya was ranked 120th out of 122 jurisdictions surveyed regarding mining.[20] After the 2013 general elections, President Uhuru Kenyatta, under the Jubilee Government, made policy and administrative-focused interventions to improve the mining sector. Some of the interventions included creating the Ministry of Mining in 2013, enacting the Mining and Minerals Policy, and a new Mining Act in 2016. These changes had a positive impact, as captured by the Fraser Report in 2016, ranking Kenya 86th out of 104 jurisdictions.[21] Adopting the Mining Act was a huge step from the old legislation that had been in place since 1940, which was outdated and treated minerals as government property. There was a need to incorporate modern technological and environmental developments. The new Mining

13 Lack of information and misinformation is a huge contributor of conflicts between the local community on one hand and the government and the investor on the other. Mining agreements have traditionally been kept away from the prying eyes of the public and this has led to lack of scrutiny of these agreements by the people. There is also lack of sensitisation to the public by the government and the investors. This has led to a lot of mistrust between the state, community and the investors.

14 For public participation to occur, there must be presence of information, and this has been a major issue with some of the mining agreements being discussed and signed in confidentiality. This negates the right to public participation by the citizenry.

15 The extractive industry as a whole can be a very lucrative industry if handled well and its projects has attracted a lot of public interest as well as the politicians. This is because it is a high profit industry that the politicians can use to gain wealth and power and most of the political interference leads to corruption and embezzlement of funds.

16 The community usually looks at the detection of a natural resource in their area as the tool that will eliminate all their problems and save them from poverty. However, exploration and extraction of natural resources is an expensive affair.

17 KPMG 'Analysis of Mining Act 2016' (July 2016) https://assets.kpmg.com/content/dam/kpmg/ke/pdf/kpmg-mining-act-2016-analysis.pdf(accessed 7 June 2021).

18 'Kenya's mining industry: Set for a boom?' *Mining Technology* 24 July 2016 (accessed 7 June 2021).

19 As above.

20 'Kenya's mining sector has great growth potential' *Business Daily* 10 August 2017 https://www.businessdailyafrica.com/bd/opinion-analysis/columnists/kenya-s-mining-sector-has-great-growth-potential-2164624(accessed 7 June 2021).

21 As above.

Act provided more information on land policy principles, land use, and property regulation, environmental agreements, and obligations relating to natural resources. It was also necessary to reform mining laws in Kenya to conform with the Africa Mining Vision[22] formulated in 2009 to sustainably maximise the exploitation of minerals in Africa and address the challenges facing the African mining sector.[23] The Mining Act calls for compliance with water laws, land use laws, and environmental protection laws in mining operations. It also requires that mining licenses be granted only after obtaining environmental impact assessment licenses, site mitigation plans, approved site heritage assessments, environmental management plans, and rehabilitation measures.[24] The Ministry of Mining merged with that of Petroleum after the 2017 general elections, which was a critical decision considering the constitutional limit on the number of ministries which is 22. The constitutional imperatives on mining include Article 10, which outlines the principles of governance with one of them being sustainable development; Article 42 on the right to a clean and healthy environment; and Article 62(1) with provisions on public land, that include minerals and mineral oils as part of that tenure category.

Because the extractive sector results in positive and negative impacts, states have responded by formulating global and national laws to regulate the industry.[25] The environmental rule of law has been used as a tool to support the management of environmental conflicts through a robust dispute resolution mechanism. It incorporates the necessities of the environment with the vital features of the rule of law and governs the critical link between the environment and human life.[26] Previously, resource sustainability had been viewed using an economic policy lens due to the paucity of literature and evidence on the nexus between natural resources and the rule of law.[27] The environmental rule of law is strategic

22 African Union 'Africa Mining Vision: Transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development' (1 September 2021) https://au.int/en/articles/african-mining-vision (accessed 7 June 2021).

23 As above.

24 See generally KPMG (n 17).

25 M Kariuki 'Promoting open and accountable management of extractives in Kenya: Implementing the extractives industries transparency initiative' (2019).

26 UN Environment Programme 'Environmental Rule of Law: First Global Report' (29 October 2019) https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report (accessed 19 November 2023).

27 LA Berg & D Desai 'Background paper: Overview on the rule of law and sustainable development for the global dialogue on rule of law and the post-2015 development agenda' *Paris: UNDP* (2013); see also CS Norman 'Rule of law and the resource curse: abundance versus intensity' (2009) 43 *Environmental and Resource Economics* 183; World Bank 'The changing wealth of nations: Measuring sustainable development in the new millennium' (2010).

in dealing with the full array of environmental issues.[28] The environmental rule of law infuses environmental protection aims with the components of the rule of law, thus reinforcing the reformation of environmental law and governance.[29] Motivated by these aims, the impetus for the environmental rule of law has evolved from 'obscurity to ubiquity'.[30] An autonomous judiciary and judicial processes are promoted and are crucial for its application, advancement, and execution.[31] The indispensable custodian of the rule of law is a judiciary that is independent and acts as the *'sine qua non'* of the structure of checks and balances through which there is an assurance of separation of powers.[32] This is the only way to ensure that the executive will observe the rule of law and perform its functions within entrenched laws and institutions.[33] To give a perfect demonstration of how the environmental rule of law can be actualised using robust judicial mechanisms, this chapter discusses the *Cortec Mining* case and how it went through the national judicial processes via the Kenyan High Court, and the Court of Appeal, and then how it found its way to the International Centre for Settlement of Investment Disputes (ICSID). The judicial decisions stemming from the *Cortec Mining* case show how the environmental rule of law contributes to environmental justice and sustainable development.

2 Environmental rule of law as a legal concept

The environmental rule of law integrates critical environmental needs with the essential elements of the rule of law and provides the basis for reforming environmental governance. It prioritises environmental sustainability by connecting it with fundamental rights and obligations. It implicitly reflects universal moral values and ethical norms of behaviour and provides a foundation for environmental rights and obligations. Environmental governance may be arbitrary, discretionary, subjective, and unpredictable without the environmental rule of law and the enforcement of legal rights and obligations.[34]

28 UNEP (n 26).

29 UNEP (n 26) 9.

30 As above.

31 Governing Council of the United Nations Environment Programme, Proceedings of the Governing Council/Global Ministerial Environment Forum at its first universal session, 12 March 2013, UN Doc UNEP/GC.27/17 (2013).

32 M Mutua 'Justice under siege: The rule of law and judicial subservience in Kenya' (2001) 23 *Human Rights Quarterly* 96.

33 Mutua (n 32) 96-97.

34 UNEP 'Environmental rule of law' https://globalpact.informea.org/glossary/environmental-rule-law (accessed 19 November 2023).

The concept of environmental law as a rule of law is of recent emergence and application. It, however, is underpinned by and derived from the broader and historically recognised term of the rule of law. A scholar has described the rule of law's history as stretching deep into equity and the Magna Carta.[35] Despite its long history, the term lacks a universal definition, with sentiments directed at perceived ambiguity.[36] The rule of law is defined variously by different scholars.[37] Some see it as a code of governance in which every person, agency, institution, and state is held accountable to openly promulgated, objectively enforced, and autonomously adjudicated state laws compatible with international human rights.[38] Others define it as a structure of guidelines and customs, institutions, progression, and an attribute of the procedures cutting across spheres to permit development.[39] Within the United Nations, the term's normative foundation derives from the UN Charter's Preamble, even though its exact definition remains contested amongst the membership.[40] Broadly, though, the United Nations sees the rule of law as bearing three interrelated components: consistency of the law with fundamental rights; law being fairly effectuated and comprehensively developed; and lastly, the law should convey liability theoretically and practically. Its main essence is the ordering of society and the relationship between the state and citizens.[41]

35 Mutua (n 1) 160.

36 J Scott 'From environmental rights to environmental rule of law: A proposal for better environmental outcomes' (2016) 6 *Michigan Journal of Environmental and Administrative Law* 203 at 221.

37 For discussions of the concept, see AH Garrison 'The traditions and history of the meaning of the rule of law' (2014) 12 *Georgetown Journal of Law & Public Policy* 565 at 581; G Wright 'The rule of law: A currently incoherent idea that can be redeemed through virtue' (2014-2015) 43 *Hofstra Law Review* 1125 at 1127; J Raz *The rule of law and its virtue* (2005); RH Fallon 'Rule of law as a concept in constitutional discourse' (1997) 97 *Columbia Law Review* 1 at 6; A Scalia 'The rule of law as a law of rules' (1989) 56 *University of Chicago Law Review* 1175.

38 United Nations Security Council, The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General, 23 August 2004, UN Doc S/2004/616 (2004).

39 LA Berg & D Devai 'Background Paper: Overview on the rule of law and sustainable development for the global dialogue on rule of law and the post-2015 development agenda' (2013) https://tijpublicforum.org/wp-content/uploads/2018/06/4-20130801-READING_Global-Dialogue-Background-Paper-Rule-of-Law-and-Sustainable-Developme pdf (accessed 19 November 2023).

40 N Arajärvi 'The Rule of Law in the 2030 Agenda' KFG Working Paper Series, No 9, Berlin Potsdam Research Group 'The international rule of law – Rise or decline?' (June 2017) https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/42190/file/kfg_wps09.pdf (accessed 19 November 2023).

41 Berg & Devai (n 39).

It is contrasted with the rule of man,[42] where there is a lack of equality and objectivity in implementing the law in society. What differentiates undemocratic states from democratic ones and freedom from tyranny is respect for the rule of law.[43] The concept is unique because 'its genius lies in the subordination of rulers to the law and due process'.[44]

These components are incorporated into the environmental rule of law and are applied in an environmental setting.[45] The application of the rule of law to environmental protection and the realisation of sustainable development derives from the function of law in preserving the threshold of sustainability.[46] While the development of environmental law worldwide since its emergence at the 1972 United Nations Conference on the Human Environment in Stockholm[47] has seen a myriad of conventions, protocols, and international declarations coupled with constitutional provisions and domestic legislation, the levels of environmental degradation remain disturbing. In efforts to both explain and address this disjuncture between promise and reality, the concept of the environmental rule of law has emerged. It is significant to address the implementation gap to deliver on the prerequisites of sustainable development.[48] It seeks to incorporate the rule of law in environmental protection and conservation to reduce environmental law violations and promote sustainable development.[49] As the UNEP's first global report on environmental rule of law states, 'Environmental rule of law integrates critical environmental needs with the elements of the rule of law, thus creating a foundation for environmental

42 J Scott 'From environmental rights to environmental rule of law: A proposal for better environmental outcomes' (2016) 6 *Michigan Journal of Environmental and Administrative Law* 203.

43 Mutua (n 32) 97.

44 Mutua (n 1).

45 Mutua (n 1) 8.

46 C Odote 'Environmental jurisprudence and sustainable development in Kenya: A theoretical foundation' in P Kameri-Mbote (ed) *Blazing the trail: Professor Charles Okidi's enduring legacy in the development of environmental law* (2019) 176-193 at 184.

47 See UN 'United Nations Conference on the Human Environment, 5-16 June 1972, Stockholm' https://www.un.org/en/conferences/environment/stockholm1972 (accessed 19 November 2023).

48 UNEP (n 26).

49 F Abioye 'Advancing human rights through environmental rule of law in Africa' in M Addaney & AO Jegede *Human rights and the environment under African Union law* (2020) 81-105; see also AD Tarlock 'The future of environmental rule of law litigation' (2001) *Pace Environmental Law Review* 19, 575; R Kibugi 'Development and the balancing of interests in Kenya' in M Faure & W du Plessis *The balancing of interests in environmental law in Africa* (2011) 169.

governance that protects rights and enforces fundamental obligations'.[50] Although premised on general precepts of rule of law and long-recognised internationally as an essential element of democracies, environmental rule of law has unique identifying features. The UNEP report points this out in the following words:

> While drawing from the broader rule of law principles, the environmental rule of law is unique in its context principle, principally because the environmental rule of law governs the vital link between humans and the environment that supports human life and society as well as life on the planet.[51]

The concept of the environmental rule of law was first used by UNEP in its Decision 27/9 on Advancing Justice, Governance, and Law for Environmental Sustainability[52] in 2013. The decision stated that:[53]

> [D]emocracy, good governance, and the rule of law at the national and international levels, as well as an enabling environment, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection, and the eradication of poverty and hunger.

The choice to request assistance for states in implementing the environmental rule of law emphasised the significance of this notion. Moreover, integrating the rule of law into environmental protection was essential for aiding national governments in constructing and executing the environmental rule of law. This effort encompassed a focus on various interrelated governance aspects, such as transparent information dissemination, inclusive public engagement, the establishment of actionable and enforceable regulations, and the deployment of mechanisms to ensure implementation and accountability. These mechanisms included harmonised role coordination, environmental audits, and the effective enforcement of laws through criminal, civil, and administrative channels, all backed by prompt, impartial, and independent methods for resolving disputes. The concept has recently been featured in the discourse on the

50 United Nations Environment Programme & Environmental Law Institute 'Environmental rule of law discussion paper' 7 December 2016 cited in UNEP (n 26).

51 UNEP (n 26).

52 C Odote 'The role of the Environment and Land Court in governing natural resources in Kenya' in P Kameri-Mbote et al *Law | Environment | Africa* Nomos (2019) 335-356.

53 UNEP Governing Council Dec. 27/9, Advancing Justice, Governance and Law for Environmental Sustainability, U.N. Doc. UNEP/GC.27/17 (Mar. 12, 2013). Available at https://wedocs.unep.org/bitstream/handle/20.500.11822/17292/K1350945.pdf?sequence=3&isAllowed=y.

linkages between human rights and environmental protection.[54] Those advocating for it stress the necessity of legislating developmental efforts alongside environmental protection.[55] Consequently, it is a powerful tool for realising sustainable development,[56] thus balancing development imperatives with environmental management.

3 Environmental rule of law, the judiciary and dispute resolution for sustainable development

Environmental law and governance are increasingly viewed as avenues for resolving environmental justice issues.[57] Considerable reliance is placed on the judiciary to deliver this justice and realise the framework of laws and principles that offer its foundation.[58] As an element of the rule of law and development, access to justice is essential to the enjoyment of human rights and sustainable development at the national and international levels.[59] The community should also be empowered to know their rights when dealing with environmental issues. This will ensure that they bring their claims to court in case their environmental rights are violated and that they can challenge the court if they feel that the decision made is unjust. This is the context in which the concept is discussed in this paper.

54 Abioye (n 49); see also C Odote 'Human rights-based approach to environmental protection: Kenyan, South African and Nigerian constitutional architecture and experience' in M Addaney & AO Jegede *Human rights and the environment under African Union law* (2020) 381-414; DL Shelton 'Human rights, environmental rights, and the right to environment' in S Vanderheiden (ed) *Environmental rights* (2017) 509-544; DK Anton & DL Shelton *Environmental protection and human rights* (2011); A Boyle *Human rights and the environment: where next?* (2017); S Atapattu 'The right to a healthy life or the right to die polluted: The emergence of a human right to a healthy environment under international law' (2002) 16 *Tulane Environmental Law Journal* 65.

55 Atapattu (n 54) 119.

56 DB Magraw 'Rule of law, environment and sustainable development' (2015) 21 *Southwestern Journal of International Law* 277.

57 UNEP 'Advancing Justice, Governance and Law for Environmental Sustainability, Rio +20 and the World Congress of Chief Justices, Attorneys General and Auditors General' (2012).

58 UNEP (n 57); see also Odote (n 52) 335-356.

59 F Githumbi 'Legal aid in civil matters' in M Mkuu *A publication of the Office of the Attorney General and Department of Justice* 3rd ed (July-December 2018); see also F Githumbi, A Wainaina & C Amondi 'Kenya hosts 1st East African Regional Legal Aid' in M Mkuu *A publication of the Office of the Attorney General and Department of Justice* 3rd ed (July-December 2018); M Kariuki 'Natural Resource Conflicts in Kenya: Effective Management for Attainment of Environmental Justice' in P Kameri-Mbote & Odote (eds) *Blazing the trail: Professor Charles Okidi's enduring legacy in the development of environmental law* (2019).

Recognising the judiciary's role in sustainable development is traceable to the 2002 World Summit on Sustainable Development in Johannesburg.[60] The Johannesburg Principles on the Role of Law and Sustainable Development were adopted at the Global Judges Symposium on the Role of Law and Sustainable Development.[61] The adopted principles highlighted that 'an independent Judiciary and judicial process is vital for the implementation, development, and enforcement of environmental law'. It further stated that:

> [T]he fragile State of the global environment requires the judiciary, as the guardian of the Rule of Law, to boldly and fearlessly implement and enforce applicable international and national laws, which in the field of environment and sustainable development will assist in alleviating poverty and sustaining an enduring civilization, and ensuring that the present generation will enjoy and improve the quality of life of all peoples, while also ensuring that the inherent rights and interests of succeeding generations are not compromised.

The same was underscored at the World Congress on Justice, Governance, and Law for Environmental Sustainability:[62]

> Environmental sustainability can only be achieved if there exist effective legal regimes, coupled with effective implementation and accessible legal procedures, including about locus standi and collective access to justice, and a supporting legal and institutional framework and applicable principles from all world legal traditions.

Against this background, the UNEP's Governing Council declared that:[63]

> [T]he violation of environmental law has the potential to undermine sustainable development and the implementation of agreed environmental goals and objectives at all levels, and the rule of law and effective governance play an essential role in reducing such violations.

60 UN 'Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August-4 September 2002' UN Doc A/CONF.199/20* (2002).

61 Governing Council of the United Nations Environment Programme 'Global Judges Symposium on Sustainable Development and the Role of Law' 12 November 2002, UN Doc UNEP/GC.22/INF/24 (2002); see also WSSD 'Johannesburg principles on the role of law and sustainable development adopted at the Global Judges Symposium held in Johannesburg, South Africa, on 18-20 August 2002' .

62 UNEP (n 57).

63 UNEP (n 26).

The rule of law is imperative in any conversation about sustainable development.[64] The environmental rule of law is thus essential for preserving the environment and realising sustainable development.[65] The judiciary is the arm of government responsible for adjudicating cases, which is critical for promoting sound natural resource management and a sustainable and healthy environment.[66] The linkages between the judiciary, the rule of law, and the achievement of sustainable development are captured in the United Nations' Sustainable Development Goals (SDGs) in 2015,[67] with the advancement of access to justice acknowledged as one of the ways of realising sustainable development as evidenced in Goal 16.[68] Of particular importance is Goal 16.3, which aims to 'promote the rule of law at the national and international levels and ensure access to justice for all'.[69]

A rule of law lens for realising sustainable development, encapsulated in the concept of the environmental rule of law, requires a robust judiciary that is independent and impartial in its decisions. This will enable it to deal with the numerous rule of law obstacles that hinder the achievement of sustainable development. A reading of Goal 16 of the SDGs demonstrates that the challenges to accessing justice for sustainable development include corruption, lack of access to information, lack of participation, and lack of transparency and accountability.[70] These obstacles must be eliminated in the quest for sustainability. These are widespread in the environmental sector, with discussions about access to environmental information being a global focus. The other procedural rights are captured in Principle 10 of the Rio Declaration. The development of the environmental rule of law stemmed from the acknowledgement that the challenges related to the rule of law are just as pervasive and universal in the environmental domain as they are in other realms of governance. Consequently, having a robust judiciary to address these challenges supports entrenching an environmental rule of law culture and thus delivering on the global

64 International IDEA & IDLO 'Informal discussion on linkages between the rule of law, democracy and sustainable development' (2012); see also Berg & Desai (n 39); S Handoyo 'The role of public governance in environmental sustainability' (2018) 6 *Jurnal Ilmiah Peuradeun* 161.

65 Magraw (n 56), see also UNEP (n 26).

66 Odote (n 52).

67 United Nations General Assembly, Transforming Our World: The 2030 Agenda for Sustainable Development, 21 October 2015, UN Doc A/RES/70/1 (2015) https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf (accessed 19 November 2023).

68 As above.

69 As above.

70 UNGA (n 67); see also Magraw (n 56).

commitments under the SDGs. The first global environmental rule of law report prepared by UNEP underscored this importance, stating: 'A fair, transparent justice system that efficiently resolves natural resource disputes and enforces environmental law is critical in establishing the lasting environmental rule of law'.[71]

The judiciary's role must be seen within the larger institutional architecture required to realise a rule of law culture in any democracy. Strong institutions play a pivotal role in advancing environmental governance, curbing corruption, and fostering a culture of rule of law within society.[72] According to Kaufmann et al., governance indicators include quality management, the government's efficacy, political stability, free speech and responsibility, corruption limitation, and the rule of law.[73] A study conducted by Adekunle[74] found a definite link between the rule of law, quality management, and the metamorphosis of environmental sustainability. An inverse relationship was also established between government efficiency and environmental sustainability.[75] The objectives of sustainable development cannot be realised without two vital factors:[76] state intervention, which equals quality of governance and means that measures to protect the environment are hardly adopted without regulatory stimuli; and institutional quality, since institutions decide the implementation and consequence of government laws and policies reflecting the capability to manage environmental concerns and thus influencing the degree of involvement by the people in the environmental Renaissance processes.[77] Strong institutions show a high level of environmental awareness, thus

71 UNEP (n 26).

72 SA Asongu & NM Odhiambo 'Enhancing governance for environmental sustainability in sub-Saharan Africa' (2021) 39 *Energy Exploration & Exploitation* 444.

73 D Kaufmann, A Kraay & M Mastruzzi 'The worldwide governance indicators: Methodology and analytical issues' World Bank Policy Research Working Paper 5430 (2010); see also AR Andrés, SA Asongu & V Amavilah 'The impact of formal institutions on knowledge economy' (2015) 6 *Journal of the Knowledge Economy* 1034; KB Ajide & ID Raheem 'The institutional quality impact on remittances in the ECOWAS Sub-Region' (2016) 28 *African Development Review* 462; S Oluwatobi et al 'Innovation in Africa: Why institutions matter' (2015) 83 *South African Journal of Economics* 390.

74 IA Adekunle 'On the search for environmental sustainability in Africa: The role of governance' (2021) 28 *Environmental Science and Pollution Research* 14607.

75 As above.

76 C Castiglione, D Infante & J Smirnova 'Environment and economic growth: Is the rule of law the go-between? The case of high-income countries' (2015) 5 *Energy, Sustainability and Society* 1 at 1-7; see also D Infante & J Smirnova 'Some notes on modelling the relationship between the environment and institutional context' (2011) 2 *Modern Economy* 18.

77 As above.

electing environmental protection as a dynamic sustainability strategy.[78] A strong judicial mechanism would mean a positive contribution towards environmental quality,[79] with enforcing rules of sustainable development naturally crystallising as part of the constitutional-judicial agenda upon which the day-to-day task of dispute resolution falls.[80]

Strengthening the rule of law decreases damage to the environment and boosts sustainable strategies and legal frameworks.[81] It also encourages economic development in the environmental sector to safeguard individual property rights and ensure fair and reliable contract enforcement.[82] Furthermore, the environmental rule of law facilitates the sustainable utilisation of the environment by safeguarding environmental rights enshrined in constitutions and legislation, implementing regulations, calling for regulatory protections such as environmental impact assessments (EIAs), and outlining guidelines for the exploitation and governance of natural resources.[83]

4 The state of environmental rule of law in Kenya

UNEP has offered its support and guidance in providing technical support to governments to improve their proficiency in reinforcing and implementing the environmental rule of law.[84] A critical aspect of this includes public participation, information disclosure, accountability mechanisms, and the implementation and enforcement of laws. For decades, Kenya lacked a

78 As above.

79 JA Frankel & AK Rose 'Is trade good or bad for the environment? Sorting out the causality' (2005) 87 *Review of economics and statistics* 85.

80 OB Jackton 'Sustainable development: A sampling of contributions by Kenya's superior courts' in P Kameri-Mbote & C Odote (eds) *Blazing the trail: Professor Charles Okidi's enduring legacy in the development of environmental law* (2019).

81 MPT Sanders et al 'Energy policy by beauty contests: The legitimacy of interactive sustainability policies at regional levels of the regulatory state' (2014) 4 *Energy, Sustainability and Society* 1; see also M Bhattarai & M Hamming 'Governance, economic policy, and the Environmental Kuznets Curve for natural tropical forests' in *The Second World Congress of Environmental and Resource Economist, Monterrey Bay* (2002); Magraw (n 56).

82 S Haggard & L Tiede 'The rule of law and economic growth: where are we?' (2011) 39 *World Development* 673.

83 Berg & Desai (n 39); see also Kameri-Mbote & Odote (n 12); Odote (n 52); P Kameri-Mbote & M Akech 'Justice sector and the rule of law' (2011) https://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-20110315.pdf (accessed 19 November 2023).

84 UNEP 'Strengthening environmental governance' https://www.unep.org/regions/africa/regional-initiatives/strengthening-environmental-governance (accessed 8 June 2021).

comprehensive legislative framework to regulate environmental issues.[85] The law governing environmental issues was limited to common law and sectoral statutes such as those regulating forestry, water, and agriculture.[86] In *Peter Waweru v Republic*,[87] the Court in Kenya at that time relied on the constitutional right to life under Section 71 of the previous Constitution to read in and protect the right to a clean and healthy environment.[88] To demonstrate this, the court opined that:

> Under section 71 of the Constitution, all persons are entitled to the right to life. In our view, the right to life is not just a matter of keeping body and soul together because, in this modern age, that right could be threatened by many things, including the environment. The right to a clean environment is primary to all creatures, including man; it is inherent from the act of creation, the recent restatement in the statutes and the Constitutions of the world notwithstanding.

However, the above case and a few others were an exception to the judicial approach in Kenya before the 2010 Constitution on the promotion of sustainable development, which was largely unsupportive of the sustainable management of the environment. The case of *Wangari Maathai v The Kenya Times Media Trust*[89] is a perfect example of how the Kenyan judicial system was fatally flawed regarding environmental protection. Reliance was had by the courts on procedural technicalities to avoid addressing the violation of environmental rights, with the adoption of an unjustifiably restrictive approach to legal standing[90] being the rule.[91] In the *Wangari Maathai* case, Prof Wangari Maathai had gone to court to stop the proposed construction of the Kenya Times Complex at Uhuru Park. However, the suit was dismissed. The court cited the fact that she lacked the legal standing to institute the suit. The Attorney-General had the legal

85 JM Migai-Akech 'Land, the environment and the courts in Kenya: Background paper for the environment and land law reports, a DFID/KLR Partnership' in *Nairobi: UK Department for International Development (DFID) and Kenya Law Reports* (February 2006).

86 Migai-Akech (n 85) 15; see also NA Angwenyi 'An overview of the Environmental Management and Coordination Act' in O Charles, P Kameri-Mbote & A Migai (eds) *Environmental governance in Kenya: Implementing the framework law* (2008).

87 Misc Civ Application 118 of 2004 (3 February 2006) (The High Court of Kenya at Nairobi).

88 Kameri-Mbote & Odote (n 12).

89 *Wangari Maathai v The Kenya Media Times Trust* [1989] KLR 267.

90 Angwenyi (n 86).

91 C Odote 'Public interest litigation: An example from Kenya' in CR Oliver; C Roschmann & K Ruppel-Schlichting *Climate change: International law and global governance perspectives I, Volume 1: Legal Responses and global responsibility* (2013) 817-818.

standing to sue in matters concerning the general public and not a private citizen.[92]

The right to a clean and healthy environment was also not included in the previous Constitution. However, the promulgation of the current Constitution of Kenya in 2010 remedied this and provided for it under Article 42,[93] which made it a human right.[94] The 2010 Constitution grants extensive treatment to environmental management and rights.[95] It underpins environmental justice by emphasising good governance and the rule of law in environmental matters.[96] The Constitution reformed the judiciary's structure to improve access to justice and focus on sustainable development. Branded as a 'green constitution', the 2010 Constitution has integrated environmental management and protection and accorded sustainable development constitutional status.[97] The Constitution embraced the principle of sustainable development; in its Preamble, the people declare their respect for 'the environment, which is their heritage, and which they are determined to sustain for the benefit of future generations'. In addition, the national values and principles of governance under Article 10 bind all state organs, state officers, public officers, and all persons,[98] including the rule of law,[99] good governance, integrity, transparency, accountability,[100] and sustainable development.[101] The state as the custodian of the environment, is also obligated to guarantee sustainable exploitation, utilisation, management, and protection of the environment and natural resources and ensure that the accruing benefits

92 *Wangari Maathai v The Kenya Media Times Trust* [1989] KLR 267.

93 Article 42: 'Every person has the right to a clean and healthy environment, which includes the right – a) To have the environment protected for the benefit of present and future generations through legislative and other measures … b) To have obligations relating to the environment fulfilled …

94 See generally Kameri-Mbote & Odote (n 12); Odote (n 54) 381-414; P Kameri-Mbote & M Akech 'Justice sector and the rule of law' (2011) https://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-20110315.pdf (accessed 19 November 2023); P Kameri-Mbote & M Akech 'Kenya: Justice sector and the rule of law: A review by AfriMAP and the Open Society Initiative for Eastern Africa' (2011); Mutua (n 5).

95 C Odote 'Kenya constitutional provisions on the environment' (2012) 1 *IUCN Academy of Environmental Law* 136.

96 See generally M Kariuki & F Kariuki 'Towards environmental justice in Kenya' (2015).

97 Odote (n 52); see also DW Kaniaru 'Environmental courts and tribunals: The case of Kenya' (2011) 29 *Pace Environmental Law Review* 566.

98 Article 10(1).

99 Article 10(2)(a).

100 Article 10(2)(c).

101 Article 10(2)(d); see generally, Jackton (n 80).

are equitably shared.[102] Access to justice[103] in environmental matters is assured in Article 70, whereby one can apply to a court for redress if their right to a clean and healthy environment is likely to be denied, violated, infringed upon, or threatened.[104] In the case of *Joseph Leboo v Director Kenya Forest Services*,[105] the court held:

> Litigation aimed at protecting the environment cannot be shackled by the narrow application of the *locus standi* rule, both under the Constitution and statute and indeed in principle. Any person, without the need to demonstrate personal injury, has the freedom and capacity to institute an action aimed at protecting the environment. The plaintiffs have filed this suit as representatives of the local community and in their own capacity. The community, of course, has an interest in the preservation and sustainable use of forests. Their very livelihoods depend on the proper management of the forests. Even if they had not demonstrated such interest, that would not have been important, as any person who alleges a violation of any law touching on the environment is free to commence litigation to ensure the protection of such environment.

The Constitution's establishment of the Environment and Land Court (ELC)[106] as a specialised court having equal status to the High Court has promoted access to environmental justice.[107] Before the 2010 Constitution, environmental matters were heard and decided within the normal court structure.[108] The ELC, as a specialised court gives impetus to environmental justice and sustainable development.

Kenya's ELC is currently the only constitutionally mandated and operational environmental court in Africa.[109] Its existence is, therefore, a significant statement of the commitment of Kenya to have a sound

102 Article 69(1)(a).

103 See also Article 48: 'The State shall ensure access to justice for all persons and if, any fee is required, it shall be reasonable and shall not impede access to justice.' Article 22: 'Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.'

104 R Kibugi 'Enhanced access to environmental justice in Kenya' in R Kibugi *Environmental Law and Sustainability after Rio* (2011) 158.

105 Environment and Land Case 273 of 2013.

106 Article 162(2) – The ELC was established to 'hear and determine disputes relating to the environment and use and occupation of, and title to land'.

107 Odote (n 52).

108 Odote (n 52) 339.

109 CB Soyapi 'Environmental protection in Kenya's environment and land court' (2019) 31 *Journal of Environmental Law* 151.

judicial system to support the delivery of the environmental rule of law in the country.

The ELC creates a path that encourages sustainable natural resource management and shows the advantages of having a specialised environmental court.[110] Soyapi also commends the ELC for developing a 'robust and progressive' jurisprudence, specifically by holding government power accountable for any failure in undertaking EIAs and safeguarding the environmental rule of law.[111]

5 Environmental rule of law, mining, and access to justice in Kenya: The Cortec Mining case

5.1 Background to the case

Mining frequently causes conflicts between the government, corporations, and the communities affected by mining sector activities in developing and developed states.[112] Kenya is one such country that has experienced disputes in the mining industry. The *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining* case[113] demonstrates how the judiciary can play a vital role in realising the environmental rule of law. The facts of the case are as follows:[114]

> Cortec was a Canadian-based company that was locally incorporated in Kenya on July 4, 2007, and its core business was prospecting, exploration, and mining. Cortec applied for a license on April 4, 2008, to conduct prospecting and exploration works in Kwale County, over an area of 1 180km for two years. This license was renewed in November 2011 to cover three years from December 1, 2011. On January 10, 2012, Cortec applied for a special mining license over Mrima Hills, which is considered home to the world's largest

110 Odote (n 52).

111 See also EC Lubaale 'Judicial enforcement of environmental human rights in Africa' in M Addaney & AO Jegede *Human rights and the environment under African Union law* (2020) 155-185.

112 WO Abuya 'Mining conflicts and corporate social responsibility: Titanium mining in Kwale, Kenya' (2016) 3 *The Extractive Industries and Society* 485.

113 *Cortec Mining Kenya Limited v Cabinet Secretary, Attorney General & 8 others* [2015] eKLR; *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* [2015] eKLR; *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* [2017] eKLR; *Contesse, Jorge v Republic Of Kenya* Case ARB/15/29. Award. International Centre for Settlement of Investment Disputes, 22 October 2018; L Cotula & JT Gathii '*Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v Republic of Kenya*' (2019) 113 *American Journal of International Law* 574.

114 As above.

> undeveloped deposits of niobium and rare earth deposits without complying with various statutes. Still, the application was rejected on January 27, 2012. No appeal was filed against the refusal. Strangely, however, on March 7, 2013, while the 2013 General Elections were ongoing, the Commissioner of Mines & Geology (Commissioner) clandestinely purported to issue a Special (Mining) License to Cortec for 21 years to begin 'exploration, development, and mining of Niobium and Rare Earth's Elements (REEs)' on an area covering 142 149 hectares in Mrima Hill Forest Reserve without any application having been made, without any deliberations by the relevant Licensing Committee of the Ministry, and in violation of various statutes prohibiting mining in nature reserves and forests. Cortec affirmed that it obtained all necessary approvals required by law before the license was issued and was ready to commence mining.[115] Cortec claimed to have spent over Kenyan shillings 500 million by August 5, 2013, and identified massive deposits of niobium and rare earth base metals worth over USD 600 billion. On August 5, 2013, the Special Mining License (SML 351) issued to Cortec was revoked by the Cabinet Secretary (CS) of Mining and the Attorney-General (AG) on national television under Section 27[116] of the Mining Act as part of the cleansing that was done after all the mining licenses issued between the period of January 15, 2013, and May 15, 2013 (also known as the 'Transition Period') were subjected to a review.

A task force was appointed to investigate how Cortec was issued the SML 351 and the special mining licenses issued to other companies during the transition period by the Commissioner of Mines, who was accused of irregularities. Cortec filed a suit in the High Court of Kenya, protesting the decision as unconstitutional, *ultra vires*, and against the rules of natural justice. They complained that they were not heard before the decision to cancel the license was made; no reason was given for the action; it was actuated by ulterior motives and was inconsiderate of its legitimate expectations of making profits from the business. Critically, for environmental rule of law concerns, Cortec alleged that the Cabinet Secretary's main reason for the decision was their refusal to offer him a bribe.

In response, though, the government argued that the revocation process was in accordance with the law and justified by existing facts. The government accused Cortec of not having obtained an EIA license from National Environmental Management Authority (NEMA) under the

115 It was subject to various conditions, including the provisions of the Mining Act, the Environmental Management & Co-ordination Act (EMCA), the Forest Conservation and Management Act, the Wildlife Conservation & Management Act (WCMA), and the Trust Land Act.

116 The CS under sec 27 of the Mining Act has the power to revoke a holder's license where there is breach of the license's conditions or the law.

Environment Management and Coordination Act (EMCA),[117] clearance from the Kenya Forest Service (KFS),[118] and from the National Museum of Kenya (NMK) under the National Museums and Heritage Act since Mrima Hill Forest Reserve was gazetted as a Natural Heritage and a Natural Monument.[119] The Kwale County government supported the revocation of the license granted to Cortec.[120]

5.2 The Decisions of Kenyan Courts

Cortec filed the case in the High Court of Kenya and then to the Court of Appeal, both of which favoured the Cabinet Secretary's decision to cancel the license.

In the High Court case, *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others*,[121]121 the court determined that the revocation of the Special Mining License was legal since the Cabinet Secretary was empowered under Section 27 of the Mining Act to take the action he did if the holder of a license had breached the conditions of the license or the

117 NEMA, which is mandated by EMCA, inter alia, to process Environmental Impact Assessment (EIA) reports to mitigate and control environmental degradation and ensure a clean healthy environment for all, denied issuing any EIA report covering the social, health, cultural and environmental impacts on the Mrima Hill project before the issuance of the special license or at all. It supported the revocation of the illegal license.

118 KFS also denied issuing any clearance for mining activities on Mrima Hill before the issuance of the offending license. In all its letters on renewals of previous licenses, it pointed out, it limited its approvals to prospecting and exploration of old sites, not mining, and expressly subjected the approvals to other laws and regulations affecting the project, including the local Community Forest Association. It averred that Mrima Hill is a rich indigenous forest area which has been legally protected since 1961 and is gazetted as a Natural Heritage and a National Monument. It supported the revocation of the license.

119 NMK also supported the revocation. It is established under the National Museums and Heritage Act and entrusted, inter alia, with the mandate to identify, protect, conserve and transmit the cultural and natural heritage of Kenya for cultural, social and economic development for present and future generations. In its view, there was no provision for a 'special mining licence' under section 17 of the Mining Act and so the one issued was a nullity in law. Section 7(1)(k) of the Act also protects National Monuments like Mrima Hill forest from mining activities. NMK denied having issued any approval to Cortec. It only made recommendations which were to be complied with before any consent could be issued, but there was no follow up by Cortec.

120 Kwale County dubbed the license as illegal and unconstitutional because there was no consultation with the county government or any public participation by the people of Kwale who must know what economic benefit they will derive from the mining activities and express their fears on any radioactivity and other health hazards that may ensue from the mining activities. They protested the degazetting of the forest which is home to cultural holy sites or 'Kayas'.

121 [2015] eKLR., Civil Appeal 105 of 2015.

law. The court held that Cortec had been given the license unlawfully. It had failed to carry out mining feasibility and obtain authorisation from NEMA, Kenya Forest Services, and the National Museum of Kenya.[122] The court stated that despite the argument by Cortec that obtaining a NEMA license was not a pre-condition for being issued a mining license, the Environmental (Impact Assessment and Audit) Regulations 2003[123] were explicit on this requirement. Furthermore, EMCA lists 'Mining' as a project that must undergo an EIA before implementation.

Consequently, the decision of the Commissioner was illegal. In addition, a mining license could not be issued to authorise Cortec to undertake mining activities in Mrima Hils since it had been gazetted as a forest and national heritage, thus being a protected area. In addition, the court held that the Commissioner, in issuing the license, had violated the public trust by means of Article 62(1)(f) of the Constitution, which classifies all minerals as public land, and Article 62(3), which vests it in the national government to hold in trust for the Kenyan people. In his involvement in the licensing processing, the Commissioner was thus exercising public trust powers. His failure to adhere to this requirement justified the intervention of the Cabinet Secretary as his supervisor.

Importantly from a rule of law perspective, the court held that Cortec, having participated in a violation of the law, could not get any relief from the court. The court's judgement provided:

> In the circumstances of this case, the Minister was right and was entitled to act in the manner he did in public interest once he was satisfied the Commissioner of Mines had in issuing the license to the Applicant acted in violation of the law …
>
> A party who flouts the law to gain an advantage cannot expect that the court will aid him in sustaining the advantageous position that he acquired through the violation of the law. The acquisition by the Applicant of the Mining License was not in compliance with the law, and the license was void ab initio

122 The National Museums and Heritage Act also requires consent from NMK to undertake any prospecting or mining activities in areas falling under them as per section 7(1)(k) of the Mining Act.

123 Section 4(2) of the Environmental (Impact Assessment and Audit) Regulations, 2003, provides that: 'No licensing authority under any law in force in Kenya shall issue a license for any project for which an environmental impact assessment is required under the Act unless the applicant produces to the licensing authority a license of environmental impact assessment issued by the Authority [NEMA] under these Regulations.'

> and liable to be revoked. The 1st Respondent had a duty and obligation in the interest of the public to have the license revoked.[124]

Cortec, not satisfied with the trial court's judgement, filed an appeal at the Court of Appeal,[125] which dismissed the appeal stating:

> We have come to the conclusion that in exercising its discretion, the trial court did not misdirect itself in the matter and, as a result, arrive at a wrong decision or that the decision as a whole was clearly wrong. In the result, we find no merit in the appeal and order that it be and is hereby dismissed.

5.3 The decision of the International Centre for Settlement of Investment Disputes (ICSID)

Cortec Mining Kenya Limited, Cortec (Pty) Limited (Cortec), and Stirling Capital Limited (Stirling) filed a claim[126] at the ICSID against Kenya due to their dissatisfaction with the government decision and the domestic court judgment. In their claim, they argued that their project was 'nationalised' after they had spent millions of dollars in exploration and development over several years.[127] Further, the Special Mining License revocation was unprocedural due to a lack of notification and thus contrary to the Agreement between the United Kingdom and Northern Ireland and Kenyan Governments for the Promotion and Protection of Investments dated September 13, 1999 (hereinafter, BIT or Treaty). They based their claim on the BIT and the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which entered into force on October 14, 1966 (the ICSID Convention).[128]

The government accused Cortec of having engaged in corruption and impropriety in seeking the license granted during the previous government's tenure headed by President Mwai Kibaki. It was alleged that they had relied on a political intermediary, Jacob Juma, to seek favour from the former President Mwai Kibaki's administration after being impatient with Kenya's 'bureaucratic process'.[129] Their action was intended to evade the country's legal procedures and obtain the license

124 [2015] eKLR.

125 *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* [2017] eKLR, Civil Appeal 105 of 2015.

126 *Cortec Mining Kenya Ltd. v Republic of Kenya* ICSID Case ARB/15/29, Award (22 October 2018).

127 Para 2.

128 As above.

129 Para 6.

without due process and illegally.[130] Cortec hinged their claim before the court on the premise that their project or investment had been nationalised under the 'resource nationalism' policy commenced during the transition making it a 'protected investment'.

The Tribunal dismissed the claim, holding that investment can only be considered protected on the international level if it is processed in compliance with the host state's legal requirements,[131] and it must have been made in good faith.[132] What was vital in the Tribunal's decision-making was compliance with domestic laws.[133] Therefore:

> [T]he Claimants' failure to comply with the legislature's regulatory regime governing the Mrima Hill forest and nature reserve, and the Claimants' failure to obtain an EIA license ... constituted violations of Kenyan law that, in terms of international law, warrant the proportionate response of a denial of treaty protection under the BIT and the ICSID Convention.[134]

This license obtained in violation of domestic laws was ruled void *ab initio*; thus, there was no protected investment, thus denying the tribunal jurisdiction to intervene.[135] The claimants were ordered to pay the respondents USD 3 226 429.21 in legal costs and USD 322 561.14 in arbitration costs.[136]

The Tribunal summarily held that:[137]

> SML 351 purported to confer on the Claimants an exclusive right to mine valuable minerals for 21 years in an area that included Mrima Hill and to exclude all others from exploiting these public resources. The Claimants' own evidence establishes that SML 351 was procured by their successful political lobbying of officials of the outgoing Kibaki Government. In the Tribunal's view, the newly elected government was not bound either under domestic or international law by a 'purported' mining license issued under political direction in disregard of the explicit requirements of the Kenya Mining Act and other relevant Kenyan legislation. The Tribunal is not bound by the decision of the Kenyan courts but has reached the independent conclusion

130 As above.
131 Para 321.
132 Paras 260, 303.
133 Para 319.
134 Para 365.
135 Para 333.
136 Paras 403-405.
137 Para 11.

> that SML 351 was void. It was a scrap of paper issued by an irresponsible bureaucrat contrary to specific legislative requirements. In the circumstances, the Claimants have failed to establish the existence of an investment that qualified for treaty protection.

The claimants, after that, made an application to annul the award delivered on October 22, 2018, and the same was received by the Secretary- General of ICSID on 15 February 2019.[138] They, however, lost with the Committee upholding the Tribunal's decision by stating:[139]

> [T]he Committee finds that the Applicants have not succeeded in demonstrating a manifest excess of powers by the Tribunal or a failure to state reasons. Accordingly, the Application for Annulment will be denied.

6 Key issues from the Cortec decision

The award by the ICSID is momentous since it finds that protection of investments by international investment agreements is only possible if they are undertaken in compliance with the domestic laws of the host country.[140] It is also momentous because, for a long time, investment treaties have been described as 'investor-friendly', thus allowing private investors to sue host-states by encompassing a wide array of substantive protections and vague definitions of their scope. These agreements rarely include clauses on general exceptions that allow states to implement their laws and policies in the public interest.[141] Critics argue that arbitrators usually appointed to the investment tribunals are exceedingly keen to include in their arbitral-case law treaty text interpretations that seem to favour the investors.[142] In this context, the ICSID award is historical as it ruled on legality, regardless of the fact that there was no explicit requirement of legitimacy in the applicable BIT. It builds on and advances an extensive trail of arbitral jurisprudence that touches on issues around legal compliance in the dispute settlement setting of investors and states.[143]

138 *Cortec Mining Kenya Ltd. v Republic of Kenya* ICSID Case ARB/15/29, Award – Annulment Proceeding (19 March 2021).

139 Para 7.

140 See generally Cotula & Gathii (n 113).

141 J Hepburn 'In accordance with which host state laws? Restoring the "defence" of investor illegality in investment arbitration' (2014) 5 *Journal of International Dispute Settlement* 531; see also M Sornarajah 'A coming crisis: Expansionary trends in investment treaty arbitration' in KP Sauvant & M Chiswick-Patterson (eds) *Appeals mechanism in international investment disputes* (2008) 39, 40-66.

142 G van Harten 'Investment treaty arbitration and public law' (2007) *OUP Catalogue*.

143 Van Harten (n 142) 577; see also *Contesse, Jorge v Republic Of Kenya* Case ARB/15/29 Award International Centre for Settlement of Investment Disputes, 22 October 2018;

From the Cortec arbitral award, it emerges that compliance with domestic laws can be used in cases involving bilateral treaties and agreements between states. Consequently, foreign investors cannot get away with non-compliance with domestic laws on environmental protection and the rule of law guarantees, strengthening the environmental rule of law and sustainable development.

The case further demonstrates the vital role that the judiciary plays in ensuring the implementation of the environmental rule of law. The judiciary is critical to ensuring this balance at the national and international levels to ensure sustainable development. The fact that Kenya was able to win against Cortec at the ICSID is proof that a state can develop laws and regulations to protect its natural resources against unsustainable practices by the locals and foreigners. These laws would be recognised in BITs.

As Hepburn argued in a study:[144]

> [I]nvestors must meet two requirements in respect of the legality of their investments: to invest in compliance with positive domestic laws and also to comply with general, fundamental principles of law such as fraud, good faith, or lack of corruption.

The ICSID award in the *Cortec* case, which elevated the host nation's domestic laws over a BIT, shows a positive attitude towards the environmental rule of law and environmental justice by stating:

> A mining license is not bricks and mortar … it is wholly the creature of Kenyan domestic law.[145] Thus, to qualify for protection, it must be made in accordance with the laws of the host State.[146] Failure to follow these laws, the Tribunal held that the Special Mining License was just a 'piece of paper' to which bore no legal consequence according to the Kenyan law.[147]

Hepburn (n 141); T Obersteiner '"In accordance with domestic law" Clauses: How international investment tribunals deal with allegations of unlawful conduct of investors' (2014) 31 *Journal of International Arbitration* 265.

144 Hepburn (n 141).

145 Para 222.

146 Para 319.

147 Para 333(b).

This holding is similar to that of the ICSID in *Teinver v Argentina*[148] where it stated:[149] '[I]t is widely acknowledged in investment law that the protection of the ICSID dispute settlement mechanism should not extend to investments made illegally.'

Should countries decide to hold foreign investors strictly accountable to comply with their domestic laws,[150] investors would have no choice considering ICSID's stance on a host nation's domestic laws.[151] This means that laws protecting and conserving the environment will also be followed. This should serve as an incentive for states to strengthen their environmental laws and comply with them. Bilateral Investment Treaties usually focus more on investments than sustainability; thus, it is imperative that the BITs have clauses on sustainable management of natural resources.

Another threat to effective compliance with BITs is corruption and political interference (as discussed in the *Cortec* case). This is a huge hindrance to the environmental rule of law as it encourages impunity and illegality, which in turn threatens the sustainable management of natural resources through overexploitation of natural resources, illegal issuance of licenses and permits, and avoidance of mandatory processes such as undertaking EIAs and obtaining clearance from the respective government agencies. The environmental rule of law should supersede selfish intentions and ill-gotten gains; this is the best way to ensure sustainable resource management.

7 Conclusion

The discussion in this chapter shows a promising future for the environmental rule of law in the mining sector. Sustainable resource management is assured with robust judicial mechanisms that preserve the environmental rule of law. Courts play a crucial role in environmental justice and promote the environmental rule of law by enforcing environmental laws. Access to justice being a critical component of the rule of law, judicial processes must be available to everyone. The *Cortec* case is an excellent example of how corruption can lead to the illegal issuance of mining licenses and how investors' non-compliance can threaten sustainable development and environmental justice with

148 *Teinver SA, Transportes de Cercanías SA & Autobuses Urbanos del Sur SA v Argentine Republic* ICSID Case ARB/09/1, Decision on Jurisdiction of 2012, para 317.

149 Para 317.

150 See generally Mutua (n 5).

151 See Obersteiner (n 143).

domestic laws. Failure to comply with environmental protection laws can cause environmental degradation, which may be irreversible and cause biodiversity loss. There is a need for Kenya to review its bilateral treaties and ensure that sustainable management of natural resources is included.

The case also demonstrates the importance of having strong instructions that those in power or wealth cannot compromise.

The Kenyan judiciary has been making decisions that ensure sustainable management and exploitation of natural resources are considered and the rule of law is maintained. The 2010 Constitution has provided judicial autonomy and accountability by granting the judiciary independence from the executive, instituting accountable and transparent mechanisms for appointing judges, and restricting the power to dismiss judges arbitrarily.[152] An independent judiciary and a transparent judicial process are essential to implementing, enforcing, and progressing environmental law.

152 P Kameri-Mbote & Migai Akech 'Kenya: Justice sector and the rule of law: A Review by AfriMAP and the Open Society Initiative for Eastern Africa' (2011).

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