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ADVANCING HUMAN RIGHTS IN THE INTERNATIONAL INVESTMENT LAW REGIME THROUGH EFFECTIVE PUBLIC PARTICIPATION: A KENYAN PERSPECTIVE

By

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A MINI-DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE AWARD OF LL.M IN INTERNATIONAL TRADE & INVESTMENT LAWS IN AFRICA BY THE UNIVERSITY OF PRETORIA

To

Dr Rimdolmsom Jonathan Kabre

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DECLARATION

I, MBALUTO JOYCE WAENI, do hereby declare that the Advancing Human Rights in the International Investment Law Regime Through Effective Public Participation: A Kenyan Perspective is my original work and has not been submitted for any degree or examination in any other university or institution of higher learning. While I have relied on numerous sources and materials to develop the main argument presented in this dissertation, all the materials and sources used have been duly and properly acknowledged.

Supervisee: Mbaluto Joyce Waeni

Signed.....

Date.....

Supervisor: Dr Rimdolmsom Jonathan Kabre

Signed.....

Date.....

DEDICATION

I dedicate this work to my mother, Rosalia Mutindi Mbaluto, for her unconditional love, constant support, and encouragement throughout my post graduate studies at the University of Pretoria.

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'We delight in the beauty of the butterfly, but rarely admit the changes it has gone through to achieve that beauty' – ***Maya Angelou***

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
BIT	Bilateral Investment Treaty
BRS	Business Registration Service
ICESR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
COK	Constitution of Kenya
CSO	Civil Society Organisation
EPZA	Economic Processing Zone Act
EPA	Economic Partnership Agreement
FDI	Foreign Direct Investment
FPIC	Free Prior and Informed Consent
ICSID	International Centre for the Settlement of Investment Disputes
IIAs	International Investment Agreements
IIL	International Investment Law
IHRL	International Human Rights Law
ILA	International Law Association
ILO	International Labour Organization
ISDS	Investor-State Dispute Settlement
KIP	Kenya Investment Policy
LAPSSET	Lamu Port and Lamu-Southern Sudan-Ethiopia Transport
MNCs	Multinational Corporations
NAP	National Action Plan
NGPs	Non-Disputing Parties

OECD	Organisation for Economic Co-operation and Development
OHCHR	United Nations Human Rights Office of the High Commissioner
PPP	Public-Private Partnership
SEZA	Special Economic Zone Act
SEZs	Special Economic Zones
SDGs	Sustainable Development Goals
TNC	Transnational Corporations
TRMA	Treaty Making and Ratification Act
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
UNGPs	United Nations Guiding Principles
UNESCO	United Nations Educational, Scientific and Cultural Organization

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Urbaser S.A and Consorcio de Auguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic ICSID Case ARB/07/26

WalAm Energy LLC v The Republic of Kenya ICSID Case ARB/15/7

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African (Banjul) Charter on Human and Peoples' Rights 1981

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Declaration on the Right to International Solidarity

Hague Rules on Business and Human Rights Arbitration 2019

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International Centre for Settlement of Investment Disputes Convention Arbitration Rules 2006

International Covenant on Economic, Social and Cultural Rights 1966

International Covenant on Civil and Political Rights 1966

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Internal Labour Organization Declaration of Principles Concerning Multinational Enterprises and Social Policy 1977

Organisation for Economic and Co-operation and Development Guidelines for Multinational Enterprises 1976

Organisation for Economic and Co-operation and Development Guidelines for Multinational Enterprises 2011

Rio Declaration on Environment and Development 1992

Stockholm Declaration and Action Plan for the Human Environment 1972

United Nations Charter 1945

United Nations Charter of the Economic Rights and Duties of States 1974

United Nation Commission on International Trade Law Convention on Transparency in Treaty- based Investor- State Arbitration (Mauritius Convention) 2015

United Nation Commission on International Trade Law Arbitration Rules (Updated 2013)

United Nation Commission on International Trade Law Rules on Transparency in Treaty-based Investor–State Arbitration 2014

United Nations Global Compact 1999

Universal Declaration of Human Rights 1948

United Nations Declaration on the Establishment of a New International Order 1974

United Nations Declaration on the Rights of Indigenous Peoples General Assembly Resolution 16/295 of 13 September 2007

United Nations Declaration on the Rights of Indigenous Peoples UN General Assembly Resolution 16/295

United Nations "Protect, Respect and Remedy" Framework for Business and Human Rights 2008

United Nations Guiding Principles 2011

United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) 1998

United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources General Assembly Resolution 1803 (XVII) of 14 December 1962

CHAPTER ONE

INTRODUCTION

1.1. Background

International investment law (IIL) has been under widespread criticism for its exclusive focus on the protection investors rights without factoring non-commercial concerns such as environmental protection, sustainable development and human rights.[1] IIL was originally designed to protect foreign investors from 'political and regulatory risks' through limiting a host state's regulatory space, and providing for international arbitration as the investor-preferred dispute resolution mechanism.[2] Importantly, the role of IIL in the socio-economic advancement of developing countries has been under scrutiny, particularly as it relates to sustainable development and human rights.[3] The inextricability of sustainable development and human rights is undeniably as human beings are at the core of the agenda.[4]

The lacking balance between human rights protection and investor rights in IIL and its adverse impact on developing economies such as Kenya, has necessitated reform. Despite the ongoing reforms, modern day IIL is argued to be a product of a long history of western domination that does not address the socio-economic developmental needs of capital importing African countries.[5] Evidently, old and new generation bilateral investment treaties (BITs), particularly those signed by Kenya[6] hardly impose human rights obligations on foreign investors, except by inference in hortative language provisions. However, this practice is gradually evolving.[7]

[1]Berne Declaration, Canadian Council for International Co-operation: Human Rights Impact Assessment for Trade and Investment Agreements Report of the Expert Seminar, 23 June 2010, Geneva, Switzerland available at https://www2.ohchr.org/english/issues/food/docs/report_hria-seminar_2010.pdf

[2]DN Dagbanja 'The Limitation on Sovereign Regulatory Autonomy and Internationalization of Investment Protection by Treaty: An African Perspective' (2016) 60 *Journal of African Law* 58

[3] H Mann 'Reconceptualizing International Investment Law: Its Role in Sustainable Development' (2013) 521 *Lewis &Clark Law Review* 534

[4]K Muigua 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development' Paper Presented at the Africa International Legal Awareness (AILA) Africa International Legal Awareness (AILA) Conference 2018 Riara University, Nairobi, Kenya

[5]OD Akinkugbe 'Africanization and the Reform of International Investment Law' (2021) 53 *Case Western Reserve Journal of International Law* 30

[6]See eg Kenya Japan BIT 2016; France Kenya BIT 2007 available at https://investmentpolicy.unctad.org/country-navigator/111/kenya (accessed 3 June 2021)

[7] The Draft Pan African Investment Code 2016, South African Development Community Model BIT 2012 and the Nigeria Morocco BIT 2016

Soft law instruments on business and human rights such as the United Nations Guiding Principles on Business and Human Rights 2011 (UNGPs) have shown encouraging progress in encouraging responsible business conduct in investment activities. Nonetheless, there still lacks comprehensive data UNGPs implementation and tangible results of their ten-year existence are yet to be witnessed.[8] Without a legally binding treaty on business and human rights with respect to transnational corporations (TNCs) and other business enterprises[9], voluntary frameworks lack sufficient teeth to address human rights issues, often viewed as mere smokescreen to show progress in the right direction.[10] As a result, victims of human rights violations resulting foreign investment activities grapple access to remedy challenges to hold investors accountable due to the inaccessibility of the commonly preferred investment arbitration under the investor state dispute settlement (ISDS) system.

IIL, comprising mostly of international investment agreements (IIAs) that are negotiated either between States or States and foreign investors, are shrouded in secrecy and signed with limited opportunities for public participation.[11] Further, in IIAs negotiations, there is often an underlying assumption that the capital exporting state's role in boosting foreign direct investment (FDI) flows leads to economic development of the host state, hence such obligations are usually not expressly provided for in IIAs.[12] However, this assumption is not always factual, especially for developing countries that are yet to benefit considerably from FDI attraction. A case in point is Kenya.

Over the past decade, Kenya has witnessed a proliferation of FDI in the natural resources exploitation and infrastructure sectors. Some examples include the ongoing ambitious mega infrastructural project at Lamu Port and South Sudan Ethiopia Transport Corridor (LAPSSET)[13], oil and gas projects in Turkana[14], extractives projects in Kwale[15] and Kitui[16], among other projects. It is important to note that most of these projects are located in areas occupied by minority groups and marginalised communities in Kenya.

[8]Debevoise & Plimpton, *UN Guiding Principles on Business and Human Rights at 10 Report* (2021) available at https://www.debevoise.com/-/media/files/insights/publications/2021/06/full-report.pdf
[9]United Nations Human Rights Council, Working Group on TNCs https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx (accessed 10 August 2021)
[10]M Sornarajah *The International Law on Foreign Investment* (2010) 152
[11]O Abe 'Untying the Gordian Knot: Re-Assessing the Impact of Business and Human Rights Principles on Extractive Resource Governance in Sub-Saharan Africa' (2017) 32 *American University International Law Review* 895 929-930
[12] n 10 above at 229
[13]LAPSSET Corridor Authority https://www.lapsset.go.ke/ (accessed 10 August 2021)
[14]NS Energy https://www.nsenergybusiness.com/projects/south-lokichar-oil-project/ (accessed 10 August 2021)
[15]United Nations Development Program https://www.ke.undp.org/content/kenya/en/home/projects/extractive-industries-sustainable-development.html (accessed 10 August 2021)
[16]'Kitui Mining No Longer Viable Option' *Business Daily* 02 June 2019

Whereas FDI projects promise numerous socio-economic benefits to the local communities, most of them have been the subject of domestic litigation. Some of the disputes pertain to the adverse social impact of FDI activities, associated human rights violations and insufficient mitigation measures to address potential risks.[17] Further, one common concern raised by litigants in such cases is the issue of lack of adequate and meaningful public participation in decision making at different stages of investment projects in Kenya.

Public participation, human rights, and democracy are some of the national values and principles of governance in Kenya.[18] Though progressive, the constitutionalisation of public participation in Kenya has posed a crucial legal problem on the extent of its applicability in IIL. Notwithstanding the fact that the Constitution of Kenya (COK) 2010 acknowledges the right to public participation as it pertains to law making processes[19] including treaties and broader governance issues such as environmental management[20], it is not a self-executing right. Currently, there is lacking a parliamentary legislation in force to provide guidance on the meaning and scope of the application of public participation in Kenya.[21] A draft policy framework[22] and a myriad of jurisprudence from Kenyan courts on the principle of public participation have been the main source of guidance.

Additionally, transparency an important element of effective participation and informed decision making.[23] Even so, the extent of public participation in IIA norm creation is still characterised with opaqueness despite their direct impact on the public welfare. As a developing principle in Kenya, public participation presents a number of opportunities with which human rights can be fostered in the IIL regime. Particularly, public participation in IIL can be advanced through three main aspects namely; involvement of the public in norm creation and decision-making, protection of the right to access to information and more participatory access to remedy mechanisms.[24]

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[17]*Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR available at http://kenyalaw.org/caselaw/cases/view/156405 and *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR available at http://kenyalaw.org/caselaw/cases/view/117704.
[18]COK, art 10
[19]As above, art 118 and 196
[20]As above, art 69
[21]Public Participation Bill 2019 under consideration in the National Assembly available at http://kenyalaw.org/kl/index.php?id=9091
[22]Kenya Draft Policy on Public Participation 2018 available at https://statelaw.go.ke/wp-content/uploads/2020/07/Kenya-Draft-Policy-on-Public-Participation.pdf
[23]International Institute for Environment and Development 'Lifting the Lid on Foreign Investment Contracts: The Real Deal for Sustainable Development' Briefing Paper 1 (2005) available at https://pubs.iied.org/sites/default/files/pdfs/migrate/16007IIED.pdf
[24]ED Brabanbere et al *Public participation and Foreign Investment Law: From the Creation of Rights and Obligations to the Settlement of Disputes* (2021) 54-80; see also Principle 10 of the Rio Declaration on Environment and Development 1992.

Hence, this study investigates the current deficiencies in IIL as it pertains to public interest concerns, specifically human rights protection. It also evaluates how public participation can play a critical role in addressing some of the existing gaps. This study will particularly focus on public participation in treaty making, decision making in different stages of investments and access to remedies to hold foreign investors accountable for human rights violations.

There is need for a paradigm shift in the perceptions surrounding FDI attraction as a guarantee for economic growth to one that focuses on whether the investment is fair and sustainable. States have a duty to protect human rights and to ensure that IIL contributes positively towards the achievement of the sustainable development goals (SDGs).[25] In other words, it is the quality of investments the matters over the quantity.

Further, inclusive and accountable democratic governance is an important aspect of sustainable development.[26] Public participation not only creates an avenues that can foster human rights considerations in IIL, but also promotes a sense of ownership and legitimacy in the regime.[27] The greater the transparency and more participatory the IIL becomes, the greater legitimacy and public approval it earns.[28]

1.2. Research Problem

Scholarly debates on the asymmetrical gap in IIAs and need for reforms to balance the rights of foreign investors and public interests of host states in developing countries, have long been in existence. IIL entrenches the interests of foreign investors[29] and notoriously fails to provide corresponding investor obligations including respect for human rights in host states. In addition, the IIL regime is often characterized by opaque normative processes and close door arbitral procedures. Although developing countries sign IIAs with the promise or hope that there would be a spur in economic development, there is inadequate empirical evidence to show that this promise is always kept. It has been argued that IIL does not always guarantee economic development and that investment treaties are not the sole determinant of FDI flows into the host state.[30]

[25] n 3 above 534
[26] UN Sustainable Development Goals 'Goal 16' https://sdgs.un.org/goals/goal16 (accessed on 11 August 2021)
[27] Y Farah, & VO Kunuji, 'Contractualisation of Human Rights and Public Participation: Challenges and Prospects' in ED Brabanbere et al (eds) *Public participation and Foreign Investment Law: From the Creation of Rights and Obligations to the Settlement of Disputes* (2021) 129
[28] CM Peter, SJ & Mwakaje, 'Public Participation and the Adoption of Investment Codes: Observation of the Mixed Practice from Tanzania' in ED Brabanbere et al (eds) *Public participation and Foreign Investment Law: From the Creation of Rights and Obligations to the Settlement of Disputes* (2021) 152
[29] n 5 above at 9
[30] n 2 above at 82

Evidently, Kenya's economic growth rate despite increasingly attracting FDI in the recent past remains low.[31] Whereas the potential benefits of foreign investment to the Kenyan economy are not undervalued, the far reaching human rights impacts associated with FDI activities in sectors such as infrastructure development, natural resources exploitation, extractives, and mining activities cannot be ignored either. While it is clear that the public is a key stakeholder in IIL, they find themselves side-lined from direct involvement since the regime hardly provides opportunities for effective public participation. For example, Kenya has signed at least nine BITs post 2010,[32] four of which have been ratified and in force, as well as an Economic Partnership Agreement (EPA)[33] with investment chapter, without meaningful public participation as required.[34]

In democratic states, the legitimacy of government is based on public approval.[35] The public participation deficit in IIL therefore calls to question its democratic legitimacy[36] given that the regime lack public approval to a large extent. Even though the current constitutional dispensation in Kenya is forward-looking and people-centered, the IIL regime does not entirely conform with the ideals and values enshrined in national legislative frameworks in Kenya. Further, implementation of the right to public participation, even when it is mandatory[37], has not been as effective as would be expected.

The increasing human rights concerns associated with FDI activities in Kenya necessitate the need to address this important issue going forward. The lack of an international treaty imposing binding human rights obligations on TNCs and access to remedy challenges for victims of human rights violations calls for innovative reforms aimed at fostering human rights in IIL. Extensive research on the utilisation of public participation as a tool to address human rights in IIL, to ensure it contributes towards the achievement of sustainable development especially in African countries, is necessary and critical; hence this study.

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[31] MJ Gachunga 'Impact of Foreign Direct Investment on Economic Growth in Kenya' (2019) 6 *International Journal of Information Research and Review* 6161-6163

[32] https://investmentpolicy.unctad.org/international-investment-agreements/countries/108/kenya (accessed 10 August 2021)

[33] https://www.gov.uk/government/collections/uk-kenya-economic-partnership-agreement (accessed 10 August 2011)

[34] H Mbori & JT Gathii 'Bilateralizing the EU-EAC EPA: An Introductory Legal Analysis of the Kenya-UK Economic Partnership Agreement' available at https://www.afronomicslaw.org/category/analysis/bilateralizing-eu-eac-epa-introductory-legal-analysis-kenya-uk-economic (accessed 10 August 2021)

[35] n 28 above at 148

[36] C Lorenzo, 'Public Participation and Investment Treaties: towards a New Settlement?' Tanzania' in ED Brabanbere et al (eds) *Public participation and Foreign Investment Law: From the Creation of Rights and Obligations to the Settlement of Disputes* (2021) 48

[37] n 34 above

1.3. Aims and Objectives of the Research

This study seeks to:

a) Evaluate the need for human rights protection in IIL through effective public participation in Kenya;
b) Analyse the legal frameworks for public participation in Kenya and how it applies to IIL;
c) Evaluate the development of the right to public participation in international law;
d) Illustrate how different forms of public participation can be used to foster human rights and sustainable development in Kenya;
e) Analyse the deficiencies of investor-state arbitration in IIL as it specifically pertains to the participation of affected local communities in seeking redress for business and human rights claims against foreign investors; and
f) Propose alternative participatory and more efficient judicial and non-judicial grievance mechanisms that enhance access to justice and ultimately human rights protection in the IIL in Kenya.

1.4. Research Questions

The main question that this research seeks to answer is how public participation in Kenya can be utilised to advance human rights in IIL. In doing so, this research will consider the following pertinent questions:

a) What is public participation in Kenya and what are the existing legal frameworks for public participation in the IIL regime in Kenya?
b) Through what forms of public participation in Kenya can human rights considerations in IIAs be advanced?
c) To what extent has public participation been achieved in the promotion of human rights in IIL in Kenya?
d) To what extent has investor-state arbitration impeded access to effective remedies to the victims of business-related human rights violations in Kenya against foreign investors?
e) Other than investor-state arbitration, what alternative dispute resolution mechanisms can provide direct access to remedy to victims of business-related human rights violations by foreign investors in Kenya?

1.5. Significance of the research

Although there has been fairly extensive research on public participation in the international environmental law regime, which is an inseparable subject from international human rights law (IHRL), there is scanty research dedicated to public participation in IIL. Therefore, this study reveals this gap and provides a stepping stone towards further research on balancing the competing interests in IIL by specifically focusing on human rights advancement through public participation from a Kenyan perspective.

Broadly, it will contribute to ongoing research on the promotion of sustainable development in Kenya. As such, this study is informative and relevant to students, academics and scholars who would be interested in studying or researching further on public participation in IIL more so in developing countries. Additionally, it would be of useful guidance to policy makers, legislators, government entities, investors and the general public on the concept of public participation and how it can be utilised as a democratic tool to foster human rights considerations in the IIL regime in Kenya.

Lastly, it will highlight current legislative gaps in Kenya that can be subject for reform in future, to address human rights concerns in IIL and to reshape the IIL regime to reflect the letter and spirit of the COK.

1.6. Literature Review

Many scholars have contributed to the legal discourse on the asymmetrical nature of IIL and the IIL legitimacy crisis debates. Apparently, there has been a consensus that there are indeed tensions between IIL and IHRL that can generally be attributed to the fragmentation of international law. Human rights issues are increasingly being raised in international investment arbitration and the deficiencies of the substantive provisions of IIAs in this regard, are becoming more evident. Conventional arguments that foreign investors are at a disadvantage when negotiating IIAs due to their 'lack of formalized political rights as a normative justification for international investment protection'[38], have overtime been questioned. The practice of states signing IIAs which provide extensive investors rights without imposing human rights obligations is an advantage in itself, at the detriment of the direct consumers that ultimately suffer the consequences of irresponsible and unsustainable foreign investment activities.

[38]C Lorenzo 'Democracy and International Investment Law' (2017) 30 *Leiden Journal of International Law* 360

Sarkinovic,[39] in highlighting the asymmetry in IIL discusses the increasing human rights claims in investment arbitration cases and buttresses the need for a shift in the emphasis that is placed on foreign investor rights and obligations of states in IIL, to the often overlooked public nature aspects of the IIL regime. Particularly, the right of host states to maintain and pursue public policy objectives. Even though arbitral tribunals have gradually, and in limited circumstances adopted progressive interpretations of IIAs to address human rights claims,[40] substantive human rights provisions in IIAs are almost lacking, especially old generation IIAs.

Despite the public nature of IIL, consumers of foreign investment activities not only have constrained voices in normative processes, but also lack legal standing to seek redress for business-related human rights violations under international investment arbitration. Choudhury[41] posits that the IIL regime is gradually arising as a kind of global public good and viewing it as such, highlights the regime's public interest shortcomings that would create an opportunity for the issues to be addressed. Viewing IIL through the lens of a public good shifts the tide from a commercial driven legal regime to one that contributes to socio-economic growth in developing host states. Further, Mann[42] argues that an era of globalization focused on the promotion of sustainable development, modern public international law places the relationship between FDI and sustainable development at the core of IIL, otherwise the original objective of the regime becomes unjustifiable.

Kent[43] posits that public participation was originally designed as a public accountability tool for ensuring good governance. However, given the increasingly public interest nature of disputes arising from IIL, Kent questions whether investment tribunals can or should be regarded as public authorities.[44] Kent also ties this argument by highlighting that private bodies are increasingly actively engaging in the delivery of public goods and governance hence the need for the evolution of public participation.[45]

With or without categorising arbitral tribunals in investment disputes as public authorities, it is undisputed that investment arbitration was developed to provide an avenue for foreign investors to sue

[39]TB Sarkinovic 'Human Rights Issues in Investment Arbitration Cases: A New Perspective?' (2020) 11 *Union University Law School Review* 532
[40] See *Urbaser v Argentina* ICSID Case ARB/07/26, *Bear Creek Mining Corporation v Republic of Perú* ICSID Case ARB/14/21 and *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania,* ICSID Case ARB/05 /22
[41] B Choudhury 'International Investment Law as a Global Public Good' (2013) 17 *Lewis & Clark Law Review* 481
[42] n 3 above at 521-544
[43]A Kent, 'The Evolving Concept of Public Participation' in ED Brabanbere et al (eds) *Public participation and Foreign Investment Law: From the Creation of Rights and Obligations to the Settlement of Disputes* (2021) 58-60.
[44] As above at 60
[45] As above at 62

host states. However, it now does not adequately reflect the evolving public policy dimensions of investment disputes. Hence, the need to adopt more participatory alternative dispute resolution mechanisms. In this regard, Puig and Shaffer recommend flexibility in investment dispute resolution to allow states to select alternative, yet equally flawed international alternatives but complementary to investment arbitration and domestic litigation.[46] 'Flawed alternatives' is as an acknowledgement of the challenges associated with balancing competing interests of foreign investors and host states in as far as dispute settlement is concerned. Domestic litigation is often resisted and certainly unattractive to foreign investors due to perception of bias and lengthy processes.

Collins[47] argues that 'public policy making processes that fail to incorporate public consultations may be perceived as illegitimate and risk subsequent challenge or protect.' Evidently, Collin's argument highlights the legitimacy debates relating to the IIL regime's lack of transparency and public participation. As such, it has become a common practice for civil society organisations (CSOs)to lobby against the Kenyan government over failure to involve the public in decision making, and in some cases litigating against public entities on behalf of local communities for government failure to failing to protect human rights.[48]

Additionally, Maupin[49] argues that democracy requires transparency, access to information, accountability, good governance, and legitimacy. Although the definition of transparency in international law varies contextually, Maupin's characterisation reflects the general elements of transparency that would be expected in IIL, yet hardly reflected. Hence, the unfounded notion that IIL is a secretive international diplomacy and political practice has raised questions on its legitimacy especially in democratic states. IIL is no different from other fields of public international law and can therefore no longer be the subject of closed door discussions.

The above cited works of literature, albeit valuable, reveal that there is a gap in research on public participation as a human rights advancement strategy. Particularly, as it relates to developing countries with unique needs and legal frameworks; in this case Kenya. The COK provides opportunities to advance human rights through meaningful public. Hence, country-specific reform that reflects the

[46] S Puig & G Shaffer 'Imperfect Alternatives: Institutional Choice and The Reform of Investment Law' (2018) 112 *American Journal of International Law* 362

[47]DA Collins 'Public Participation in Environmental Impact Assessments for Foreign Investment Projects: A Canadian Perspective'' in ED Brabanbere et al (eds) *Public participation and Foreign Investment Law: From the Creation of Rights and Obligations to the Settlement of Disputes* (2021) 242-246

[48]Business and Human Rights Resource Centre available at https://www.business-humanrights.org/en/latest-news/kenya-lobbies-push-for-fishermen-affected-by-lamu-port-payout/ (accessed on 12 August 2021)

[49] J Maupin, 'Transparency in International Investment Law: The Good, the Bad, and the Murky, in A Bianchi & A Peters (eds) *Transparency in International Law* (2013) 142-171

realities of a particular country would better address the IIL deficiencies. Ultimately, the IIL regime governed by bilaterally negotiated IIAs that may differ from country to country.

Undeniably, public participation, as a tool for promoting human rights in IIL is currently underutilised in Kenya, and in some cases completely ignored. Meaningful public participation crucial in advancing the business and human rights agenda.[50] Importantly, differentiating between mere public consultations and public participation that impacts on decision is paramount. As such, inspiration can be drawn from the evolution of the right to public participation under international environmental law to address the IIL asymmetry. This research is timely and relevant, particularly in Kenya, where there has been an increasing need to democratise the IIL regime and to enhance accountability governance.

1.7. Research Methodology

This study is primarily based on qualitative doctrinal research methods. Specifically, it employs an intensive text based research, desktop analysis and library research. It relies heavily on primary sources of law such as the hard and soft law international instruments, the COK, national legislation and policies in Kenya, BITs, IIAs and jurisprudence emanating from Kenyan courts. It also makes use of secondary sources in available literature such as books, journal articles, theses, reports and other relevant publications.

1.8. Limitations of the Research

The key limitation of this study is the inadequacy of information regarding the extent of public participation in IIL normative processes of IIL in Kenya, for example in negotiations of IIAs. Lack of transparency and inaccessibility of such relevant information limits the researcher from making reference to practical experiences. Generally, this is also one of the challenges that curtains meaningful and informed public participation in IIL. There are also scarce judicial precedents in Kenya that provide valuable guidance on the principle of public participation in BIT making and IIAs. Nonetheless, this study makes good use of the available information and evolving research to develop meaningful scholarship in this area of law.

Notably, this study will restrict itself to investigating Kenyan experiences post the promulgation of the COK; a milestone that significantly changed Kenya's constitutional dispensation into a more participatory democracy.

[50] n 11 above at 895

1.9. Chapter Breakdown

The synopsis of this study is broken down into six chapters as follows:

1.9.1. Chapter 1: Introduction

This chapter provides a background and roadmap for the study covering the research problem, literature review, objectives, significance, limitations, methodology and structure of the research.

1.9.2. Chapter 2: A Critical Analysis of the Principle of Public Participation in Kenya

This chapter delves into the principle of public participation as provided for under the legal and regulatory in Kenya. It focuses on the important constitutional changes introduced by the COK that particularly impact on human rights. Additionally, it analyses the scope of the application of public participation in the IIL regime as provided under the laws of Kenya It also examines Kenyan jurisprudence on treaty making and public participation in different aspects of foreign investment activities.

1.9.3. Chapter 3: The Development of the Principle of Public Participation in International Law

This chapter discusses the foundations of public participation in international law from an IHRL and international environmental law lens. It examines the development of public participation in IIL normative processes and investment arbitration practices relying on global experiences. Further, it discusses the right of a state to exercise permanent sovereignty over natural resources to justify the need to preserve regulatory autonomy for public interest regulation that a host state can utilise to create avenues for public participation in a bid to foster human rights in IIL in Kenya.

1.9.4. Chapter 4: Public Participation in International Investment Law Normative Processes and Decision Making in Kenya

This chapter examines two aspects of public participation in IIL, that is, participation in decision making and access to information. It discusses the importance of transparency and participation in decision making relating to foreign investment activities in Kenya. It also analyses different forms of public participation currently available in Kenya using practical examples, highlighting the existing deficiencies in addressing human rights concerns.

1.9.5. Chapter 5: Re-Examining Investor-State Arbitration as a Dispute Settlement Mechanism in International Investment Law: A Place for Human Rights?

This chapter focuses on the third and final aspect of public participation in this study; access to remedy. It examines some of the access to remedy gaps existing in the IIL regime. Particularly, it discusses the

ongoing legitimacy crisis debates concerning investor-state arbitration and its inaccessibility to local communities in host states as a dispute settlement mechanism for business-related human rights violations. This chapter also analyses the progressive but limited reforms in international investment arbitration and examines Kenya's experience with investor-state arbitration as a host state protecting legitimate pursuing public policy matters. Lastly, it proposes alternative grievance mechanisms that are accessible to victims of business-related human rights violations.

1.9.6. Chapter 6: Conclusion and Recommendations

This chapter recapitulates the overarching theme of the research, concludes the study and features a number of recommendations that can be adopted to foster human rights in IIL through meaningful public participation in Kenya.

CHAPTER TWO

A CRITICAL ANALYSIS OF THE PRINCIPLE OF PUBLIC PARTICIPATION IN KENYA

2.1. Introduction

Public participation in governance and decision making on public interest matters has increasingly become an important aspect democracy especially in the advancement of economic growth and sustainable development. Public participation has advanced from merely a political right to freely take part in government directly or through free and fair elections[51] to a right that safeguards a variety of ideals such as democracy, freedom of expression, accountability, transparency and sustainable development.[52] The principle of public participation has transcended into the IIL regime due to the need to address the often over looked non-economic concerns such as the social and human rights impact of investment activities, more prevalent in capital importing African countries; majority of which have prioritised the attraction of FDI in their national development policies.

Kenya's Vision 2030 is a development blueprint whose objective is to transform Kenya into a middle income country by 2030.[53] It highlights the significance of FDI in the government's development agenda through investment in natural resource exploitation, special economic zones (SEZ) and public-private partnership (PPP) infrastructure projects.[54] One crucial lesson learned from the implementation of development projects in the vision's third medium-term plan 2018-2022, is the need to facilitate and implement meaningful public participation.[55] Despite this lesson and the fact that public participation is enshrined in Kenya's current constitutional regime, this chapter argues that implementation of public participation in the IIL regime in Kenya is work in progress, and still far from being full realised.

Opportunities for public participation vary depending on the legislative regime in a country. In Kenya, the principle of public participation is an integral value and principle of governance.[56] The move to constitutionalise public participation as a national value and principle of governance is a manifestation of the adoption of the subsidiarity principle. Subsidiarity is a type of organizing principle based on the

[51] African Charter on Human and Peoples' Rights (African Charter), art 13
[52] n 43 above at 3-4
[53] Kenya Vision 2030 available at https://vision2030.go.ke/ (accessed 1 September 2021)
[54] Kenya Vision 2030 Third Medium Term Plan 2018-2022 available at http://vision2030.go.ke/wpcontent/uploads/2019/01/THIRD-MEDIUM-TERM-PLAN-2018-2022.pdf
[55] n 54 above
[56] COK, art 10

assumption that public participation of the local population, which bears the highest developmental and environmental costs, is enhanced when decision making is decentralised and local autonomy is embraced.[57] Among other legal changes, the COK introduced important provisions impacting directly on human rights, law-making, the environment and natural resources, among other governance aspects of relevance in the IIL regime. Even with such progressive legislation, this paper argues that there exists a gap in the facilitation and implementation of public participation in the IIL regime in Kenya.

Hence, this chapter examines the legal frameworks in place for public participation in Kenya. Further, it evaluates the extent of the application of public participation in foreign investment regulation thus far and also explores the interpretation of the principle of public participation by domestic courts.

2.2. Constitutional Underpinnings of Public Participation in Kenya

In the quest for a more participatory and people-centered democracy, the COK expressly incorporated the principle of public participation in the newly introduced devolved system of government. One of the objectives of the introduction of a devolved system of government in Kenya is to empower the public to take part in self-governance and decision making on matters directly affecting them to promote democracy and accountability.[58] To begin with, the Preamble acknowledges that the COK is a product of the 'sovereign and inalienable right to determine the form of governance' by the Kenyan people in exercise of their right to participate in democratic governance.[59]

Chapter 1 of the COK lays foundation for the principle of public participation in Kenya. Article 1 reaffirms the sovereignty of the Kenyan people and their political right to exercise their sovereign power directly or through elected representatives.[60] Article 2 and 3 provide for the supremacy of the COK and the obligation of every person to uphold and respect the Kenyan Constitution.[61] Notably, Article 10 expressly sets out the national values and principle of governance including public participation of the people, transparency, democracy, human rights, sustainable development, among others, binding upon all persons, state officers and public authorities, in the application, interpretation, and implementation of law or public policy decisions.[62]

[57] S Dinah 'A Rights- Based Approach to Public Participation and Local Management of Natural Resources' (2008) available at https://www.iges.or.jp/en/publication_documents/pub/conferenceproceedings/en/739/3ws-26-dinah.pdf
[58] COK, art 174
[59] COK, Preamble
[60] COK
[61] As above
[62] COK, art 10

Article 10 highlights the key beneficiaries and major stakeholders in the advancement and implementation of public participation in Kenya. The public is main stakeholder, as both actors in direct and indirect governance and as key beneficiaries when effective public participation is implemented.[63] Other stakeholders who have a role to play in upholding the principle of public participation in governance include public officers at both levels of government, state officers, parliamentarians, judicial officers, private actors, both natural, and legal persons. Meaningful participation would require cooperation amongst all relevant stakeholders. This cooperation is currently insufficient, especially in foreign investment regulation and management in Kenya.

In addition, there are a number of other relevant constitutional provisions on public participation in governance matters in Kenya. Article 69 obligates the State to encourage public participation in environmental and natural resource management and conservation.[64] Law-making bodies at both levels of government, that is, the parliament and county assemblies have an obligation to conduct their business openly and to facilitate public participation in legislative processes.[65] Further, the right of every person to petition parliament on the matters concerning the enactment, amendment, and repeal of national legislation is guaranteed.[66] The principle of public participation has also been incorporated into public service and all public finance aspects in Kenya. Particularly, public participation, transparency, and accountability are guiding principles of public finance[67] as well as critical values of public service in public policy-making processes.[68]

Evidently, the COK creates a wide array of avenues within which citizens can be involved in different aspects of governance. Incorporation of public participation as a tool for the promotion of good governance in Kenya ushered in a progressive yet superficially realised, and to a great extent, contentious aspect of decision making in public interest matters. Arguably, it is a change that the public would benefit from, as it would increase transparency and accountability in governance but on the other hand, a complex and expensive concept to implement.

Kenyans have, and are still grappling with emerging contentious issues concerning implementation of public participation, and more recently, how meaningful participation can be achieved in the IIL regime. This is due to a number of challenges. Firstly, the drafters of the COK failed to a substantive

[63]SW Waiganjo 'Public Participation in Foreign Direct Investment Projects in Kenya' Master's thesis, University of Nairobi, November 2019 18
[64] COK
[65] As above, art 118 &196 respectively
[66] As above, art 119
[67] As above, art 201 (a)
[68] As above, art 232(1)(b)

interpretation of the term 'public participation' Secondly, there lacks an overarching enacted national legislation to enable full and coordinated realisation of effective implementation of public participation. However, there has been some notable efforts at both levels of government to create enabling frameworks for public participation.

Nonetheless, the fact that public participation is enshrined in the COK marks a paradigm shift from a top-down approach to governance to a bottom-up approach intended to create more avenues for local participation of people in governance. Ideally, this approach to governance also ought to be reflected in the different aspects the IIL regime in Kenya. For example, in IIL normative processes, decision making, access to information and dispute resolution mechanisms.

2.3. Legislative and Policy Frameworks for Public Participation in Kenya

More than a decade post-the promulgation of the COK, efforts to develop substantive policy and legislative frameworks on public participation are still in progress, albeit at a snail's pace. Without overarching enabling law to give effect to the principle of public participation, its implementation remains passive, superficial and almost lacking particularly in the IIL regime in Kenya. Further, implementation has so far been uncoordinated at both levels of government. This is evidenced by the existing inharmonious policies, guidelines and frameworks on public participation.

2.3.1. National Legislation

At the national level, Parliament is yet to enact a legislation to give effect to Article 10 of the COK that provides for the right to public participation. At the moment, the Public Participation Bill (the Bill) 2019 is under consideration at the National Assembly.[69] The Committee on Broadcasting and Library sponsored the Bill which has now been approved for tabling in Parliament.[70] The objective of the Bill is to promote, enhance and facilitate public participation to give effect to the constitutional provisions empowering Kenyans to take part in governance both directly and indirectly.[71] Notably, the Bill defines public participation as 'any process that directly engages the public in decision making and gives consideration to public input in making that decision'[72] This definition differentiates between empowered participation and consultative participation. In empowered participation, public opinions

[69]Parliament of Kenya available at http://parliament.go.ke/sites/default/files/2019-10/The%20Public%20Participation%20%28No.1%29%20Bill%202019.pdf (accessed 1 September 2021)
[70]See Select Committee on Parliamentary Broadcasting and Library Report on the Consideration of the Public Participation Bill 2019 available at http://www.parliament.go.ke/sites/default/files/2020-09/Report%20on%20the%20consideration%20of%20the%20public%20participation%20Bill%2C%202019%20%281%29.pdf
[71] Public Participation Bill 2019, art 4
[72] As above, art 2

and views are not only heard but also influence the decision made, whereas consultative participation, views are heard without a guarantee that they will influence decisions made.[73]

The Select Committee on Parliamentary Broadcasting and Library report on the consideration of the Bill highlights the novelty of the constitutionalisation of public participation in Kenya, its current unstructured implementation, which as majorly been in the form of tokenism and the need to have its operationalisation more organised as intended in the COK.[74] Once enacted, the Bill would apply at all levels of government; hence providing an overarching streamlined benchmark for the facilitation and implementation of public participation in Kenya. The Bill provides the guiding principles on how public participation should be conducted. It stipulates the rights of the public, and the obligations of public authorities with respect to public participation. In addition, it provides the considerations to be made when giving effect to public participation, among other important related matters.

2.3.2. County Legislation

Several counties have developed bills and some have enacted legislation to give effect to Article 196 and Part 2 of the Fourth Schedule of the COK on the facilitation of public participation in governance at the county level. Public participation at the county level is also stipulated under Part 8 of the County Governments Act 2012[75] which provides for citizen participation. At least 20 counties have developed public participations bills and approximately 15 counties have already enacted laws to that effect.[76]

Even though some county governments have enacted public participation laws, its operationalisation remains challenging. According to the Intergovernmental Relations Technical Committee, public participation is to a large extent perfunctory since it is still unclear what constitutes effective and adequate public participation and when the constitutional threshold is said to have been met.[77]

2.3.3. Policy Frameworks

In 2018, the Department of Justice and the Office of the Attorney General developed a draft public participation policy to reaffirm the government's adherence and commitment towards implementation of participatory governance. The draft policy was a product of a long consultative and transparent

[73] K Muigua 'Towards Meaningful Public Participation in Natural Resource Management in Kenya' (2014) 5-6.
[74] n 70 above 11
[75] Act 17 of 2012
[76] See Intergovernmental Relations Technical Committee Report on the Status of Public Participation in National and County Governments available at https://countytoolkit.devolution.go.ke/sites/default/files/resources/27.%20The%20Status%20of%20Public%20Participation%20in%20National%20and%20County%20Governments%20.pdf
[77] n 76 above

multi-stakeholder process that began in 2012.[78] This policy is the first laudable attempt towards a harmonised national framework for the coordination and management of public participation. It provides a more elaborate definition of public participation as[79]:

> the process by which citizens, as individuals, groups or communities (also known as stakeholders), take part in the conduct of public affairs, interact with the state and other non-state actors to influence decisions, policies, programs, legislation and provide oversight in service delivery, development and other matters concerning their governance and public interest, either directly or through freely chosen representatives.

The draft policy is not only anchored on the COK but also the Vision 2030 development blueprint, both requiring a more participatory democracy. Ideally, foreign investment regulation and management ought to adhere to the national ideals and values of governance. With a national policy in place stipulating the norms, standards, and guiding principles for public participation, it should be expected that implementation will become more organised. However, there is a need for Parliament to prioritise the enactment of a public participation law with enforceable rights.

2.3.4. Guidelines

Besides the legislation and policy, several government agencies have developed guidelines on public participation. In 2016, the Ministry of Devolution and Planning, in collaboration with the Council of Governors and other development partners prepared and published the County Public Participation Guidelines[80] as a complimentary guide to the existing laws and regulations on public participation within the counties. The Public Service Commission also developed Guidelines for Public Participation in Public Policy Formulation 2015, which apply to all state departments, agencies, corporations, parastatals, ministries, state agencies, and other public bodies.[81] The main objective of the guidelines is to ensure that State organs consult and involve relevant members of the public in decision making and take their views into consideration when making policy decisions.[82]

Undisputedly, even though public participation is not an entirely new phenomenon, the COK elevated it into a core value of governance, far beyond simply electoral processes and mere consultation, into a requirement in decision-making processes. Hence, it is important to examine the application of public

[78]Kenya Draft Policy on Public Participation 2018 available at https://statelaw.go.ke/wp-content/uploads/2020/07/Kenya-Draft-Policy-on-Public-Participation.pdf
[79] As above
[80]State Department for Devolution available at https://countytoolkit.devolution.go.ke/resource/county-public-participation-guidelines-ministry-devolution-and-planning-modp-and-council (accessed 1 September 2021)
[81]Public Service Commission available at https://www.publicservice.go.ke/index.php/policies-guidelines/category/62-guidelines?download=229:guidelines-for-public-participation-in-policy-formulation (accessed 1 September 2021)
[82] Public Service Commission Guidelines for Public Participation in Public Policy Formulation 2015, 4

participation in foreign investment regulation and decision making, while analysing domestic court decisions on the concept.

2.4. The Relationship Between the Bill of Rights and Public Participation

Public participation and human rights are interrelated both directly and indirectly. Some scholars have observed that implementation of the principle of public participation potentially reduces human rights risks that could affect relevant persons or communities.[83] Moreover, involving the public in matters affecting their human rights also mitigates potential conflicts especially in development projects as they would obtain the 'social license to operate'[84] Essentially, when a particular project, industry or company operating within a certain area is perceived by the relevant local stakeholders as being legitimate or socially acceptable, it is then deemed to have obtained a social license to operate.[85]

It has been opined that facilitating meaningful participation by the local people or communities impacted by investment projects create a sense of ownership and legitimacy, not only in the specific projects but also in the IIL regime generally.[86] Additionally, it has been noted that the success of investment and development projects is closely linked to the level of effective local community participation undertaken in such projects, as well as the human rights status of relevant persons throughout the life cycle of a project.[87] In other words, attention has been drawn to the role that the IIL regime plays in the sustainable development agenda and human rights promotion. It has been posited that public participation, in its numerous manifestations, forms part of the evolution process in foreign investment regulation and the ongoing efforts to address the tension between public and private interests in the existing IIL framework.[88]

The COK introduced an elaborate Bill of Rights that forms an integral part of Kenya's social, political and economic policies.[89] The objective of the Kenyan Bill of Rights is to preserve human dignity, foster social justice, and the realization of every person's potential.[90] It is binding upon all state organs

[83]n above at 123-125
[84] K Muigua 'Upholding Human Rights and Meaningful Public Participation in Development Projects' (May 2021) http://kmco.co.ke/wp-content/uploads/2021/05/Upholding-Human-Rights-and-Meaningful-Public-Participation-in-Development-Projects-AutoRecovered-Kariuki-Muigua-24th-May-2021.pdf
[85] E Raufflet, 'Social License' in SO Idowu et al (eds), *Encyclopedia of Corporate Social Responsibility* (Springer 2013) 82-101; See also J Gehman et al, 'Social License to Operate: Legitimacy by Another Name?' (June 2017) 60 *Canadian Public Administration* 293-317
[86] n 28 at 152-154
[87]n 84 above
[88]YN Hodu, 'Exploring the Legal Framework for International Investment' in ED Brabandere et al (eds) *Public participation and Foreign Investment Law: From the Creation of Rights and Obligations to the Settlement of Disputes* (2021) 34-36
[89] COK, art 19 (1)
[90] COK, art 19 (2)

and persons[91], including both natural and legal persons.[92] Further, it specifically provides for the facilitation of public participation in the implementation of certain human rights, particularly those of special groups of persons such as the youth, elderly, persons with disabilities, children, minorities and marginalised groups in Kenya.[93]

It is also worth noting that Kenya is one of the few African countries that have committed to implementing of the UNGPs by developing a National Action Plan (NAP).[94] It is a policy strategy domesticating the UNGPs and providing a clear action plan for their implementation.[95] The NAP is a clear indication that the Kenyan government has endorsed the UNGPs and acknowledges the importance of safeguarding its people against business-related human rights violations

Lastly, effective public participation is highly dependent on fully guaranteeing or implementing human rights such access to information[96], freedom of expression[97], and access to justice[98], subject to certain limitations[99] In order for local communities to meaningfully participate in decision making, transparency ensures that they have access to non-biased, understandable and adequate information.[100] The right to freedom of expression includes the 'freedom to seek, receive or impart information or ideas'[101] The public is a key stakeholder in the IIL regime. Hence, the notion that IIA negotiations are highly diplomatic and secretive activities that take place behind closed doors without public input infringes on the right to freedom of expression.

With this background, it is important to analyse how and to what extent, the principle of public participation has been incorporated into foreign investment regulation, in as far as promotion, protection, and management of foreign investment activities in Kenya is concerned.

[91] COK, art 20
[92] See definition of 'person' provided for under COK, art 260.
[93] COK, Part 3 of Chapter 4
[94] Republic of Kenya National Action Plan on Business and Human Rights for the Implementation of the United Nations Guiding Principles on Business and Human Rights (June 2019) available at https://www.ohchr.org/Documents/Issues/Business/NationalPlans/2019_FINAL_BHR_NAP.PDF
[95]n above at 21-27
[96] COK, art 35
[97] COK, Art 32
[98] COK, Art 48
[99] COK, art 24
[100] Y Kanosue, 'When Land is Taken Away: States Obligations under International Human Rights Law concerning Large-Scale Projects Impacting Local Communities' (2015) 15 *Human Rights Law Review* 643
[101] COK, art 33 (1) (a)

2.5. Foreign Investment Regulation

The IIL regime comprises IIAs such as BITs, EPAs with investment chapters, investor-state contracts, among others. It also requires enabling domestic regulation in the host state. The business environment in Kenya is investor-friendly compared to other African countries. Kenya ranked fifty sixth out of 190 economies in the Ease of Doing Business Report in 2020.[102] This was an improvement from a ranking of sixty first in 2019.[103] Kenya has achieved this improvement through continuous legal and regulatory reforms on laws governing foreign investment activities to make the business environment attractive to foreign investors.

The supreme law governing foreign investment activities is the COK. The COK provides the overarching law on aspects such as human rights[104], land rights[105], environmental rights[106], and natural resources management.[107] Article 2 of the COK provides that general rules of international law, treaties or conventions, that have been ratified in accordance with the law form part of Kenyan law.[108] Hence, BITs negotiated, signed and ratified in accordance with the Treaty Making and Ratification Act (TMRA) 2012[109] are part of the laws of Kenya.

2.5.1. Key Legislation and Policy Frameworks

The Investment Promotion Act 2004[110] and the Foreign Investment Protection Act[111] are the two main legislations governing foreign investment activities in Kenya. The Investment Promotion Act was enacted to promote both local and foreign investment activities by facilitating licensing processes required and providing investor incentives.[112] In addition, the Investment Promotion Act established the Kenya Investment Authority[113], whose mandate is to facilitate and encourage investment in Kenya.[114]

[102]World Bank Group, Kenya Ease of Doing Business 2020 Report available at https://www.doingbusiness.org/content/dam/doingBusiness/country/k/kenya/KEN.pdf
[103]World Bank Group Ease of Doing Business Report 2019 available at https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf
[104] COK, Chapter 4
[105] COK, art 65
[106] COK, arts 69,70&72
[107] COK, art 71
[108] COK, arts 2(5) & 2(6)
[109] Act 45 of 2012
[110] Act 6 of 2004
[111] Chapter 518 Laws of Kenya
[112] Investment Promotion Act 2004 Act 6 of 2004
[113] As above, s 15
[114] Kenya Investment Authority http://www.invest.go.ke/services/investment-promotion/ (accessed 1 September 2021)

The Foreign Investment Protection Act, is an independence-era legislation that was assented into law in 1964. Its objective is to protect 'certain approved foreign investments' against compulsory acquisition and guarantee foreign investors the right to repatriate their investment profits and capital[115] The Foreign Investment Protection Act requires foreign nationals wishing to invest their assets in Kenya to make an application to the Cabinet Secretary in charge of Finance to be granted a certificate as an approved enterprise under the Act.[116] The application is discretionary and subject to satisfying the Cabinet Secretary that the enterprise would benefit Kenya or further its economic interests.[117]

Other legislations relevant to foreign investment activities include the Companies Act 2015[118] which provides for the requirements of registration and operations of foreign companies in Kenya.[119] The Business Registration Service Act 2015 establishes the Business Registration Service (BRS). BRS is a semi-autonomous public body that is managed under the Office of the Attorney General, to ensure effective administration of laws governing incorporation, registration, management and operation of business entities in Kenya.[120]

The Public Private Partnerships Act 2013[121] provides a legal framework enabling private sector contracting in the financing, construction, operation and maintenance of development projects within PPP arrangements.[122] Pursuant to this framework, foreign companies have been contracted by government entities under public private partnership arrangements to undertake projects in the energy and petroleum sector, transport and infrastructure development among others.[123] For instance, the Amu Power Company, a joint venture registered as a special purpose vehicle between a foreign energy company and a local investment company in Kenya, was contracted by the Kenyan government to undertake the Lamu Coal-Fired Thermal Power Plant as a PPP project.[124]

Further, the Export Processing Zones Act (EPZA) 1990[125] and the Special Economic Zones Act (SEZA) 2015[126] provide for legal frameworks to facilitate export oriented investment activities and the establishment of SEZs respectively. The EPZA makes it possible for foreign investors to

[115] n 111 above
[116]Foreign Investment Protection Act, s 3(1)
[117] As above, s 3(2)
[118] Act 17 of 2015.
[119] Companies Act 2015, secs 973-995
[120] BRS Act 2015
[121] Act 15 of 2013
[122] Public Private Partnerships Act No 15 of 2013
[123] PPP Unit available at http://portal.pppunit.go.ke/ (accessed 1 September 2021)
[124] Amu Power Company https://www.amupower.co.ke/about.html (accessed 1 September 2021)
[125] Chapter 517 Laws of Kenya
[126] Act 16 of 2015

incorporate export processing zones enterprises in Kenya[127] which would be eligible for certain financial and fiscal incentives.[128] The SEZA was enacted with an objective to facilitate and promote both foreign and local investments into declared SEZs in Kenya.[129]

Last but not least, the Ministry of Industry, Trade, and Cooperatives developed and launched a single harmonised national investment policy in 2019.[130] The objective of the Kenya Investment Policy (KIP) is to 'attract, encourage and retain productive investments for sustainable and inclusive development by promoting and providing a thriving, dynamic and globally attractive investment climate'[131] One of the policy targets is to attract foreign direct investment from at least 50% multinational companies headquartered in Africa.[132]

Apparently, Kenya has quite extensive legislations and policy frameworks providing foreign investors with different opportunities and incentives to invest in Kenya. Evidently, FDI is at the top of Kenya's development agenda. Equally, the policy framework acknowledges that FDI needs to be sustainable. States have a duty and a right to ensure that FDI activities contribute positively towards socio-economic development. This would a focus on improving the quality of investments as opposed to the quantities because not all investment contributes to sustainable development.[133]

2.5.2. International Investment Agreements

As noted in the previous section, the IIL regime comprises of numerous IIAs that are negotiated and signed between States, in the case of BITs and EPAs with investment chapters or between foreign investors and states, in the case of investor-state contracts. The dynamics of IIA negotiations, particularly between developed and developing countries, have shown that there is indeed unequal bargaining power and international politics has enduring relevance in the process.[134] Consequently, the legitimacy of the IIL regime has been questioned and there has been increasing pressure for states to adopt more participatory and transparent approaches to IIA negotiations.[135]

[127] EPZA, s 23
[128] EPZA, s 29
[129] SEZA, s 3
[130]KIP 2019 https://drive.google.com/file/d/1EBm-xj4Mefm38RzPwuTCoa0p-kBJYCh_/view
[131] KIP, 14
[132] KIP, 15
[133]n 3 above at 521
[134]n 38 above at 351-382
[135]E Shirlow, 'Three Manifestations of Transparency in International Investment Law: A Story of Sources, Stakeholders and Structures' (2017) 8 *Goettingen Journal of International Law* 73.

In Kenya, foreign affairs, foreign policy and international trade are within the mandate of the national government[136], particularly the Ministry of Foreign Affairs. This Ministry is mandated to negotiate and conclude treaties on behalf of the Kenyan Government.[137] Currently, Kenya has approximately 11 BITs in force and 8 BITs that have been signed but are not in force.[138] The BITs in force include old generation BITs signed before the promulgation of the COK[139] and several others signed after 2010.[140] Besides the UNCTAD Investment Policy Hub that provides an IIAs navigator, the Ministry of Foreign Affairs maintains a non-comprehensive database of conventions and treaties that Kenya is a signatory.[141] It is not always a guarantee that such information would be readily available on the Ministry's database and one would be required to directly enquire from the treaty section representatives for additional information. Due to long bureaucratic processes in government offices, it is quite cumbersome for such endeavour to bear fruits.

Information on investor-state contracts is quite scanty and generally not in the public domain. There is lack of transparency on when, how and where investor contracts are negotiated. Arguably, the right to access to information is violated in this regard. The Access to Information Act 2016[142] guarantees every person the constitutional right to access information held by the State.[143] Public entities have a duty to disclose information unless non-disclosure is pursuant to permissible limitations.[144] Non-disclosure is allowed in circumstances such as, when the requested information could undermine national security, endanger safety or health or any person, prejudice commercial interests, infringe professional confidentiality, substantially harm the government's ability to manage the economy, among other circumstances.[145]

Reasonably, disclosing to the public general information about IIAs is within the state's duty to disclose information on foreign investment governance in Kenya. Without this information, meaningful public participation in investment activities may not be achieved. It has been noted that investment contracts are crucial instruments of governance since they define the obligations and duties

[136] COK, Fourth Schedule Part 1
[137] Ministry of Foreign Affairs http://treaties.mfa.go.ke/ (accessed 1 September 2021)
[138]UNCTAD Investment Policy Hub https://investmentpolicy.unctad.org/international-investment-agreements/countries/108/kenya (accessed 1 September 2021)
[139] Eg France Kenya BIT 2007, Finland Kenya BIT 2008, Kenya Switzerland BIT 2006, Kenya United Kingdom BIT 1999, Germany Kenya BIT 1996, Kenya Netherlands BIT 1970
[140] Eg Kuwait Kenya BIT 2013, Japan Kenya BIT 2016, Kenya United Arab Emirates 2014
[141] Ministry of Foreign Affairs http://treaties.mfa.go.ke/ (accessed 1 September 2021)
[142] Act 31 of 2016
[143] Access to Information Act 2016, s 4
[144] As above, secs 4(4) & 6
[145] As above, s 6

of parties as well as the terms of a project.[146] The fact that FDI can potentially undermine or advance the socio-economic development agenda of a host state, decision making on the rules governing how investment projects are implemented is an important governance issue that the public ought to be involved at the very least.

2.6. Public Participation in Foreign Investment Regulation

Public participation in law making, including treaty making is a mandatory requirement in Kenya. However, the mechanisms to ensure that public participation is fully open to Kenyans are insufficient. Foreign investment legislation enacted before 2010 did not generally reflect the national values and principles of governance in the current constitutional framework. One of the lacking elements in the enactment of laws prior to 2010 is lack of public participation.

Hence, the Parliament of Kenya has gradually been working towards reforming relevant laws and enacting new laws to reflect the changes and to respond to current national needs. Some examples of the new laws include the Energy Act 2019, the Mining Act 2016, and the Natural Resources (Classes of Transactions Subject to Ratification) Act 2016, that have been enacted to regulate certain sectors that have attracted an increasing number of foreign investors in the recent past.

There is considerable evidence to show that public participation in the law making, especially in the case of national legislation has been embraced. Parliament is obligated to seek public input before passing any national legislation.[147] Draft bills or regulations are first published on the Kenya Gazette[148] to inform the public and to allow time for all relevant stakeholders to go through the text. Thereafter, Parliament and relevant government entities would issue public notices to invite the public for consultations and invite comments on the draft bills or regulations.[149]

Whether the threshold of meaningful public participation has been attained or not has been an issue of courts interpretation. As observed before, without a national legislation and constitutional interpretation providing guidance on the principle of public participation, disputes are bound to arise. Numerous domestic court decisions have dealt with the issue of public participation in Kenya.

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[146] C Lorenzo, 'Investment Contracts and Sustainable Development: How to Make Contracts for Fairer and More Sustainable Natural Resource Investments' (2010) *International Institute for Environment and Development* Natural Resource Issues 20, 4

[147] COK, art 118(1)(b)

[148] Kenya Gazette available at http://kenyalaw.org/kenya_gazette/ (accessed 1 September 2021)

[149] See eg, Energy & Petroleum Regulatory Authority Public Notice for Public Participation Workshops and Call for Further Comments on the Draft Energy (Mini-Grid) Regulations 2021 available at https://www.epra.go.ke/wp-content/uploads/2021/06/Public-Participation-Workshop-Minigrid-Regulations.pdf

However, there are two court decisions that stand out in as far as interpretation of the principle of public participation is concerned.

Firstly, in the case of *Republic v Independent Electoral and Boundaries Commission Ex parte National Super Alliance Kenya and 6 others* [2017] eKLR, the High Court of Kenya noted that 'public participation is not a mere cosmetic venture or public relations exercise'[150] The Court further highlighted that the enforceability of the principle of public participation is not dependent on whether a facilitative national legislation has been enacted or not, since such reasoning would derogate from the core constitutional requirements of governance.[151] Secondly, in the case of *Robert N Gakuru and Others v Governor Kiambu County and 3 others* [2014] eKLR, the High Court of Kenya stated as follows[152]:

> Public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively.

The two court decisions emphasize that not only should public participation be done; but also should also be seen as done. Public participation ought to be understood as a process and not a single peripheral checkbox affair. Further, the two cases buttress the centrality of participatory governance in Kenya with which state entities have a duty to safeguard. Notably, national legislation that is passed without meaningful public participation can be challenged in court and declared unconstitutional.[153]

Whereas the implementation of public participation in the making of national legislation is so far commendable, public participation in IIA making is still deficient. Despite the rich plethora of domestic jurisprudence on contentious issues concerning public participation in Kenya, there is still limited guidance on public participation in IIA making. The TMRA dictates that public participation must be conducted before the National Assembly ratifies a treaty or bilateral agreement[154].

Further, the Natural Resources (Classes of Transactions Subject to Ratification) Act 2016 requires certain agreements or classes of transactions relating to the exploitation of natural resources in

[150]Judicial Review No 378 of 2017, para 170
[151] As above, para 175
[152] Petition 532 of 2013 & 12, 35, 36, 42 & 72 of 2014 & Judicial Review Miscellaneous Application 61 of 2014 (Consolidated), para 75
[153] Contempt of Court Act 2016 declared invalid and unconstitutional for lack of public participation in *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR Constitution Petition 87 of 2017.
[154] TMRA, secs 6, 7(m) & 8(3)

Kenya[155], to be ratified by Parliament before they can enter into force.[156] In ratifying such agreements, Parliament must consider, among other factors, whether adequate stakeholder consultation has been undertaken.[157] So far, no IIAs have been declared unconstitutional or invalid due to lack of public participation. Yet in reality, IIA making processes remain opaque and quite inaccessible to the public.

One court decision that discussed the principle of public participation in treat making is the case of *Tax Justice Network Africa v Cabinet Secretary for National Treasury & 2 others* [2019] eKLR.[158] In this case, the constitutionality of the double tax agreement (DTA) signed between Kenya and Mauritius in 2012 was in question due to alleged procedural deficiencies. One of the questions for determination was whether the DTA was within the meaning of a treaty under Kenyan law, hence subject to public participation before ratification. The court highlighted that the term 'international agreement' and 'treaty' are distinct, and that the TMRA implies that ratification only applies to treaties. Specifically, the High Court stated that the petitioner 'failed to show which law provides for the involvement of parliament in the process of making or entering bilateral agreements as distinguished from treaties'[159]

Such restrictive interpretation diminishes the advancement of participatory rights in the IIL regime which is predominantly governed by IIAs. Some commentators have termed this decision as a hindrance for greater democratisation of the IIL normative processes as envisaged in the COK. [160] Arguably so, since it does not reflect the progressive and people-centered spirit of the COK.[161]

2.7. Conclusion

Indeed, Kenya has made progress in the right direction in incorporating public participation in governance and public policy making processes. Even though public participation is a mandatory requirement in law making, it is not sufficiently reflected in the IIL regime. Some scholars have observed that much more work remains to be done to create avenues that ensure effective citizen scrutiny and participation in investment treaty making is achieved, especially in low and middle income countries where it is more difficult and spaces for scrutiny are constrained.[162] Apparently, Kenya falls squarely in this category.

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[155] COK, art 71
[156] Natural Resources (Classes of Transactions Subject to Ratification) Act 2016, s 4
[157] As above, sec 9(1)(d)
[158] Petition 494 of 2014
[159] As above, para 38
[160]B Nyamori, 'The Kenyan Parliament and Investment Treaty-Making' (2019) available at https://www.iisd.org/itn/en/2019/06/27/the-kenyan-parliament-and-investment-treaty-making-bosire-nyamori/ (accessed 1 September 2021)
[161] COK, art 259(1)
[162] n 36 above at 51-52

Additionally, it has been suggested that in enhancing legitimacy of investment treaty making processes, action-based conceptions of democracy ought to be adopted as they would encompass continuous parliamentary and citizen scrutiny on technical issues and real life conditions that would constrain, enable or push the law in making.[163] An action-based political strategy would benefit Kenya as it would foster public participation and the negotiation of IIAs that mutually benefit the parties and most importantly, protect the human rights of the Kenyan people.

[163] n 38 above at 351-382

CHAPTER THREE

THE DEVELOPMENT OF THE PRINCIPLE OF PUBLIC PARTICIPATION IN INTERNATIONAL LAW

3.1 Introduction

The previous chapter set the scene for an analysis of the principle of public participation from an international law lens. It examined the progress Kenya has made in pursuit of a more participatory democracy in foreign investment regulation. It discussed the legal and policy frameworks put in place to enable public participation. Further, it analysed the interconnection between public participation and human rights from a national perspective, laying a foundation for a similar analysis from an international law lens.

Hence, this chapter delves into the foundations of public participation in IHRL while drawing inspiration and lessons from international environmental law. It also examines the linkages between the right to self-determination[164], right to international solidarity[165], right to development[166] and public participation. From this premise, this chapter explores the development of public participation in IIL, a regime that plays an important role in the promotion of the achievement of sustainable development and advancement of human rights.

Additionally, this chapter argues that the right of a state to exercise permanent sovereignty over natural resources has been diminished by the IIL regime due to the regulatory chill effect it has on host states, especially in north-south foreign direct investment relations.[167] Bearing in mind the social contract that a sovereign state enters into with its citizens, this chapter argues that the need to preserve regulatory space for public interest regulation in IIL cannot be understated. Regulatory autonomy can then be utilised to create avenues for public participation in a bid to foster human rights considerations in IIL.

3.2. Foundations of Public Participation in International Human Rights Law

Public participation is not a new phenomenon in international law. It can be traced in IHRL from as early as the UN Charter 1945 and the Universal Declaration of Human Rights 1948 (Universal

[164] UN Charter, art 1
[165]Office of the UN High Commissioner for Human Rights, Draft Declaration on the Right to International Solidarity available at https://www.ohchr.org/Documents/Issues/Solidarity/DraftDeclarationRightInternationalSolidarity.pdf
[166]Declaration on the Right to Development, UN General Assembly Resolution 41/128 of 4 December 1986 available at https://www.ohchr.org/Documents/ProfessionalInterest/rtd.pdf
[167]n 2 above at 60-63

Declaration). The need to incorporate public participation into IIL gained traction especially in the wake of the millennial development goals and subsequently the SDGs. Particularly, the contribution of the IIL regime to the sustainable development agenda in developing countries has been on the spotlight.[168] As such, scholarly debates concerning the democratic legitimacy of the IIL regime are increasingly common. Some scholars argue that modern IIL seems to be at a crossroads of either evolving to reflect its role in sustainable development or shrinking in its past objectives and potentially leading to its own failure.[169]

The underlying source of tensions between IHRL and IIL is arguably the asymmetrical character of north-south IIAs to the detriment of public interest matters such as protection of human rights in host states. The evolution of IIL, through numerous BITs was originally designed to protect foreign investors against 'political and regulatory risks' by limiting host state's regulatory space.[170] Moreover, it has been opined that modern day IIL is a product of a long history of western domination.[171] These tensions are potentially an effect of the fragmentation of international law, even though they are both creatures of public international law.[172] It has been observed that it is not accidental that there lacks a homogenous system of international law because new specialisations emerge to respond to new functional and technical needs.[173] Consequently, the burgeoning specializations in international law potentially generates contradictions and frictions especially when mutually exclusive obligations are imposed on States.[174]

Evidently, balancing competing investor and public interests in IIL has been challenging. Cognizant of the fact that IHRL and IIL are specialisations aimed at regulating diverse needs, an uneasy mix is created in attempting to reconcile them. Nonetheless, reforms are justified to ensure that a balance is achieved and both regimes contribute positively to sustainable development.

3.2.1. Right to Self- Determination

The principle of public participation is a fundamental doctrine in international law. It is the contemporary manifestation of the right to self-determination that was first embodied in the UN

[168] As above, 56-82
[169] n 3 above at 544
[170] n 2 above at 58.
[171] n 5 above at 30
[172] n 10 above
[173] M Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) International Law Commission A/CN.4/L.682 available at https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf
[174] G Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law' (2004) 25 *Michigan Journal of International Law* 851

Charter. The right to self-determination ushered in an era of de-colonialization and formation of democratic governments.[175] In 1966, the right to self-determination was enshrined in two important binding international human rights instruments. Article 1 of the International Covenant on Economic, Social and Cultural Rights (CESCR)[176] and the International Covenant on Civil and Political Rights (CCPR)[177] both enshrine the right to self-determination 'to freely determine their political status and freely pursue their economic, social and cultural development.' States have a duty to refrain from depriving its people the right to self-determination and to respect this right and ensure that it is realized.[178] The African Charter also provides that every person has the right to existence and the unquestionable right to self-determination to pursue social and economic development.[179]

The right to self-determination is therefore a tool that enables people to hold their governments accountable and to have a say in their socio-economic advancement. Therefore, the principle of public participation in governance can be said to have originated from the right to self-determination.

3.2.2. Civil and Political Rights

Public participation can also be placed within the auspices of civil and political rights in IHRL. The Universal Declaration guarantees every person the 'right to take part in the government of his country, directly or through freely chosen representatives'[180] Additionally, the Universal Declaration protects the right of every person to realize their indispensable economic, social and cultural rights through national and international cooperation.[181] The African Charter[182] and CCPR[183] enshrine similar participatory rights in governance, directly or through elected representatives.

Notably, universal suffrage was primarily the interpretation of the right to participate in government. However, the principle of public participation has advanced to a right that safeguards democratic ideals, human rights and entails direct involvement in decision making.[184] It has been noted that whereas public participation was originally developed as a public tool for ensuring good governance

[175]EK Uzor & GN Okeke, 'The Right of People to Self-Determination and the Principle of Non-Interference in the Domestic Affairs of States' (2013) 10 *NALSAR Law Review* 145
[176] UN General Assembly Resolution 2200A (XXI) of 16 December 1996
[177] As above
[178] Declaration on Principles of International Law Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 of 24 October 1970
[179] African Charter, art 20
[180] Universal Declaration, art 21
[181] Universal Declaration, art 22
[182] African Charter, art 13
[183] CCPR, art 25 (a)
[184] A Kent et al, 'Public Participation in International Investment Law: Setting the Scene' ED Brabandere et al (eds) *Public participation and Foreign Investment Law: From the Creation of Rights and Obligations to the Settlement of Disputes* (2021) 3

and accountability by states, as private bodies continue to deliver public good so must the concept of public participation revolutionize.[185]

Participatory rights in human rights law rejects the notion that the state is the sovereign and instead assert that the people hold sovereign authority and wield political power.[186] Some scholars have observed that the right to participation is inherent in democratic governance and the rule of law, and that it forms an essential part of the body of general international law as one of the fundamental rights protected under IHRL.[187]

3.2.3. Right to Development

The right to self-determination and the right to participate in social, economic and political development is reaffirmed in the Declaration on the Right to Development.[188] Particularly, it is acknowledged that human beings are at the centre of the development agenda as active participants and ultimate beneficiaries of the right to development.[189] Further, the right to development is an absolute right pegged on the full realization of the right to self-determination which entitles every person to contribute, participate and enjoy the fruits of social, political, and cultural development.[190]

Every person, individually and collectively has a responsibility to promote development[191] and states have a duty to create favourable conditions for the achievement of the right to development.[192] Another important right of relevance to development is the right to international solidarity which encompasses the spirit of unity to achieve common goals and preserve international order.[193] Particularly, the human right to international solidarity entitles every person, on the basis of non-discrimination, to meaningfully participate, contribute and enjoy an international order where all human rights can be achieved.[194]

In other words, the realization of the sustainable development goals is the responsibility of every person. Hence, States need to create mechanisms for public participation given the stake that people hold in their individual and collective development. Further, the importance of the principle of public

[185] n 43 above at 58-59
[186] GH Fox, 'The Right to Political Participation in International Law' (1992) 17 *Yale Journal of International Law* 539
[187] n 57 above
[188] UN General Assembly Resolution 41/128 of 4 December 1986
[189] Declaration on the Right to Development, art 2
[190] As above, art 1
[191] Declaration on the Right to Development, art 2
[192] As above, art 3
[193] Declaration on the Right to International Solidarity, art 1
[194] As above art 4

participation is also buttressed in the International Law Association New Delhi Declaration of Principles of International Law Relating to Sustainable Development (ILA New Delhi Declaration) 2002 as follows[195]:

> Public participation is essential to sustainable development and good governance in that it is a condition for responsive, transparent, and accountably governments. Public participation in the context of sustainable development requires effective protection of the human right to hold and express opinions, and to seek, receive and impart ideas.

3.2.4. Access to Information and Freedom of Expression

As noted by the ILA, the right to access to information, freedom of opinion, and expression are essential in the realization of the right to public participation. The Universal Declaration recognizes the right to freedom of expression including the freedom to hold opinions, seek, receive and impart ideas.[196] Similarly, CCPR guarantees the right to freedom of expression subject to justifiable limitations provided under law.[197] The right to receive information and freedom to express opinions is also provided for African Charter.[198]

Seemingly, the right to freedom of expression also justifies the human rights underpinning of the principle of public participation. Effective public participation is highly dependent on the availability relevant information provided in an understandable format and timely manner. Both the host state and foreign investors need to be transparent. Apparently, such practice is rare in IIL. For instance, it has been observed that formalised opportunities for public participation in BIT making outside parliamentary scrutiny tend be constrained.[199]

Transparency in IIL is argued to manifest in 3 dimensions, namely norm creation, participation in decision making and investment arbitration.[200] All 3 dimensions in the IIL regime are characterised by opaque processes and lack of adequate opportunities for direct public participation. In this regard, it has been opined that the challenges associated with the implementation of public participation ought not be underestimated and increased levels of transparency could mitigate such challenges.[201] Enough

[195] ILA New Delhi Declaration, principle 5
[196] Universal Declaration, art 19
[197] CCPR, art 19
[198] African Charter, art 9
[199] n 38 above at 369
[200] n 135 above at 74

[201] ML Marceddu, 'How to Ensure Public Participation in FTA Negotiations? A Critical Analysis of the Instruments Used in the FTA-Making Process' in ED Brabandere et al (eds) *Public participation and Foreign Investment Law: From the Creation of Rights and Obligations to the Settlement of Disputes* (2021) 119

weight needs to be given to the implementation of strategic reforms aimed at increasing transparency and access to information to guarantee meaningful public participation of relevant local communities throughout the lifecycle of FDI activities in the host state.

3.2.5. Rights of Indigenous Peoples

The rights of indigenous people, recognized at both the international and Africa regional level, are important in the IIL regime. The definition of indigenous people under international law remains contentious and is determined based on a number of criteria such as self-identification on account of descent, distinctive cultural practices, and a determination to preserve their ancestral territories, usually endowed with natural resources with which they depend on for their livelihood.[202]

Though unbinding, the UN Declaration on the Rights of Indigenous Peoples[203] was adopted with an overwhelming support from member states as a comprehensive international instrument that provide minimum standards on the rights of indigenous peoples. One notable right provided for in this instrument is the right of indigenous peoples to Free, Prior and Informed Consent (FPIC) as part of their right to self-determination.[204] FPIC creates an obligation on project managers and government officials to obtain un-coerced support from local communities based on sufficient, timely and comprehensible information before commencement of investment activities or development projects, with the possibility of withheld consent.[205]

The predecessor international instrument providing for the rights of indigenous peoples is the International Labour Organisation (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries No 169 of 1989.[206] Kenya is not a signatory to the ILO Convention No 169. At the regional level, the African Commission on Human and Peoples' Rights (African Commission) established a working group of experts to examine the concept of indigenous communities in Africa and the impact of the African Charter on their right to self-determination, equality dignity and protection against domination.[207]

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[202]See OHCHR Indigenous Peoples and the UN Human Rights System Fact Sheet No.9/Rev.2 https://www.ohchr.org/documents/publications/fs9rev.2.pdf

[203] UN General Assembly Resolution 16/295 of 13 September 2007

[204]UN available at https://www.un.org/development/desa/indigenouspeoples/publications/2016/10/free-prior-and-informed-consent-an-indigenous-peoples-right-and-a-good-practice-for-local-communities-fao/ (accessed 7 September 2021)

[205]OHCHR available at https://www.ohchr.org/Documents/Issues/ipeoples/freepriorandinformedconsent.pdf (accessed 7 September 2021)

[206]ILO available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 (accessed 7 September 2021)

[207]African Commission Resolution 51 (XXVIII) of 6 November 2000 https://www.achpr.org/sessions/resolutions?id=56

Indigenous communities in Kenya are categorized as marginalised communities, particularly those people who 'have retained and maintained a traditional lifestyle and livelihood based on a hunter and gatherer economy'[208] The Kenyan Bill of Rights provides special rights applications for marginalised communities through affirmative action programs to ensure their participation in governance.[209] Despite the recognition of their rights, indigenous peoples continue to face a wide range of human rights challenges especially those affecting their social, economic, and cultural rights when extraction of natural resources takes place on their lands.[210] Their individual and collective right to self-determination to participate in decision making processes on investment activities directly affecting their human rights is hardly respected. This is often the case in Kenya where a majority of FDI activities take place in regions occupied by indigenous communities, for example in the coastal region of Lamu.[211]

Therefore, there is evidently a gap with regards to the implementation of the principle of public participation in the IIL regime as far as it concerns the rights of indigenous peoples.

3.3. Business and Human Rights

Another developing thematic area in IIL is business and human rights. The increasing human rights impacts in developing countries, as a result of business activities carried out by TNCs, multinational companies (MNCs) and other business enterprises without a mechanism to hold them accountable, led to the development of the UN "Protect, Respect and Remedy" Framework for Business and Human Rights.[212] In 2011, the UN Human Rights Council subsequently endorsed Prof John Ruggie's framework under the UNGPs.[213] Essentially, the UNGPs provide 3 pillars aimed at addressing and preventing human rights violations by business enterprises namely; state duty to protect human rights, corporate responsibility to respect human rights and access to remedy.[214]

Prior to the UNGPs, there were other global efforts to address business and human rights issues through soft law instruments. One example is the voluntary UN Global Compact 1999[215] made up of 10

[208] COK, art 260
[209] COK, art 56
[210] OHCHR Indigenous Peoples and the UN Human Rights System Fact Sheet 9/Rev.2, 4
[211] See eg the case of *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another* [2019] Eklr Tribunal Appeal Net 196 of 2016
[212]UN Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights by John Ruggie A/HRC/8/5 7 April 2008.
[213]UN Resolution 17/4 of 16 June 2011 https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf
[214] UNGPs https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf
[215] https://www.unglobalcompact.org/what-is-gc/mission/principles (accessed 7 September 2021)

principles aimed at promoting corporate sustainability. Another notable instrument is the ILO Declaration of Principles Concerning Multinational Enterprises and Social Policy first adopted in 1977 as a guiding framework to guide governments, multinational enterprises and business in the adoption of social policies to further decent work, social and economic progress.[216]

Additionally, the Organisation for Economic and Co-operation and Development (OECD) has shown commitment towards advancing the business and human rights agenda within its thirty-eight member countries. In 1976, the OECD adopted a policy statement to provide a transparent international investment environment and encourage investment activities that contribute positively to the social and economic progress in its adhering countries.[217] In 2011, the OECD adopted the Guidelines for Multinational Enterprises providing crucial recommendations for responsible business conduct to multinational enterprises operating in the adhering governments.[218]

Lastly, it is worth noting that efforts by the UN Human Rights Council to encourage states to adopt an internationally binding treaty on business and human rights are still ongoing.[219] The sixth session of the open ended working group on the treaty process led to the publication of a third revised draft of the proposed treaty[220] that will be discussed further in October 2021.[221]

The progress that has been made thus far in advancement of the business and human rights agenda proves that indeed the IIL regime has been deficient in protecting human rights related to business activities by TNCs and MNCs in host states. One common feature of the currently existing soft law instruments on business and human rights is the increased importance placed on the principle of public participation. For instance, due diligence on the potential human rights impacts of business activities has become an important pre-establishment aspect in IIL. Guidelines on due diligence processes often include ascertaining whether meaningful public participation has been undertaken prior to embarking on investment projects.[222]

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[216]ILO MNE Declaration 5th edn 2017 available at https://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm
[217]OECD Declaration and Decisions on International Investment and Multinational Enterprises 1976 https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0144
[218]OECD Guidelines for Multinational Enterprises 2011 https://www.oecd.org/corporate/mne/48004323.pdf

[219]UN Human Rights Council Open-Ended Intergovernmental Working Group established under Resolution 26/9 https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx
[220]https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf
[221]Business and Human Rights Resource Centre available at https://www.business-humanrights.org/en/big-issues/binding-treaty/ (accessed 7 September 2021)
[222]See eg OECD Due Diligence Guidance for Responsible Business Conduct https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm

3.4. Public Participation in International Environmental Law

The development of the principle of public participation in international environmental law has advanced much more than in IIL. Despite its uneven implementation in different jurisdictions, there is a general consensus that public participation is an essential procedural principle in international environmental law.[223] Indeed, the right to participate in decision making relating to environmental matters is enshrined in both hard and soft law instruments. The UN Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) 1998 [224] is the first international instrument under the UN framework entirely devoted to public participation in environmental matters. The Aarhus Convention incorporates 3 interdependent aspects of public participation namely; access to information, access to decision making processes, and access to justice.[225]

Prior to the Aarhus Convention, the principle of public participation is mentioned in vague reference in the Stockholm Declaration and Action Plan for the Human Environment adopted at the first global UN Conference on the Environment.[226] Additionally, the Rio Declaration on Environment and Development (Rio Declaration), adopted at UN Conference on Environment and Development in 1992, is one of the soft law instruments that provides that 'environmental issues are best handled with the participation of all concerned citizens, at the relevant level'[227] Notably, the Rio Declaration recognises the role played by women[228] and indigenous peoples[229] in environmental management and the achievement of sustainable development.

As a procedural principle in international environmental law, public participation manifests in different dimensions. Two common manifestations are in due diligence processes such as environmental impact assessments, and in decision making processes on matters directly impacting the environmental, social and economic rights of local communities where projects are to take place. This is not to say that the implementation of the principle of public participation in environmental matters is perfect. Whereas similar rights are guaranteed in the COK, implementation has been ineffective. Nonetheless, as compared to IIL, it has been observed that there is widespread consistent practice of the principle of

[223] V Nanda, & G Pring, *International Environmental Law: International Environmental Law and Policy for the 21st Century* (2012) 47
[224] https://ec.europa.eu/environment/aarhus/ (accessed 7 September 2021)
[225] Aarhus Convention https://unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf
[226] UN Conference on the Human Environment, 5-16 June 1972 Stockholm https://www.un.org/en/conferences/environment/stockholm1972
[227] Rio Declaration, principle 10
[228] Rio Declaration, principle 20
[229] Rio Declaration, principle 22

public participation in environmental matters[230], a key lesson that ought to be emulated in the IIL regime.

3.5. Public Participation in IIL

IIL is gradually evolving from an exclusionary regime that is developed by without public involvement to a more participatory framework with increasing traces of public participation in different aspects.[231] The global legitimacy crisis debates are exerting pressure on government to reform the IIA normative processes more participatory and to adopt new generation IIAs that are anchored on the advancement of sustainable development and human rights protection.[232] Hence chapter 4 of this study focuses on the progress Kenya has made in advancing public participation in the IIL regime in Kenya.

Additionally, different dimensions and degrees of public participation in IIL are evident in international investment arbitration. Procedural rules of arbitration at the UNCITRAL and ICSID are progressively undergoing reforms increase transparency and participation by non-disputing parties. This is due to the need to address some of the public interest dimensions of investor-state disputes especially human rights violations by foreign investors in host states. Hence, chapter 5 of this study delves into the development of public participation in international investment arbitration.

3.6. The Right of a State to Exercise Permanent Sovereignty Over Natural Resources

One of the sectors in Kenya that has attracted an increasing number of foreign investors in the recent past is renewable and non-renewable natural resources exploitation.[233] It has been observed that in negotiating IIAs, developing countries commit to obligations to attract foreign investors with the hope to stimulate socio-economic growth even though the negotiated host state obligations may impose real limits regulatory autonomy and policy making flexibility.[234] Sustainability in the exploitation of natural resources for the benefit of today's and future generations is an essential aspect of the right to development and the right to self-determination.[235]

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[230] n 223 above at185-190

[231] K Norwot & E Sipiorski, 'Towards a Republicanisation of International Investment Law? Conceptualising the Legitimatory Value of Public Participation in the Negotiation and Enforcement of International Investment Agreements' in KF Gomez (ed) *European Yearbook of International Economic Law: Private Actors in International Law*, 160-162

[232] See UNCTAD Report on new IIAs and IIA reform processes in 2020-2021 available at https://unctad.org/system/files/official-document/diaepcbinf2021d6_en.pdf

[233] See WA Mutubwa et al, 'Impact of Foreign Direct Investment in the Utilization of Natural Resources: Case Study from Kenya' (2020) 4 *Journal of Conflict Management and Sustainable Development* 5

[234] Commonwealth Secretariat, Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries (2012) 14 available at https://www.iisd.org/system/files/meterial/6th_annual_forum_commonwealth_guide.pdf

[235] N Schrijiver, 'Self-determination of peoples and sovereignty over natural wealth and resources' in Realizing the Right to Development (2013) 95-102 available at https://doi.org/10.18356/15cd19ff-en

The UN General Assembly Resolution on Permanent Sovereignty over Natural Resources declared the rights as follows[236]:

> The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.

Further, similar are enshrined in the UN Charter of the Economic Rights and Duties of States 1974 [237] and the UN Declaration on the Establishment of a New International Order 1974.[238] Both states and its citizens have a sovereign right over natural resources within their territories and a duty to ensure that exploitation of natural resources is suitable and to their benefit. Undisputedly, this is not the case in many African countries that are endowed with rich natural resources but their economies are categorised as low or lower middle income countries, including Kenya.[239]

Therefore, it is prudent for states not to constrain its regulatory space to assert their sovereignty over natural resources at the expense of attracting foreign investors who are in pursuit of their own commercial interests. The right of the host state to regulate ought to be expressly guaranteed in IIAs, an increasingly common practice in new generation BITs.[240] Additionally, on the basis that the sovereign right over natural resources is equally enjoyed by the people, the right to participate in IIL regulation and management is justified and paramount.

3.7. Conclusion

In conclusion, it is apparent that the principle of public participation is an established norm in international law. However, it is evolving in diverse dimensions and degrees in IHRL, international environmental law and IIL. Despite the specialisations in international law, the sustainable development agenda is cross cutting and public participation is evidently at the core of realising the right to development. Hence, public participation in IIL ought to evolve to balance the competing interests of investors and host states in a bid to ensure that human rights are protected.

Further, the potential positive contribution of IIL to sustainable development should not be ignored. Nonetheless, the right of a state to exercise sovereignty over natural resources ought not to be undermined in the process. It is not only a right but a duty the host state owes to its citizens when

[236] UN General Assembly Resolution 1803 (XVII) of 14 December 1962

[237] UN General Assembly Resolution 3281(XXIX), chapter 2 art 2
[238] UN General Assembly Resolution S-6/3201
[239]World Bank available at https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups (accessed 7 September 2021)
[240]See eg Morocco Nigeria BIT (2016), art 23

negotiating IIAs to ensure that flexibility is maintained to allow for regulatory autonomy for public interest legislative action and policy decisions.

CHAPTER FOUR

PUBLIC PARTICIPATION IN INTERNATIONAL INVESTMENT LAW NORMATIVE PROCESSES AND DECISION MAKING IN KENYA

4.1. Introduction

At the heart of Kenya's development agenda is the attraction of FDI. Due to increasing competition to attract foreign investors among developing countries, the government of Kenya continues to improve its investment climate to attract FDI in targeted sectors such as natural resource exploitation, development and infrastructure development, energy and extractives, among others. Private capital from foreign investors has been an important source of development financing due to existing public budgetary constraints.

According to the World Bank, Kenya recorded the highest FDI net inflows of approximately 1.45 billion US dollars and 1.626 billion US dollars in 2011 and 2018 respectively.[241] Indeed, the contribution of FDI to Kenya's economic growth has been increasing but is still low.[242] Additionally, Kenya is still a lower middle income country with a higher poverty rate than other lower middle income countries of approximately 35%.[243] To maximise the impact of FDI on sustainable development, public participation is one of the core principles that ought to be promoted.

Therefore, this chapter examines the implementation of the right to public participation in foreign investment activities in Kenya. Particularly, it analyses the extent to which the public is involved in normative processes such as investment treaty making and conclusion of investor-state contracts. Generally, some of the public participation opportunities include stakeholder engagement, public consolations, public hearings and meetings, media platforms, petitions to parliament, lobbying, litigation, the right to access to information, and submission of comments to parliamentary committees. Even with the existence of numerous public participation opportunities, this study argues that public authorities often fail to implement public participation in IIL norm creation and exclude the public

[241]World Bank available at https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?locations=KE (accessed 9 September 2021)
[242] n 31 above 6163
[243]World Bank publication available at https://www.worldbank.org/en/country/kenya/publication/kenya-economic-update-poverty-incidence-in-kenya-declined-significantly-but-unlikely-to-be-eradicated-by-2030 (accessed 9 September 2021)

from taking part in decision making that affects their human rights. IIL normative processes remain shroud in secrecy and public input has not been prioritised as it should.[244]

4.2. Investment Treaty Making in Kenya

Public participation is a mandatory requirement in the treaty making process in Kenya and is governed by the TRMA. The national executive, particularly the Ministry of Foreign Affairs initiates the treaty making process.[245] Although the TRMA does not expressly require public participation to be conducted at this point, it provides that the negotiations are bound by constitutional principles and must take into consideration the regulatory impact of the treaty.[246] Undisputedly, public participation is one of the core constitutional principles that bind relevant state officers in treaty negotiation.

Further, when a treaty is presented for approval by Cabinet, it must be accompanied by a memorandum outlining public views on ratification of the relevant treaty, financial implications of the treaty, national interests that may be affected, among others issues.[247] After cabinet approval, the treaty and memorandum are presented to the National Assembly for consideration and ratification.[248] In considering the treaty, the relevant parliamentary committee is obligated to ensure that public participation is undertaken before the treaty can be ratified.[249] Whereas public participation in national law making has become a common practice and where lacking, domestic legislation is challenged in court on grounds of procedural unconstitutionality, the same is not reflected in the treaty making practice.

The perception that treaty making is an elitist and technical process that a lay person would not comprehend, and whose input may cumbersome to obtain seems to prevail. With adequate resources to facilitate information dissemination and education of local communities, public participation can be effectively implemented. It is worth noting that the public is hardly ever informed when Kenya is negotiating international investment treaties. Evidently, Kenya has signed and ratified BITs with Japan, United Arab Emirates, Korea, and Kuwait post the promulgation of the COK. Information about the negotiation and ratification processes of the 4 BITs generally not in the public domain. It would have been expected that the 4 BITs reflect the recent developments in new generation IIAs such as

[244] 'Why citizen engagement is critical for East Africa oil and gas sector' Business Daily 23 November 2020
[245] TRMA, s 5 (1)
[246] TRMA, s 6 (1)
[247] TRMA, s 7
[248] TRMA s 8 (1)
[249] TRMA, s 8 (3)

references to investor human rights obligations in the host state, but none of them contains such provision.[250]

Notably, the TRMA defines a bilateral treaty as an agreement signed between Kenya and another State.[251] It further provides that the TRMA applies to bilateral treaties which deal with among other matters, the environment and natural resource, and the rights and duties of Kenyan citizens.[252] Nevertheless, it includes a stand-alone provision that allows the government of Kenya to enter into bilateral agreements relating to administrative, technical or executive matters.[253] The Court's interpretation regarding this provision is that the drafters of the TRMA intended that a differentiation is struck between a treaty and an international agreement, which would then imply that international agreements may not require public participation before they are entered into.[254] In this case, the High Court of Kenya placed the burden upon the petitioners to show that public participation is a mandatory requirement in the signing of international agreements.[255]

A relevant case study in this regard is the recently signed Kenya- United Kingdom EPA 2020.[256] Before its ratification, it was reported that Parliament of Kenya had been reluctant to ratify the agreement without joint statements from both governments and full details of the goods covered.[257] Further, a group of small scale farmers with the support of a non-partisan advocacy organisation in Kenya challenged the EPA in court on grounds that it has far reaching consequences on local farmers and yet, it was not subjected to public scrutiny as required under the COK.[258] This was an unprecedented move whose impact on trade and investment treaty-making is yet to be examined after the court case has been heard and determined. Notwithstanding, the Kenya-UK was ratified and is now in force. The EPA has been notified at the World Trade Organisation as a Free Trade Agreement under Article 24 of the General Agreement on Tariffs and Trade.[259]

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[250]BITs signed and ratified by Kenya after 2010 available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/108/kenya?type=bits(accessed 9 September 2021)
[251] s 2
[252] s 3 (b)
[253]s 3 (4)
[254] See *Tax Justice Network Africa v Cabinet Secretary for National Treasury & 2 others* [2019] eKLR Petition 494 of 2014
[255] As above, para 38
[256]Kenya-UK EPA 2020 available at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/tips/4940/kenya---united-kingdom-epa-2020- (accessed 9 September 2021)
[257]Anjarwalla & Khana analysis available at https://www.africalegalnetwork.com/kenya/news/legal-alert-parliament-kenya-finally-green-lights-kenya-uk-trade-deal/ (accesses 9 September 2021)
[258] See Bilaterals.org report available at https://www.bilaterals.org/?kenya-small-scale-farmers-forum (accessed 9 September 2021)
[259]World Trade Organization Regional Trade Agreements Database http://rtais.wto.org/UI/CRShowRTAIDCard.aspx?rtaid=1134 (accessed 1 September 2021)

It may be argued that there is lacking lacks political goodwill to implement the right to public participation in investment treaty-making. The impunity by public authorities acting procedurally and not in the best interests of Kenyan citizens is evident. In fact, according to media reports, Kenya is currently negotiating an EPA with the European Union[260] and a Free Trade Agreement covering both trade and investment with the United States of America.[261] The degree of transparency and public participation in treaty negotiations is questionable.

4.3. Public Involvement in Investment Contracts

Foreign investment activities are common in energy exploration, natural resource exploitation, and development and infrastructure projects in Kenya. Since such projects are financially intensive, the government seeks to engage foreign investors who can provide private capital. This is done through conclusion of concession agreements, issuance of licences, public procurement processes, and more recently public-private partnership agreements. The applicable laws include the Mining Act 2016[262] which governs mineral exploration, the Energy Act 2019[263] which governs the energy sector including renewable energy, the Public Procurement and Assets Disposal Act 2012[264] which governs public procurement and the Public Private Partnerships Act 2013[265] which governs PPP development or infrastructure projects.

PPP projects in Kenya have attracted an increasing number of foreign investors in Kenya. There are currently about 64 PPP projects at different phases with the highest projects in the transport and infrastructure sectors worth approximately 6477. 81 million US dollars.[266] Generally, the negotiation of PPP agreements is contractual in nature and not subject to public participation. However, it has been opined that investor-state contracts are social contracts with which governments enter into through the sovereign power of the people.[267] On this premise, it is important that the public is involved in decision making at different stages of a project life cycle, especially the local communities whose rights may

[260] European Commission https://trade.ec.europa.eu/doclib/press/index.cfm?id=2279 (accessed 1 September 2021)
[261] Ministry of Industrialization, Trade and Enterprise Development https://www.industrialization.go.ke/index.php/kenya-usa-free-trade-area-agreement/580-joint-statement-between-the-united-states-and-kenya-on-the-launch-of-negotiations-towards-a-free-trade-agreement (accessed 1 September 2021)
[262] Act 12 of 2016
[263] Act 1 of 2019
[264] Act 33 of 2015
[265] Act 15 of 2013
[266] PPP Unit available at http://portal.pppunit.go.ke/ (accessed 1 September 2021)
[267] F Onditi, 'The balance between resource development and environmental protection is "Social Contracting": The case of LAPSSET project in Kenya' (2019) 4 *Environment and Social Psychology* available at http://dx.doi.org/10.18063/esp.v3.i1.597

be directly impacted. Contracting public authorities are obligated to conduct feasibility studies on the social, environmental and economic impact of an approved project before it is implemented.[268]

4.3.1. LAPSSET Project

One of the most controversial projects that has attracted foreign investors such as the China Communications Construction Company Limited, and is currently under implementation through several PPP agreements in Kenya is the LAPSSET mega transport and infrastructure project.[269] The LAPSSET project consists of a number subsidiary components including a port in Manda Bay in Lamu, standard gauge railways lines, crude oil pipelines, international airports and highways in the north-eastern region of Kenya. Despite the potential social and economic growth opportunities that the LAPSSET project promises, the residents of Lamu, where implementation of the project has already begun, have expressed dissatisfaction over the implementation of the project.

The local communities in Lamu instituted a constitutional petition to challenge the implementation procedure and human rights impact of the LAPSSET project in the case of *the Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR.*[270] The court held that indeed LAPSSET project had procedural infirmities and negative human rights impacts of the indigenous communities living in Lamu. Particularly, the court found that the environmental impact assessment was inadequate and the right of the local communities to a clean and healthy environment were potentially at risk of violation.

Further, the court found that the people of Lamu was not provided with relevant information concerning the project to enable them participate in decision making, hence their right to information was violated. The court also found that the traditional fishing rights of more than 4,700 local fishermen in Lamu were going to be adversely affected hence the government was required to fully and promptly compensate them as stipulated under Article 40(3) of the COK. Notably, the court highlighted the special rights application required for indigenous communities whose livelihoods depend on the proper implementation of the project as well as the environment.

The court emphasised that development projects with significant linkage between social and economic considerations require proactive and a higher degree of decision making.[271] Given that Lamu is a

[268] Public Private Partnerships Act 2013, s 33 (1) & (2)
[269]Brief on the LAPSSET Corridor Project July 2016 available at https://s3-eu-west-1.amazonaws.com/s3.sourceafrica.net/documents/118442/LAPSSET-Project-Report-July-2016-1.pdf
[270] Petition 22 of 2012
[271] Para 186

United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage site[272], the government violated the rights of the residents of Lamu to culture when it failed to prepare a management plan to presence the island's cultural identity. Essentially, the Court did not oppose the project but instead opposed its implementation procedure and issued orders that would enable continuation of the project and remedy the negative impacts. It affirmed that public participation is a real process that involves all social actors in decision making that potentially affects communities' survival and livelihoods.[273] Since the decision in 2018, the local fishermen in Lamu are still waiting to be compensated[274], yet the Lamu Port was already lunched and in operation.[275]

4.3.2. Tullow Crude Oil Project in Turkana Region

Another controversial foreign investment project arising from a mining exploration agreement is the Tullow Oil exploration project in Turkana. The discovery of oil in the Turkana region of Kenya in 2012 triggered confidence in the beginning of a lucrative investment.[276] One of the poorest and under-developed regions occupied by marginalised pastoralists communities in Kenya became the centre for attraction. British company, Tullow Oil was contracted to explore the crude oil by the Kenyan government. Due to lack of inclusive and effective public participation and the lack of a fair revenue sharing scheme, the project became a breeding ground for community-investor conflicts.[277] Reports have been published on the increasing wrangles in Turkana by local pastoralists feeling dissatisfied over exclusion from decision making affecting their pastoral lands and livelihoods.[278] Fluctuating oil prices, reduction of oil volumes and costly local community conflicts has dis-incentivised foreign investors as some express their interests to sell their investments.[279]

Lessons learnt from this project and public pressure on government to ensure proper management of natural resources later saw the enactment of the Mining Act 2016 and the Natural Resources (Classes of Transactions Subject to Ratification) Act 2016. Pursuant to the provisions of the Mining Act, the Mining (Community Development Agreement) Regulations 2017 were enacted for the purpose of ensuring that revenue is equitable shared between investors and local communities, mining

[272] UNESCO available at https://whc.unesco.org/en/list/1055 (accessed 1 September 2021)
[273] Para 211
[274] 'Lobbies push for fishermen affected by Lamu Port pay-out' *The Star* 6 June 2021 available at https://www.the-star.co.ke/counties/coast/2021-06-06-lobbies-push-for-fishermen-affected-by-lamu-port-payout/
[275]Kenya Ports Authority available at https://www.kpa.co.ke/Pages/Lamu-Port-Commissioning.aspx (accessed 1 September 2021)
[276]'Kenya's first crude oil export sparks demand over revenue sharing' *Reuters* 26 August 2019
[277] KM Agade, ''Ungoverned Space' and the Oil Find in Turkana, Kenya' (2014) 103 (5) *The Commonwealth Journal of International Affairs* 497-515
[278] 'Tullow regains cites after seizures by locals' *Business Daily* 2 August 2017
[279] 'What is in store for Turkana oil as investors depart?' *Business Daily* 11 February 2020

significantly improves the socio-economic well-being of local communities, and that there is transparency and accountability in mining that is linked to community development.[280]

The Natural Resources (Classes of Transactions Subject to Ratification) Act was passed pursuant to Article 71 of the COK that requires parliamentary scrutiny over concession agreements relating to the exploitation of natural resources. Muigua[281] questions some of provisions under the Natural Resources (Classes of Transactions Subject to Ratification) Act particularly those exempting concessions to private persons for the exploitation of natural resources through a contract or an agreement. Muigua argues that in light of rampant corruption, such exemption provisions could potentially be abused by public authorities.[282]

The intentions of Parliament to exempt some of the agreements is questionable especially since the COK did not contemplate exemptions to agreements on natural resources, defined in a non-exhaustive list of renewable or non-renewable natural resources. Nonetheless, parliamentary scrutiny for the non-exempt agreements ensures some level of checks and balances over the executive powers to the benefit of the public, a form of public participation in the context of IIL.

4.4. Obstacles to Effective Public Participation in Foreign Investment Projects in Kenya

Besides lack of political goodwill to implement public participation, there are other impediments to effective public participation in foreign investment projects. A minimalism attitude amongst public authorities where public participation is undertaken for compliance only diminishes the importance placed on the right to public participation. Hence, public participation is implemented quantitatively as a checkbox requirement to avoid public interest litigation.

Language barrier and low literacy levels especially in the rural parts of Kenya occupied by minority groups and marginalised communities is also a challenge. Poverty and inadequate resources also hinders the participation of local communities who lack access to online and print media, lack access to courts and government offices. Some of these challenges were meant to have been mitigated by the introduction of a devolved government. However, poor coordination between national and county governments has been one of the impediments to public participation. Evidently, one of the issues

[280] Mining (Community Development Agreement) Regulations 2017, rule 3
[281] K Muigua, 'Enhancing Benefits from Natural Resources Exploitation: An Appraisal of the Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act, 2016' (August 2019) available at http://kmco.co.ke/wp-content/uploads/2019/08/Enhancing-Benefits-from-Natural-Resources-Exploitation-Kariuki-Muigua-31st-August-2019.pdf
[282] As above at 6-8

raised in the LAPSSET project case was failure by the national government to involve the Lamu county government in the planning and implementation of the project.

A similar issue of poor coordination between the national and county government arose in the Mui Basin coal exploration project that was commenced by the Ministry of Energy in 1999 through a concession agreement awarded to foreign Chinese company.[283] Mui is located in Kitui county, a semi-arid region in Kenya occupied by marginalised Kamba communities living in poverty. The project required compulsory acquisition of land by the government and was to be implemented over a period of 42 years. The local community in Mui Basin filed several domestic suits to challenge the mining project on grounds that the concessioning process was shroud with secrecy and that due diligence and adequate public participation were lacking.[284]

In finding that the project was implemented without adequate public participation, the court called out the Kitui County Government for failing to take seriously its role in facilitating public participation of Mui community and co-operating with the national government to ensure the interests of the people are well respected.[285] The status and way forward concerning the Mui Basin coal project is yet to be established[286], after the court ordered the relevant ministry, the foreign investor and the Attorney General to engage the public in the environmental and social impact assessment as well as the resettlement processes pursuant to the project benefits sharing agreement.[287]

Lack of transparency and access to information makes it difficult for Kenyans, including those with high literacy levels to participate in governance. IIAs are hardly in the public domain, and in the case of BITs, they are only published after they have been signed and ratified. Information on feasibility studies on projects is also quite scanty despite being a mandatory requirement. Lastly, citizen apathy has also been an obstacle in the implementation of public participation. A lack of enthusiasm and indifference to participate in governance due to some of the hurdles already discussed has a counterproductive impact since it then encourages a minimalistic attitude amongst public officials. Ultimately, the duty to exercise the right to public participation lies on the public.

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[283] Centre for International Environmental Law 'Coal mining disrupts people's livelihoods in Mui Basin, Kenya' (2017) available at https://www.ciel.org/wp-content/uploads/2017/11/Coal-mining-disrupts-peoples-livelihoods-in-Mui-basin-Kenya.pdf

[284] *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR* Constitutional Petition 305 of 2012, 34 of 2013 & 12 of 2014(Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated)

[285] Para 101-107

[286] 'Kenya undecided on mining coal in Kitui's Mui Basin' *The Star* 02 September 2020

[287] Para 140

4.5. The Role of Non-State Actors in Promoting Public Participation

Local and international civil society organisations have played a critical role in enhancing public participation in investment and development projects in Kenya. CSOs support local communities lacking resources in enforcing their human rights through domestic litigation. A good example is the Lamu Coal Power Plant project that was halted[288] after Save Lamu with the support of Natural Justice and Katiba Institute, NGOs working in Kenya, successfully challenged implementation of the project at the National and Environmental Tribunal[289], on the basis of lack of participation in the environmental impact assessment as well as the adverse environmental and human rights impacts the project would have had on the local communities.[290] UNESCO also played a critical role in publicising and raising awareness amongst the international community on the social and environmental impact of the Lamu coal power project has it been implemented.[291] This exerted pressure on the Kenyan government to halt the project and the Chinese financiers thereafter withdrew from the project.[292]

Additionally, CSOs play a role in capacity building amongst local communities on their human rights. They also support local communities to participate in legislative process through translating bills tabled in parliament into local languages, and provide expert advice on the implications of the laws once passed. CSOs also engage in advocacy and lobbying activities on government actions that would impact environmental and human rights. Such campaigns indirectly persuade the government into engaging with the public in projects ultimately enhancing transparency and accountability in governance.

Therefore, it would be prudent for the government to cooperate with CSOs in promoting and enabling local communities participate in IIL normative processes and decision making. Effective public participation not only ensure that human rights considerations are made but also build public confidence in investment projects. With public confidence comes social approval which ultimately creates and enabling environment for FDI to flourish for the benefit of all stakeholders.

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[288] 'Kenya halts Lamu Coal Power Project at World Heritage Site' *BBC* 26 June 2019

[289] *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another [2019] eKLR* Tribunal Appeal Net 196 of 2016

[290] Natural Justice available at https://naturaljustice.org/reflections-of-the-lamu-coal-plant-case/ (accessed 1 September 2021)

[291] UN Environment, 'The Impacts on Community of the Proposed Coal Plant in Lamu: Who, if anyone benefits from fossil fuels?' Issue 31 available at https://wedocs.unep.org/bitstream/handle/20.500.11822/25363/Perspectives31_ImpactCoalPlantLamu_28032018_WEB.pdf?sequence=1&isAllowed=y

[292] 'Lamu coal plant's biggest investor abandons project' *The Star* 18 November 2020

4.6. Conclusion

It is plausible to conclude that the right to public participation in IIL norm creation and in the implementation of foreign investment projects is an illusionary right in Kenya. Despite the avenues for public participation created under the COK and various other legislations, these opportunities are not adequately utilised. Some of the obstacles include the inadequacy of public resources to implement public participation programs, lack of political goodwill and a minimalist 'compliance only' attitude that fails to appreciate the objective behind the principle.

For the local communities to participate meaningfully in IIL normative processes and project scrutiny, they need to have access to timely and comprehensible information. Further, they need to be provided with opportunities to consult with each other and present their views to the relevant stakeholders. Additionally, the right to public participation is not merely consultation but includes consideration of views which ultimately influences the decisions made. Last but not least, the government must follow the laid down procedures on IIAs making and held accountable when the IIAs fall short of the constitutional and legislative standards.

CHAPTER FIVE

RE-EXAMINING INVESTOR-STATE ARBITRATION AS A DISPUTE SETTLEMENT MECHANISM IN INTERNATIONAL INVESTMENT LAW: A PLACE FOR HUMAN RIGHTS?

5.1. Introduction

Investor-state arbitration has predominantly been the investor-preferred dispute settlement mechanism and generally arises from dispute settlement clauses in IIAs. Little attention has been paid to the public dimensions of investor-state disputes and as a result, scholars are increasingly questioning its legitimacy.[293] The ISDS system, in its nature, was not designed to accommodate business-related human rights claims. It was designed as a mechanism for foreign investors to enforce their rights against host states, yet another manifestation of the IIL asymmetry. Hence, it has been noted that the conventional paradigm of international investment arbitration as a dispute settlement mechanism for exclusive protection of investor rights does not reflect the evolving dimensions of investment disputes.[294]

In IIA negotiations, host states commit to extensive obligations similar commitments from foreign investors, save for the right to regulate in a few instances. Consequently, local communities directly impacted by foreign investment activities lack legal standing to initiate arbitral proceedings to enforce their rights. The substantive provisions of IIAs providing for ISDS through international arbitration empower foreign investors to challenge host state regulatory powers exercised in pursuit of legitimate public policy matters.

As observed in previous chapters, public participation in IIL normative are by and large conducted without meaningful public participation. On this premise, it may be argued that the ISDS system lacks social license as a dispute resolution mechanism in IIL. Access to justice is one of the SDGs.[295] Similarly, the third pillar of the UNGPs enshrines the duty of states to guarantee access to remedy for the enforcement of business-related human rights claims. Evidently, the ISDS system is restricted and exclusionary in this regard; hence the need for its evolution and reform.

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[293]C Lorenzo, 'Reforming investor-state dispute settlement: what about third-party rights?' (2019) *International Institute for Environment and Development* available at https://pubs.iied.org/sites/default/files/pdfs/migrate/17638IIED.pdf

[294] T Ishikawa, 'Counterclaims and the Rule of Law in Investment Arbitration' (2019) 113 *American Journal of International Law* 33

[295] SDG 16 https://sdgs.un.org/goals/goal16

Therefore, this chapter examines the changing landscape in international investment arbitration under investor-state arbitration and evaluates whether it adequately responds to emerging human rights concerns in IIL. It argues that although there have been progressive reforms such as transparency rules and participation by non-disputing parties (NDPs) in the ISDS system, among others, these reforms remain very limited and unresponsive to the core substantive issues. Hence, it highlights alternative grievance mechanisms that are arguably more accessible, participatory and responsive to human rights concerns in the IIL regime. Further, this chapter examines Kenya's interaction with the ISDS system as a host state in protecting public policy concerns.

5.2. Investor-State Arbitration and Human Rights

Though distinct, investor-state arbitration and international commercial arbitration are quite similar. They are both commercial and private modes of international arbitration grounded on the principles of confidentiality and party autonomy.[296] However, investor-state arbitration is special because, although both the host state and foreign investor are commercial actors in the arbitration proceedings, the host state is also a sovereign representing its people. For this reason, some scholars have characterised it as a type of 'global administrative law'[297] In addition, the challenged state actions in a majority of the ISDS cases are usually linked to the exercise of sovereign regulatory power on behalf of the public.[298] Further, it is local communities that are directly impacted by foreign investment activities and tax payers' money that is at stake when arbitral awards are issued against host states.

Bearing in mind that developing countries are mostly capital-importing in FDI activities, ISDS fails to factor the intersection between public policy matters and private commercial interests. Inaccessibility of the ISDS system to individuals or local communities impacted by FDI activities robs them of their right to access to justice. Whereas foreign investors can enforce their rights through this system, the public cannot do the same. As a result, the ISDS system is increasingly criticised and perceived as an imbalanced, exclusive, and illegitimate investment dispute settlement mechanism.[299] Further, IIAs and arbitral procedure rules grant tribunals wide discretion to evaluate domestic laws and policies in the host state, sometimes without an appreciation of contextual public objectives behind them.

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[296] A Galindo & A Elsisi, 'Non-Disputing Parties' Rights in Investor-State Dispute Settlement: The Application of the Monetary Gold Principle' (2021) in KF Gomez (ed) in *Private Actors in International Investment Law*, European Yearbook of International Economic Law 175

[297] GV Harten & M Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 *European Journal of International Law* 121-150

[298] n 296 above at 176

[299] C Lorenzo & M Schroder, 'Community Perspectives in Investor-State Arbitration' (2017) *International Institute for Environment and Development* 10-17 available at http://pubs.iied.org/sites/default/files/pdfs/migrate/12603IIED.pdf

It is not uncommon for arbitral tribunals to be faced with public interest issues such as human rights claims, either raised by host states as respondents in arbitral proceedings instituted by foreign investors, or in some cases host state counterclaims. Environmental rights, access to water rights, rights of indigenous peoples, right to health, land rights, among others are quite prevalent.[300] It has been noted that text references of human rights in investment treaties are rare, whereas in investment arbitration, such references are infrequent and exiguous.[301] Nevertheless, human rights issues are gradually gaining traction in investment arbitration even though it may not be well articulated or fully acknowledged.[302] Some scholars have also observed that arbitral tribunals are neither fully ignoring human rights claims nor completely embracing them; a situation that has heightened the legitimacy criticisms of the ISDS.[303]

5.2.1. Amicus Curiae Submissions

Public outcry and pressure from civil society organisations on the participatory deficit in investment arbitration led to the recent inception of amicus curiae submissions in investment arbitration.[304] Amicus curiae submissions are now often utilised as a mechanism to raise human rights claims in ISDS.[305] Admission of amicus curiae is one of the developments in investment arbitration that has increased participation by NDPs, in very constrained circumstances and with limited impact on business-related human rights enforcement.

The amicus curiae practice at the International Centre for Settlement of Investment Disputes (ICSID), the commonly used forum for investor-state arbitration, is governed by ICSID Convention Arbitration Rules 2006.[306] Under the rules, arbitral tribunals have the discretion either to admit or deny participation by amicus curiae subject to obtaining the consent from the disputing parties.[307] Further, amicus participation is centered on assisting the arbitral tribunal through submission of expert

[300] S Nappert & N Tuzheliak, 'Politics of Public Participation in Investment Arbitration' in De BE Gazzini & A Kent (eds) *Public participation and Foreign Investment Law: From the Creation of Rights and Obligations to the Settlement of Disputes* (2021) 401-402
[301] C Reiner & C Schreuer, 'Human Rights and International Investment Arbitration' in PM Dupuy et al (eds) *Human Rights in International Investment Law and Arbitration* (2009) 82.
[302] B Simma 'Foreign Investment Arbitration: A place for Human Rights?' (2011) 60 *International & Comparative Law Quarterly* 578
[303] SL Karamanian, 'The Place of Human Rights in Investor-State Arbitration' (2013)17 (2) *Lewis & Clark Law Review* 423
[304] KF Gomez, 'Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest' (2012) 35 *Fordham International Law Journal* 523-524
[305] U Kriebaum, 'Human Rights of the Population of the Host State in International Investment Arbitration' (2009) 10(5) *Journal of World Investment & Trade* 655
[306]ICSID available at https://icsid.worldbank.org/resources/rules-and-regulations/convention/arbitration-rules (accessed 12 September 2021)
[307] Rule 32(2)

arguments and perspectives that disputing parties did not raise but limited to the issues in dispute.[308] Similarly, provisions on admission of NDPs are included in the United Nation Commission on International Trade Law (UNCITRAL) Arbitration Rules updated in 2013.[309]

Essentially, an amicus is not a party to a dispute and their participation in arbitral proceedings requires the consent of the disputing parties; which is denied in some cases.[310] In cases where amicus submissions are admitted, their impact may be limited. Nonetheless, they can be a strategic driving vehicle to advance human rights considerations in the ISDS system. For instance, in the *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania case*[311] the arbitral tribunal admitted a group of NGOs as amici but curtailed their participation by maintaining confidentiality of the arbitral proceedings. Nonetheless, the amici filed submissions on the right to clean and safe water to support Tanzania's action to terminate their agreement with the foreign investor. Even though the tribunal found Tanzania to be in violation with its BIT with the UK, it declined to award the foreign investor monetary damages.

It has been noted that there lacks systemic evidence on the difference amicus submissions make in arbitral proceedings, if any.[312] Nonetheless, perhaps with time and recurrence of amici participation in ISDS, investor human rights obligations may feature more in new generation IIAs and arbitral tribunals would have broader jurisdiction to consider human rights claims. However, this would still need to be coupled with ISDS procedural reforms that allow private actors direct access to institute human rights claims on behalf of local communities.

5.2.2. Counterclaims

Given the deficiencies of the ISDS system in addressing human rights issues, counterclaims can potentially play an important role in bridging this gap.[313] It has been opined that counterclaims attempt to counterbalance the investor-state arbitration asymmetry and facilitate equality between parties, and when rendered in one forum, enhance efficiency in ISDS.[314] A host state, as a party with standing in investor-state arbitration, can initiate a counterclaim in an existing dispute on behalf of its people.

[308]B Miller et al, 'Guide for Potential Amici in International Investment Arbitration' (January 2014) available at https://ciel.org/Publications/Guide_PotentialAmici_Jan2014.pdf
[309]art 17 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf
[310]See eg Decision on Respondent's Objections to Jurisdiction in *Aguas del Tunari, S.A v. Republic of Bolivia*, ICSID Case ARB/02/3; see also *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co.(Private) Limited v. Republic of Zimbabwe,* ICDID Case ARB/10/25
[311] ICSID Case ARB/05/22
[312]n 38 above at 379
[313]n 294 above at 35
[314]Y Kryvoi, 'Counterclaims in Investor-State Arbitration' (2012) 21 2 *Minnesota Journal of International Law* 216-225

However, there are procedural rules that would enable an assertion of the right of a host state to counterclaims.

Firstly, consent by parties to jurisdiction over counterclaims in a BIT must be established. Foreign investor who would be the claimant in an investor- state dispute needs to consent to the right to counterclaim established from the arbitration clause in an investment treaty.[315]Secondly, the counterclaim must meet the requirements of the ICSID Convention. It requires that the counterclaim arises directly from the dispute subject matter, within the scope of consent of the parties and within the jurisdiction of ICSID.[316]

It has been observed that even though host state counterclaims against foreign investors are often rejected on the basis of lack of jurisdiction and in other cases unsuccessful on their merits, there is some evidence to show that this practice is gradually evolving.[317] For example, in the case of *Urbaser S.A and Consorcio de Auguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*[318], the arbitral tribunal accepted jurisdiction over Argentina's human rights counterclaim on the basis of a broad arbitration clause and assessed the merits of the counterclaim. Notably, the arbitral tribunal in this case upheld that non-state actors are bound by IHRL even though the counterclaim was unsuccessful.

Therefore, despite the piecemeal evolution of counterclaims, its potential in advancing human rights in investor-state arbitration ought not be downplayed. Counterclaims present an opportunity for host states to protect human rights pursuant to IHRL obligations.

5.2.3. Transparency

Undeniably, confidentiality is an important tenet of international arbitration. Particularly, investor-state arbitration is to a great extent an exclusive and confidential practice characterised by a high degree of opacity and lack of transparency.[319] It has been observed that arbitral proceedings are in most cases conducted in private, access to party submissions is restricted, arbitral awards are often not published, and those that are published have redacted material, and NDPs participation in proceedings is very

[315] AK Hoffman, 'Counterclaims in Investment Arbitration' (2013) 28 2 *ICSID Review* 445-448
[316] ICSID Convention, art 46
[317] E Brabandere, 'Human rights counterclaims in investment treaty arbitration' (2017) 50 *2 Revue Belge de Droit International Belgian Review of International Law* 591-611
[318] ICSID Case ARB/07/26
[319]DB Magraw & NM Amerasinghe, 'Transparency and Public Participation in Investor- State Arbitration' (2009) 15 2 *ILSA Journal of International & Comparative Law 341-343*

limited.[320] However, given the special character of ISDS and the public interest dimensions of the regime, some degree of transparency becomes important. Seemingly, the ISDS is search of legitimacy that can only be achieved with greater transparency and more predictability.[321]

The transparency frameworks at the UNCITRAL and ICSID differ. ICSID adopts a consent-based transparency and confidentiality practice that is tailor made by parties.[322] However, ICSID is working towards amending its rules to increase transparency.[323] On the other hand, UNCITRAL adopts a more robust rule-based transparency framework whose applicability is subject to adoption by parties.[324] Particularly, UNCITRAL adopted the UNCITRAL Convention on Transparency in Treaty- based Investor- State Arbitration (the Mauritius Convention), which entered into force in 2017 with an aim of promoting extensive application of the UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration (Transparency Rules)[325] intended to increase transparency and accessibility of investor-state arbitration to the public. The Transparency Rules apply subject to states' ratification of the Mauritius Convention for investment treaties concluded before 1 April 2014.[326]

Therefore, in comparison, ICSID transparency rules appear to provide a lower degree of degree or standard of transparency since at least the UNCITRAL guarantees a certain minimum threshold. Nonetheless, both forums still predominantly uphold confidentiality and party autonomy and to a large extent remain opaque.

5.3. UNCITRAL Working Group III Reforms

The UNCITRAL Working Group III is one of the ISDS system reform initiatives within the auspices of the UN. In 2017, UNCITRAL Working Group III was tasked with identifying ISDS reform areas through a government-led, research-based, and stakeholder-inclusive process.[327] Working Group III reforms are largely focused on the procedural aspects of the ISDS, hence limited and still unresponsive to business and human rights concerns in developing countries. 4 years later, after consultation with

[320] G Ruscalla, 'Transparency in International Arbitration: Any (Concrete) Need to Codify the Standard' (2015) 3(1) *Groningen Journal of International Law* 2-5
[321] n 88 above at 33
[322]ICSID available at https://icsid.worldbank.org/services/arbitration/convention/process/confidentiality-transparency (accessed 12 September 2021)
[323]ICSID available at https://icsid.worldbank.org/resources/rules-amendments (accessed 12 September 2021)
[324]UNCITRAL available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf (accessed 12 September 2021)
[325]https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/transparency-convention-e.pdf (accessed 12 September 2021)
[326] Mauritius Convention, art 1
[327] https://uncitral.un.org/en/working_groups/3/investor-state (accessed 12 September 2021)

states to identify possible areas of reform, the UNCITRAL Secretariat acknowledges that the ISDS system requires broader systemic reforms that address human rights issues and promote of the SDGs.[328] Nonetheless, issues relating to inaccessibility of the ISDS to local communities impacted by investment activities have still taken a back seat in the reform agenda.

Additionally, the contributions of African countries to the Working Group III have been minimal[329] yet they arguably stand to benefit most should the reforms address most of the identified issues by virtue of being capital-importing countries. It is worth noting some critical human rights concerns raised by South Africa in its submissions to the working group. Particularly, South Africa proposes an approach to reform that begins with redefining the purpose of the IIL regime to reflect a conscious recognition of sustainable development through fostering and facilitating responsible investment that respect and protection of human rights.[330] Further, South Africa challenges states to question the necessity or otherwise of the ISDS system noting that it was stopgap in cases of host state maladministration and was not a substitute for domestic dispute settlement mechanisms.[331]

In concurring with South Africa's submissions, ISDS reforms ought to begin with the substantive law that establishes investor-state arbitration in the first place; which is the IIAs signed by states. This goes to buttress the need to enhance democratic legitimacy in IIL normative processes through incorporating mandatory public participation.

5.4. Hague Rules on Business and Human Rights Arbitration

Another notable development is the Hague Rules on Business and Human Rights Arbitration (Hague Rules) launched in 2019[332] by a private working group of academics and international lawyers known as the Business and Human Rights Arbitration working group. The Hague Rules apply specifically to business-related human rights claims against investors.[333]

Despite the fact that The Hague Rules fill a critical gap by providing a unique and innovative procedure that gives effect to pillar 3 of the UNGPs, they are still based on conventional arbitration principle of

[328]See Contribution of the Secretariat of the UNCITRAL (21 April 2021) available at https://www.ohchr.org/Documents/Issues/Business/WG/Submissions/Others/UNCITRAL.pdf
[329]Submissions to Working Group III made by South Africa, Burkina Faso and Morocco https://uncitral.un.org/en/working_groups/3/investor-state
[330]Submission from the Government of South Africa to UNCITRAL Working Group III, 4-5 available at https://undocs.org/en/A/CN.9/WG.III/WP.176 (accessed 12 September 2021)
[331] Ibid, para 37
[332]Hague Rules 2019 available at https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf
[333]Centre for International Legal Cooperation available at https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/ (accessed 12 September 2021)

party consent. They would only be applicable if parties consent to them in the relevant IIAs. Therefore, their impact can only be assessed in the future should a practice emerge of their inclusion in IIAs.

5.5. Kenya ICSID Cases

Kenya's interaction with investor-state arbitration at the ICSID has been in 3 cases where Kenya was a respondent in claims initiated by foreign investors. Notably, the arbitral awards were all in favour of Kenya. The first case was the *World Duty Free Co. Ltd. v Republic of Kenya case*.[334] In this case, ICSID issued an award in 2006 dismissing the claimant's claim on the basis of corruption which was against public policy on corruption both in Kenya and internationally.[335]

The second case was the *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya* case.[336] In this case, the claimants instituted proceedings against the Kenyan government for its action to suspend the companies' mining licenses that allowed them to operate in Kenya. In 2018, the arbitral tribunal dismissed the claim with costs awarded in favour of Kenya. It upheld that environmental impact assessments are a mandatory requirement before a mining license is issued under Kenyan law.[337]

The most recent and final case is the *WalAm Energy LLC v The Republic of Kenya* case.[338] In this case WalAm Energy LLC instituted a claim against Kenya for its action to remove its license to exploit geothermal energy pursuant to a concession agreement. In dismissing the case, the arbitral tribunal found that the licence was validly removed since Kenya acted within its legal powers in invoking the right to forfeit the license due to failure to perform physical work for 6 months consecutively.[339]

Evidently, Kenya has been able to successfully defend public interest matters in the 3 investor-state arbitrations. The arbitral tribunals equally considered the merits of the case and rendered awards that appreciate both international norms and domestic law.

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[334] ICSID Case ARB/00/7
[335] https://www.italaw.com/sites/default/files/case-documents/italaw15005.pdf (accessed 12 September 2021)
[336] ICSID Case ARB/15/29
[337] UNCTAD available at https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/626/cortec-mining-v-kenya (accessed 12 September 2021)
[338] ICSID Case ARB/15/7
[339] https://www.iisd.org/itn/en/2021/03/23/kenya-prevails-in-a-geothermal-arbitration-brought-by-walam-energy-icsid-tribunal-reject-all-claimant-allegations/ (accessed 12 September 2021)

5.6. Alternative Grievance Mechanisms

The foundational principle underlying the access to remedy pillar under the UNGPs is articulated as follows[340]:

> As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

Manifestly, the UNGPs provide a wide array of mechanisms that States can utilise to ensure that victims of business-related human rights violations have access to effective remedy. A remedy in the context of the UNGPs includes restitution, punitive sanctions, apologies, compensation, prevention of harm or rehabilitation.[341] Such mechanisms can either be state-based judicial and non-judicial grievance mechanism or non-state based grievance mechanisms.[342] The UNGPs also highlight the effectiveness criteria for grievance mechanisms including transparency, accessibility, predictability, legitimacy, among others.[343]

5.6.1. State-Based Grievance Mechanisms

State-based grievance mechanisms can either be judicial or non-judicial mechanisms. Judicial mechanism would essentially require victims of business-related human rights violations to litigate in court. The High Court of Kenya has the jurisdiction to hear and determine cases relating to infringement, denial or violation of the Kenyan Bill of Rights.[344] On the other hand, non-judicial mechanisms those that are implemented by other government bodies such as the complaints and investigative mechanism administered by the Kenya National Commission on Human Rights.[345]

As noted earlier, Kenya adopted a National Action Plan in 2019 for the implementation of the UNGPs. Some of the policy actions that Kenya undertakes under the National Action Plan in this regard include to promote alternative dispute resolution (ADR) mechanism in accordance with Article 159 of the COK which encourages the use of ADR in dispute settlement. [346] Additionally, the Kenyan government undertakes to improve access to domestic courts, enhance access to information on

[340]UNGPs, para 15 https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf
[341] UNGPs para 25
[342] UNGPS, para 26-30
[343] UNGPs, para 31
[344] COK, art 165
[345]Kenya National Commission on Human Rights available at https://www.knchr.org/Our-Work/Business-and-Human-Rights (accessed 12 September 2021)
[346] Kenya NAP, 12

available grievance mechanisms for business-related human rights violations, and to prioritise access legal assistance to victims.[347]

5.6.2. Non-State Based Grievance Mechanisms

Non-state based grievance mechanisms are those that are administered business enterprises, industry associations, international human rights bodies or multi-stakeholder groups.[348] The Kenyan government has committed to guide and sensitise businesses operating in Kenya on the creation of operational-grievance mechanisms.[349] A practice is evolving in Kenya where MNCs and TNCs with subsidiaries in Kenya are establishing operational-level grievance mechanism to provide their employees with an alternative mechanism for human rights claims arising from their business operations.[350]

Evidently, the UNGPs recommend numerous alternative mechanisms that would allow victims of business-related human rights direct access to remedy. Both state- and non-state based ought to be implemented conjunctively to promote access to justice. With the policy commitments that the Kenyan government has made, effective implementation would require multi-stakeholder cooperation. In addition, the public needs to be sensitised on the different grievance mechanisms and provided with resources to enable them utilise the mechanisms to hold foreign investors accountable for human rights abuses.

5.7. Conclusion

In summary, it is plausible to conclude that investor- state arbitration as it exists today fails to adequately incorporate human rights norms. Whereas a few attempts have been made in the assertion of human rights issues in a number of amicus curiae submissions and counterclaims, the ISDS system remains by and large a commercial dispute settlement mechanism that constrains the space for public interest considerations of investment disputes, particularly human rights.

Therefore, as the ISDS system undergoes reform, developing countries should consider negotiating dispute settlement clauses that first require exhaustion of local remedies to give room to domestic

[347] As above
[348] UNGPs, para 28
[349] NAP, 26
[350] See eg https://www.business-humanrights.org/en/latest-news/kenya-kakuzi-says-it-has-set-up-an-operational-level-grievance-mechanism-for-quick-and-impartial-resolution-of-concerns-by-workers-local-community/ (accessed 12 September 2021)

litigation. In addition, alternative grievance mechanism should also be embraced as a mechanism for the enforcement of business-related human rights claims.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1. Introduction

This final chapter provides a summary of the research findings, recommends a number of reforms, and concludes the research by highlighting key takeaways from each chapter. Further, it epitomises the main research agenda of the role public participating can play in fostering human rights in the IIL regime in Kenya.

6.2. Summary of Research Findings

This study established a deficiency in the IIL regime in Kenya, as it pertains to its impact on human rights and the role it plays in the sustainable development agenda. It demonstrated that there is a need for the IIL regime to evolve to ensure that the expected social and economic benefits of FDI, in Kenya and other developing countries, are not in the abstract. Importantly, this research identified an opportunity in a complex, and gradually developing concept in IIL; the principle of public participation.

One recurring trend in the global IIL reform agenda is the aspect of democratising a regime that has for a long time been regulated, and interpreted from a commercial, and private law standpoint. At the core of the democratisation agenda is the adoption of more participatory approaches to IIL, to mitigate the increasing human rights impacts associated with FDI activities in capital importing countries. Hence, this research analysed the principle of public participation in Kenya under the current constitutional dispensation with an aim of evaluating how it can be utilised to foster human rights in the IIL regime in Kenya.

In doing so, the second chapter evaluated the legal frameworks for public participation, highlighting the laudable efforts Kenya has made to guarantee its citizens a participatory democracy based on national values such as human rights, rule of law, and sustainable development. This study relied on the COK, a number of Acts of Parliament, and policy frameworks to lay a foundation of the right to public participation in Kenya, and its inclusion in foreign investment regulation.

Further, the third chapter evaluated the development of the concept of public participation in international law, while highlighting its evolution in IHRL and international environmental law to establish a nexus between human rights and public participation in governance and decision making.

It then analysed its limited development in IIL normative processes and investment arbitration and concluded that there is much more that can be done to democratise IIL through reforms centered on enhancing public involvement.

Chapter four analysed the implementation of public participation in the IIL regime using practical case studies. It established that whereas the legislative frameworks in Kenya provide various avenues for public participation in foreign investment activities, there is still a deficit that insufficiently addresses human rights impacts on local communities.

Chapter five focused on access to remedy, an important pillar in the business and human rights agenda. It highlighted the deficiencies of investment arbitration under the ISDS system, noted some of the progress that the UNCITRAL and ICSID have made to reform its rules of procedure. However, it concluded that there are deeper normative shortcomings of the IIL regime that would require substantive reforms. Essentially through adoption of new generation IIAs that protect public interests such as human rights through substantive investor obligations and adoption of alternative and more participatory dispute settlement mechanisms.

Hence, this study proposes a number of recommendations to address human rights concerns in the IIL regime and public participation deficit in Kenya.

6.3. Recommendations

Some of the reform proposals that can be implemented to achieve the overarching theme of this research, that is, advancing human rights in IIL through public participation in Kenya are include:

6.3.1. Enacting a Comprehensive Public Participation Legislation

Undisputedly, public participation in governance is a constitutional right in Kenya. However, without an enabling national legislation setting standards, creating obligations, and providing guidance on the mechanisms for public participation, its implementation becomes haphazard and source of contentious litigious issues. This has been clearly demonstrated in the second chapter. In Further, the legislation should provide mandatory minimum obligations that would apply at both levels of government.

The use of hortative language and inclusion of broad discretionary powers would diminish full realisation of public participation. The legislation also needs to provide clarity on the administrative procedures that the public can follow should public authorities fail to comply with the stipulated public participation requirements. This would provide a yardstick from which laws governing foreign

investment in Kenya can also be reformed to conform with the legal developments in Kenya. It is high time the Parliament of Kenya prioritised this legislation and hastened its enactment.

6.3.2. Civic Education on Public Participation

Additionally, for the public to effectively utilise the avenues provided to exercise their right to participate law-making, and decision-making on foreign investment activities directly affecting them, they need to be empowered and equipped with the relevant knowledge. This is within every person's right to education. Hence, the state has a duty to ensure that citizens are sensitised on laws governing different aspects of foreign investment activities, public policy matters of high priority such as the Kenya Vision 2030 agenda, planned development projects, among other governance issues.

This would require adequate budgetary allocation on capacity building and awareness programs, as well as co-operation between the national and country governments in their implementation. The ultimate objective of a devolved system to government is to promote self-governance, decentralise public services, and to bring decision making powers closer to the people. In implementing the civic education programs, it is crucial that the unique needs of marginalised communities and minority groups such as language barrier and low literacy levels are considered and addressed.

6.3.3. Access to Information

It has been established that transparency is an essential aspect of public participation. It requires that government authorities guarantee the public access to relevant information on matters such as treaty negotiations, investor-state contracts, investment projects and the implications they would have on their human rights. The principle of free, prior and informed consent ought to be adopted in not only on decision making concerning environmental matters but also foreign investment activities throughout their life cycle.

In other words, just as public participation is a process and not a one-time event, so should dissemination of relevant information be. Local communities should be engaged continuously and provided with the information they need to make decisions, free from manipulation. This way, foreign investment projects will obtain social approval, support and ultimately a sense of ownership and legitimacy.

6.3.4. Dispute Prevention

A sense of ownership in foreign investment activities by local communities mitigates potential conflicts. Community-investor conflicts are quite common where investment projects are carried out

without the approval or at least, the participation of the locals in their areas of implementation. Such conflicts negatively impact both the local communities and investors. Local communities lack the resources and avenues to challenge the government or foreign investors when their human rights are violated.

Hence, they often resort to violence which then leads to losses of costly investment and unrest. Therefore, it crucial for the government and foreign investors to adopt more participatory decision making processes as a dispute prevention strategy. Dispute prevention is a win-win for local communities and foreign investors.

6.3.5. Alternative Dispute Settlement Mechanisms

In cases where dispute prevention is futile and conflicts arise, conflict management through community engagement is encouraged. In addition, having highlighted the access to remedy challenges of the prevalent dispute settlement mechanisms in IIL, specifically investor-state arbitration, it prudent for Kenya to negotiate the inclusion of alternative dispute settlement mechanisms in future IIAs. The Kenyan government ought to reform the existing IIAs to include more participatory mechanisms that are accessible to victims of business-related human rights violations. The dispute resolution clause in the IIAs should include a provision for exhaustion of local remedies.

ADR mechanisms such as negotiations, fact finding, and mediation would be ideal. In adopting ADR mechanisms, more transparent and participatory rules of procedure should be embraced. State-based judicial and non-judicial grievance mechanisms as well as non-state based grievance mechanism ought to be promoted and implemented in Kenya.

Additionally, the state ought to provide the necessary support to local communities that lack resources to take part in dispute resolution mechanisms. A specific legal aid programme focused on business-related human rights claims under the Legal Aid Act 2016[351], with pro bono legal practitioners with expertise on business and human rights cases should be established.

6.3.6. Cooperation with Civil Society Organisations

The increasing advocacy, lobbying and media reporting on business and human rights issues in Kenya by non-state actors such as civil society organisations cannot be understated. Some CSOs act as

[351] Act 6 of 2016

reporting watchdogs[352], others engage in activism lobby against government actions[353], other support local communities to enable their participation in decision making[354], while other defend local communities by litigating on their behalf.[355]

It is worth noting that most of the progress in incorporating public participation in the IIL regime at a global level has been highly motivated and advanced by civil society organisations, representing affected local communities that lack a voice and the resources to enforce their rights against big TNCs and MNCs.

Hence, it is important for state actors to cooperate with CSOs in enhancing public participation in law making and decision making on foreign investment activities in Kenya. CSOs are more knowledgeable on the human rights issues that local communities face as a result of FDI activities from their direct engagement with them, and have resources in the form of expertise and finances to support advocacy programs and assist affected victims of human rights violations in seeking justice.

6.3.7. Use of Technology and Innovation

Advancement of technology has presented many opportunities for the advancement of public participation in governance. Innovation has made it possible for information to be disseminated quickly and widely through online and print media. However, the reality for most of the local communities in marginalised areas in Kenya is the inaccessibility of technology to them and low literacy levels to engage with it.

Hence, there is need for the Kenyan government to invest its resources in developing the necessary technological infrastructure and training that local communities require in this regard. Whereas such endeavour would be financially intensive, the public benefits it would present arguably surpass the expense. Better still, tax payers deserve quality public services from their governments.

6.3.8. A Kenyan Investment Agreement Model

Piecemeal reforms of the IIL regime in Kenya without a substantive amendment or renegotiation of old generation IIAs that protect investor rights without imposing human rights obligations, and protecting the host state right to regulate, fails to address the root of the problem. The IIL regime is

[352]Business and Human Rights Resource Centre available https://www.business-humanrights.org/en/big-issues/corporate-legal-accountability/ (accessed 20 September 2021)
[353] Save Lamu available at https://www.savelamu.org/news/ (accessed 20 September 2021)
[354] Natural Justice available at https://naturaljustice.org/countries/kenya/ (accessed 20 September 2021)
[355] Friends of Lake Turkana available at https://friendsoflaketurkana.org/index.php/en/about/mission-and-vision (accessed 20 September 2021)

regulated by the IIAs and domestic laws conjunctively, hence the need for harmonisation of a host state's treaty or contractual obligations with national policy and legislation.

To guide representatives of the Ministry of Foreign affairs in negotiation future IIAs that reflect the national development agenda and constitutional ideals of the Kenyan people, it would be advisable for the government to engage a team of experts to develop a comprehensive investment agreement model that incorporates the unique needs of Kenya. This model can then be used as a yardstick for the calibre of foreign investors that Kenya would be seeking to attract; responsible investors who will contribute to the socio-economic development in Kenya.

6.4. Conclusion

To sum it up, human rights protection in IIL is paramount. Not only does it contribute to the IIL reforms aimed at balancing competing stakeholder interests, but also advances the sustainable development agenda especially in developing countries like Kenya. The right to public participation is gradually evolving into a core principle in the democratisation agenda in IIL. Kenya has already made progress in constitutionalising the principle of public participation and what is left is its effective implementation in foreign investment regulation and management.

Public participation in normative processes, decision making and access to justice has great potential in fostering human rights in regime that prioritised commercial interests at the expense of public interests in host states. The increasing public outcry on human rights violations associated with foreign investment activities and the growing appetite for democracy, transparency and accountability in governance can be effectively addressed through meaningful public participation.

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