

**INCORPORATING PUBLIC POLICY IN INVESTOR-STATE ARBITRATION: A
CASE STUDY OF SOUTH AFRICA AND KENYA**

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Strathmore University Law School

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Declaration

I, Cheptumo Anthony Kipchirchir, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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ABSTRACT

Investor-state arbitration has been criticised as a tool for neo-colonial domination. Developing states have decried investment arbitration for encroaching on their sovereign duty to pursue sustainable development objectives and favouring the protection of investors 'rights.

This study calls for the incorporation of public policy in the investor-state dispute resolution framework. This will ensure that the constitutive framework and dispute resolution spheres of investor-state arbitration are comprehensively balanced. This will ensure that the protection of foreign investments does not inhibit the ability of states to act in the pursuit of sustainable development.

LIST OF CASES

Cases from Kenya

Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR

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LIST OF ABBREVIATIONS

ICSID	International Centre for the Settlement of Investment Disputes
UNCITRAL	United Nations Commission on International Trade Law
BIT	Bilateral Investment Treaty
TWAIL	Third World Approaches to International Law
MPRDA	Mineral and Petroleum Resources Development Act
BEE	Black Economic Empowerment (South Africa)
UK	United Kingdom
NEMA	National Environment Management Authority (Kenya)
IIA	International Investment Agreement
FTA	free trade agreement
WTO	World Trade Organization
GATT	General Agreement on Tariff and Trade
SOAS	School of Oriental and African Studies
CRICA	Cairo Regional Centre for International Commercial Arbitration
SRSR	United Nations Special Representative of the Secretary General on the issue of Human Rights and Transnational Corporations and other Business Enterprise
BGT	Biwater Gauff International Limited
FDI	Foreign Direct Investment
OECD	Organisation for Economic Co-operation and Development

LIST OF INSTRUMENTS

Instruments from Kenya

Constitution of Kenya 2010

Investment Disputes Convention Act (Act No 31 of 1996)

Instruments from South Africa

Promotion of Investments Act, Act No. 22 of 2015 (South Africa)

Bilateral Investment Agreements

Agreement Between the Government of the United Kingdom of Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, 19 February 1993, UNTS I-30682.

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments, 13 September 1999, UNTS. 2.

Comprehensive Economic Cooperation Agreement Between the Republic of India and the Republic of Singapore, 29 June 2005.

Canada-Colombia Free Trade Agreement, 21 November 2008.

General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS 194.

Model Text for Indian Bilateral Investment Treaty, 2016.

International Instruments

Convention on Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965.

UNCITRAL Model Law on International Commercial Arbitration, 10 June 1958.

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

1. CHAPTER ONE: INTRODUCTION

1.1 Background

Investor-state arbitration is under siege.¹ In 2010, 37 prominent global academics under the Osgoode Hall Law School, issued a statement based on their shared concern on the harm done by the international investment regime.² International investment law has occasioned harm on the ability of governments to act for their people in response to the concerns of human development and environmental sustainability.³ The statement connotes that arbitral awards have prioritised the protection of the economic interests of transnational corporations over the right to regulate, and the right to self-determination of peoples.⁴ In a clear sign of hostility, the statement advises states to either withdraw from or negotiate from investment treaties based on the raised concerns.

This antagonistic approach towards investor-state arbitration has similarly been observed in Latin America. At the onset of the International Centre for Settlement of Investment Disputes (ICSID), Latin American countries avoided it.⁵ This changed in the 1990s where a vast majority of the countries became member states of the Washington Convention and ICSID, and signed bilateral investment treaties with a view to attracting foreign capital.⁶ However, the Latin American attitude changed by the turn of the century.⁷ Latin America countries have resisted ICSID as they claim that it favours investors.⁸ ICSID has been accused of doing more to protect the 'equitable' interests of the investors than to address

¹ Trakman L, 'The ICSID under siege' 45 *Cornell International Law Journal* (2012), 603.

² Osgoode Hall Law School, 'Public statement on the international investment regime' *York University*, 31 August 2010, <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/> on 20 September 2017.

³ Osgoode Hall Law School, 'Public statement on the international investment regime' *York University*, 31 August 2010, <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/> on 20 September 2017.

⁴ Osgoode Hall Law School, 'Public statement on the international investment regime' *York University*, 31 August 2010, <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/> on 20 September 2017.

⁵ Vincentelli I, 'The uncertain future of ICSID in Latin America' 16 *Law and Business Review of the Americas* (2010), 3.

⁶ Vincentelli I, 'The uncertain future of ICSID in Latin America' 4.

⁷ Vincentelli I, 'The uncertain future of ICSID in Latin America', 3.

⁸ 'Boeglin N: ICSID and Latin America' *Bretton Woods Project*, December 2013, <http://www.brettonwoodsproject.org/wp-content/uploads/2013/12/At-Issue-ICSID.pdf> on 20 September 2017.

the economic and social interests of capital importing states in Africa, Asia, and Latin America.⁹ In 2009, Ecuadorian President Raphael Correa in denouncing the ICSID Convention stated that it was necessary to do so for the liberation of the country from slavery with respect to transnationals, Washington, and the World Bank.¹⁰ Further, the Ecuadorian National Assembly decided to terminate twelve BITs based on a report from the Ecuadorean Citizens Commission for a Comprehensive Audit of Investment Protection Treaties and of the International Arbitration System on Investments.¹¹ The President of the Commission stated that the report that the BITs not only failed to deliver investment but cost Ecuador billions of dollars and posed a threat to Ecuador's ability to protect its citizens economically.¹²

The inference attained from the above observations on the backlash on investor-state arbitration shows the indifference towards a system of dispute resolution that ignores the needs of the citizens of the state. The hostility towards investment arbitration stems from concerns that the arbitrators show little regard to public policy consequences of arbitral awards than to literal texts of treaties favouring developed countries.¹³ Concerns abound that investor-state arbitration tribunals are likely to marginalise broader state and multistate policies directed at remediating systemic historical disadvantages among developing states and their investors.¹⁴

The incorporation of public policy in investor-state arbitration seeks to ensure that states are not found liable for actions that are centered on benefiting its citizens.

⁹ Grant K, 'The ICSID under siege: UNASUR and the rise of a hybrid regime for international investment arbitration' 11 *Osgoode Hall Law Journal* (2015), at 6.

¹⁰ Trakman L, 'The ICSID Under Siege' 45 *Cornell International Law Journal* (2012), at 604.

¹¹ Knox K, Thomas E, 'Ecuador terminates 12 BITs- a growing trend of reconsideration of traditional investment treaties?' *DLA Piper*, 15 May 2017, <https://www.dlapiper.com/en/latinamerica/insights/publications/2017/05/ecuador-terminates-12-bits-a-growing-trend/> on 20 September 2017.

¹² Knox K, Thomas E, 'Ecuador terminates 12 BITs- a growing trend of reconsideration of traditional investment treaties?' *DLA Piper*, 15 May 2017, <https://www.dlapiper.com/en/latinamerica/insights/publications/2017/05/ecuador-terminates-12-bits-a-growing-trend/> on 20 September 2017.

¹³ Trakman L, Ranieri N(ed), '*Regionalism in international investment law*' Oxford University Press, New York, 2013, 364.

¹⁴ Trakman L, Ranieri N(ed), '*Regionalism in International investment Law*' Oxford University Press, New York, 2013, 364.

Burroughs LJ famously remarked that “public policy is an unruly horse which once you get astride off, you never know where it will carry you.”¹⁵ Its considerations could never be exhaustively defined and it should be approached with extreme caution.¹⁶ Public policy is a concept that appears to have constantly defied all attempts at precise definition.¹⁷

However, even in its ambiguity as heralded in the above statements, there have been multiple attempts by various quarters to define the concept of public policy. Winfield tentatively defined public policy as a principle of judicial legislation or interpretation founded on the needs of the community.¹⁸ He refers to public policy as principles that are ‘against reason’, ‘repugnant to the state’ or would ‘destroy the public good’.¹⁹ Moreover, in his discourse he adds the principle that conditions against public good are void.²⁰ Winfield’s arguments would form the common thread. Indeed, in attempting to lay down the scope of public policy, the case of *Anne Mumbi Hinga v Victoria Njoki Gathara* is of importance.²¹ In this case, the Kenyan Court of Appeal stated that failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the state powers are exercised.²²

The current investor-state arbitration has been criticised as an avenue of neocolonial oppression where the sovereign right of states to regulate and seek development has been subjected to punishment. The incorporation of the public policy defence in the international investment framework will ensure that states are not punished for taking measures in the interest of its citizens. Public policy ensures international investment seeks to ensure that the requisite balance between investor rights and the state’s right to actualize its agenda is attained for the benefit of all stakeholders.

1.2 Statement of the Problem

The Washington Convention on the Settlement of Investment Disputes does not provide for public policy as a ground for the annulment and non-enforcement of arbitral awards.

¹⁵ *Richardson v Mellish* (1824) 2 Bing 229.

¹⁶ *Richardson v Mellish* (1824) 2 Bing 229.

¹⁷ Yelapaala K, ‘Restraining the unruly horse: The use of public policy in arbitration, interstate and international conflict of laws in California’ 2 *The Transnational Lawyer* (1989), 380.

¹⁸ Shand J, ‘Unblinking the unruly horse: Public policy in the law of contract’ 30(1) *The Cambridge Law Journal* (1972), 146.

¹⁹ Shatten M, ‘The determination of public policy’ 51(11) *American Bar Association Journal*, 1965, 1048.

²⁰ Shatten M, ‘The Determination of Public Policy’ 1048.

²¹ *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR.

²² *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR

An arbitral award under the ICSID Convention will be annulled on the following grounds: the tribunal was not properly constituted; it had manifestly exceeded its powers, corruption on part of a member of a tribunal, a serious departure from a fundamental rule of procedure, and failure of stating reasons of an award.²³ There is no provision that allows a state to avoid enforcement of an arbitral award on the ground of public policy.²⁴ In contrast to other dispute resolution mechanisms, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration provides that recognition and enforcement of arbitral awards may be refused where a competent authority finds that they are contrary to public policy of the state.²⁵ Thus, states cannot escape ICSID awards that find them liable for laws or strategies that seek to protect the interests of her citizens.

1.3 Justification

The ambit of investor-state dispute resolution is facing backlash from developing countries.²⁶ Arbitral tribunals formed to adjudicate disputes have been termed as ‘secret trade courts’ that entail a threat to the national interest of states.²⁷ These ‘secret trade courts’ have been deemed as fixated on compensating investors for state actions that impede on their profit while unequivocally ignoring the needs of government and their citizens.²⁸ ICSID awards are of a pecuniary nature. Thus, investor-state dispute tribunals have issued awards that sanction stringent obligations on host states devoid of contemplation on the needs of the citizens of the state. The consideration of public policy will absolve states from arbitral awards that seek to punish states for regulatory actions taken in pursuit of development.

²³Article 52(1), *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, March 18 1965, ICSID 15.

²⁴Article 54, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, March 18 1965, ICSID 15.

²⁵ Article 36(1), *UNCITRAL Model Law on International Commercial Arbitration*, 10 June 1958.

²⁶Kaufmann Kohler-G and Potetsa M, ‘ Can the Mauritius Convention serve as model for the reform of investor-state arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism, CIDS General Centre for International Dispute Settlement, 2016, 9.

²⁷Kaufmann Kohler-G and Potetsa M, ‘ Can the Mauritius Convention serve as model for the reform of investor-state arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism, CIDS General Centre for International Dispute Settlement, 2016, 10, - http://www.uncitral.org/pdf/english/commissionssessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf on 6 December 2016.

²⁸‘The Secret Trade Courts’ *The New York Times*, 7 September 2004, http://www.nytimes.com/2004/09/27/opinion/the-secret-trade-courts.html?_r=0 on 6 December 2016.

Setting down the public policy ground in investor-state arbitration will also assist in granting better assurances to foreigners on the safety of their investments. Investors will have full knowledge of the scope of government action that falls within their policy space. Thus, if the state, pursuant to its policy discretion, acts in a way that results in the encroachment of their investment, the investors will be able to negotiate with the state in order to find an amicable agreement. This will be in full cognisance that they will not be able to attain compensation for sovereign acts.

1.4 Statement of Objectives

The main objective of this study will be to critically examine the need to incorporate the application of the doctrine of public policy in the recognition and enforcement of arbitral awards in investor-state dispute resolution. Additionally, this study will also pursue the following specific research objectives:

1. To examine the constitutive elements of international investment dispute resolution.
2. To examine the place of public policy in the international investment arbitration framework.
3. To examine how public policy in investor-state arbitration has been handled in different jurisdictions.
4. To investigate why the doctrine of public policy should be incorporated into the ICSID framework and the entire ambit of investor-state arbitration.
5. To examine how the doctrine of public policy can be infused into the investor-dispute resolution framework.

1.5 Research Questions

This study will seek to answer the following three interrelated questions:

1. What is the disposition of public policy in the current investor-state dispute resolution framework?
2. Is there a need for public policy considerations to be incorporated in investor-state dispute resolution?
3. How can public policy be incorporated into the ambit of Investor-state dispute resolution?

1.6 Literature Review

Van Harten asserts that investment treaty arbitration is a form of public law adjudication.²⁹ He expounds on the public nature of investment treaty arbitration by contrasting it with the private nature of international commercial arbitration.³⁰ In international commercial arbitration, the parties including the state while acting in a private capacity agree to use a particular dispute resolution method in a dispute between them.³¹ In contrast, investor-state arbitration involves a policy choice by the state to use investment arbitration as a governing apparatus.³² In submitting to investor-state arbitration, a state acts in a sovereign capacity as compared to the private manifestation of international commercial arbitration.³³ The disputes arising from investment treaties typically emerge from acts that entail the exercise of authority that is unique to the state such as passage of legislation and adoption of mandatory regulations.³⁴ Van Harten analogises investment arbitration to domestic administrative review as investments disputes arise from the exercise of public authority by the state and arbitral tribunals. Arbitration constitutes a private model of dispute resolution but investment arbitration is a form of public law adjudication as it involves the complete panoply of the state's regulations with foreign investors.³⁵ This study aligns with van Harten's work as it advocates for investor-state dispute tribunals to accommodate the public interest as the exercise their quasi-administrative duty.

Lavopa, Barreiros, and Bruno advise state parties to refrain from denouncing the ICSID Convention as a reflex action to excessive arbitral awards.³⁶ These authors cite the increased number of ICSID cases that have seen large sums of compensation awarded to

²⁹ Van Harten G, 'The public private distinction in the international arbitration of individual claims against the State' 56(2) *The International and Comparative Law Quarterly*, 2007, 381.

³⁰ Van Harten G, 'The public private distinction in the international arbitration of individual claims against the state' 56(2) *The International and Comparative Law Quarterly*, 2007, 381.

³¹ Van Harten G, 'The public private distinction in the international arbitration of individual claims against the state' 376.

³² Van Harten G, 'The public private distinction in the international arbitration of individual claims against the state' 377.

³³ Van Harten G, 'The public private distinction in the international arbitration of individual claims against the state' 377.

³⁴ Van Harten G, 'The public private distinction in the international arbitration of individual claims against the state' 379.

³⁵ Vadi V, *Cultural Heritage in International Investment Law and Arbitration*, Cambridge University Press, Cambridge, (2014), 80.

³⁶ Lavopa M, Barreiros L, Bruno M, 'How to kill a bit and not die trying: legal and political challenges of denouncing or renegotiating bilateral investment treaties' *Journal of International Economic Law*, 2013, 4.

investors as one of the reasons why countries seek to denounce the ICSID Convention.³⁷ They, however, hold that this strategy would encounter multiple formal and substantive challenges.³⁸ This is because there are nullifying factors found in bilateral investment treaties (BITs) that will still enable states to be liable.³⁹ Investors craft BITs which have clauses that provide them with a predictable legal environment for their investments.⁴⁰ An example is given of ‘survival clauses’.⁴¹ These sunset stability clauses provide that investments shall continue even after the termination of a treaty.⁴² Additionally, such clauses provide for periods stretching up to 15 years so as to protect investments for a specific period of time.⁴³ An example is observed in Article 22 of the model United States Bilateral Investment Treaty (BIT) which states that,⁴⁴ “For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments.”⁴⁵ There is a need to craft a concrete solution as regards issues of public policy in investor-state arbitration. Knee-jerk reactions like denunciation of BITs may not overrule the legal obligations that states have entered into.

Mayeda has opined that tribunals should not see the promotion of investments as an end in itself.⁴⁶ Tribunals should take investments as part of a state’s approach to important social issues such as promoting human rights, protecting the environment, and improving social welfare.⁴⁷ An international tribunal must be a means of realising and promoting key areas of human functioning.⁴⁸ This would ensure that the intersection between international

³⁷Lavopa M, Barreiros L, Bruno M, ‘How to Kill a bit and not die trying’ 4.

³⁸Lavopa M, Barreiros L, Bruno M, ‘How to kill a bit and not die trying’ 4.

³⁹Lavopa M, Barreiros L, Bruno M, ‘How to kill a bit and not die trying’ 4.

⁴⁰Lavopa M, Barreiros L, Bruno M, ‘How to kill a bit and not die trying’ 12.

⁴¹Lavopa M, Barreiros L, Bruno M, ‘How to kill a bit and not die trying’ 12.

⁴²Lavopa M, Barreiros L, Bruno M, ‘How to kill a bit and not die trying’ 12.

⁴³Lavopa M, Barreiros L, Bruno M, ‘How to kill a bit and not die trying’ 12.

⁴⁴ Article 22, 2012 U.S Model Bilateral Investment Treaty,

<https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> accessed on 11 February 2018.

⁴⁵ Lester S, ‘Survival clauses in investment treaties’ *International Economic Law and Policy Blog*, 2 January 2014, <http://worldtradelaw.typepad.com/ielpblog/2014/01/survival-clauses-in-investment-treaties.html> accessed on 12 January 2018.

⁴⁶Mayeda G, ‘International investment agreements between developed and developing countries: Dancing with the devil case comment on the Vivendi, Sempra and Enron Awards’ 4(2), *McGill International Journal of Sustainable Development Law and Policy*, 2008,199.

⁴⁷Mayeda G, ‘International investment agreements between developed and developing countries: Dancing with the devil case comment on the Vivendi, Sempra and Enron Awards’, 199.

⁴⁸Mayeda G, ‘International investment agreements between developed and developing countries’ 200

investment law and other areas of international and national law and policy is recognised.⁴⁹ Mayeda seeks to portray investor-state arbitration as a cog in the desire for a state's socio-economic development and not a lone expedition.

Brower and Blanchard dispel the notion that the last two decades of the growth of international investment law has witnessed the ensnaring of hundreds of countries and put corporate profit before human rights and the environment.⁵⁰ They state such notions are meant to impugn the integrity of the international investment law system.⁵¹ Their unequivocal view is that this notion is wholly misleading. They assert that a review of arbitral awards reveal a great respect for national policy discretion. They add that investor-state dispute tribunals have consistently demonstrated an understanding of public interest concerns and a commitment to giving them due weight.⁵² In defending their view, they state that investor-dispute resolution follows the principle that where economic injury results from a bona fide regulation within the police powers of a state, no compensation is required.⁵³ This study will critically review the opinions of Brower and Blanchard. This variance of mentality is clearly seen as regards to the above principle. Citing the example of Ecuador in the Occidental case, Ecuador was subjected to a record ICSID award even though its actions were stepped in bona fide regulatory action.

Cosmas argues that the lack of a single omnipotent body to handle investment disputes forms the crux of the problems facing investor-state arbitration.⁵⁴ As a result, a myriad of problems have arisen. These include: there is no mechanism to avoid inconsistent decisions, no adequate rules to ensure an impartial and independent process, no rules to ensure transparency, and the lack of an appellate system.⁵⁵ A key problem highlighted by Cosmas is that the tribunals encroach on governments' regulatory powers by rendering awards which challenges legitimate laws passed by the state.⁵⁶ Multiple decisions have challenged the host states' basic regulatory functions and their duty to provide public

⁴⁹Mayeda G, 'international investment agreements between developed and developing countries' 200.

⁵⁰ Brower C and Blanchard B, 'What's in a Meme? The Truth about Investor-State Arbitration :Why it Need Not, And Must Not, Be Repossessed by States' 52 *Columbia Journal of International Law*, 2014, 700.

⁵¹ Brower C and Blanchard B, 'What's in a meme? the truth about investor-state arbitration', 701.

⁵² Brower C and Blanchard B, 'What's in a meme? the truth about investor-state arbitration', 740.

⁵³ Brower C and Blanchard B, 'What's in a meme? the truth about investor-state arbitration', 731.

⁵⁴ Cosmas J, ' Legitimacy crisis in investor-state international arbitration system: A critique on the suggested solutions and the proposal on the way forward' 4 *International Journal of Scientific and Research Publications* (2014), 1.

⁵⁵ Cosmas J, ' Legitimacy crisis in investor-state international arbitration system', 2.

⁵⁶ Cosmas J, ' Legitimacy crisis in investor-state international arbitration system', 2.

services to its citizens.⁵⁷ In some instances, the main functions of the state being peace and security have been endangered but the tribunals still do not consider these factors.⁵⁸

Martin Koskeniemi warned that the foreign investor dispute system under the TTIP would endanger the sovereignty of states by allowing a small clique of legal experts to interpret and void a state's legislation.⁵⁹ He states the TTIP's dispute resolution system heralded a transfer of power from public authorities to a body with a handful of people empowered to rule on whether a country can enact a law or how to enact that law.⁶⁰

The case of Ecuador provides a good example of the effect of a lack of considering public policy. In its case against Occidental Exploration and Production Company (Oxy), an award of \$1.77 billion was imposed against Ecuador for its decision to cancel a Participation Contract to explore and exploit hydrocarbons in the Ecuadorian Amazon regime.⁶¹ This is in spite of Ecuador's defence that it cancelled the contract because the contract had not sought ministerial approval as per Ecuadorian law and that Oxy had violated some provisions of Ecuador's Hydrocarbon regulations.⁶² The \$1.77 billion award constituted the largest award in the history of ICSID.⁶³ Together with interest, the total award amounted to \$ 2.4 billion which amount mirrors Ecuador's health expenditure for

⁵⁷ Cosmas J, 'Legitimacy crisis in investor-state international arbitration system', 2.

⁵⁸ Cosmas J, 'Legitimacy crisis in investor-state international arbitration system', 2.

⁵⁹ Borelli C, 'The investor-state dispute settlement in TTIP: Democracy under threat' December 2015, 13, <https://internationalcourts.net/system/files/Borelli.pdf> on 20 April 2018.

⁶⁰ Kleinheisterkamp J, 'Who is afraid of investor-state arbitration? Or comparative law?' *Policy briefing 4 LSE Law*, 2014, 2

http://eprints.lse.ac.uk/60869/1/_lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content_Kleinheisterkamp,%20J_Kleinheisterkamp_LSE%20Law%20policy%20briefing%204_2015_author.pdf on 20 April 2018.,

⁶¹ Cheng T and Bento L, 'ICSID largest award in history: An overview of Occidental Petroleum Corporation v the Republic of Ecuador' *Kluwer Arbitration Blog*, December 19 2012 , <http://kluwerarbitrationblog.com/2012/12/19/icsids-largest-award-in-history-an-overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador/> on 23 September 2017.

⁶² Cheng T and Bento L, 'ICSID Largest Award in History: An Overview of Occidental Petroleum Corporation v the Republic of Ecuador' *Kluwer Arbitration Blog*, December 19 2012 , <http://kluwerarbitrationblog.com/2012/12/19/icsids-largest-award-in-history-an-overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador/> on 23 September 2017.

⁶³ Lori Wallach, Beachy B, 'Occidental v Ecuador Award Spotlights Perils of Investor State System: Tribunal Fabricated a Proportionality Test to Further Extend the FET Obligation and Used "Egregious" Damages Logic to Hit Ecuador with \$ 2.4 Billion Penalty in Largest Ever ICSID' *Public Citizen*, 21 November 2012, <https://www.citizen.org/sites/default/files/oxy-v-ecuador-memo.pdf> on 23 September 2017.

over seven million Ecuadorians.⁶⁴ The sum amounts to sixteen percent of Ecuador's external debt or 11 percent of all exported goods.⁶⁵

In the Ecuador situation, the government took action on the back of contravention of their law by Oxy. The investor-state tribunals did not take into account Ecuador's right to act in the best interests of its citizens and found them liable. Therefore, involving public policy considerations in the scope of investor-state arbitration will ensure that states are not derailed in their quest for sustainable development.

1.7 Theoretical Framework

This section gives a brief introduction to the theories that this study will be based on. The subsequent chapter will herald a wider discussion on the theories. This study applies three theories: Social contract theory, the developmental state theory and the Third World Approaches to International Law.

1.7.1 Social Contract Theory

Jean Jacques Rousseau enunciates that the solution to the problem of legitimate authority is the "social contract where citizens come together for their mutual preservation."⁶⁶ This act of association creates the body called the "sovereign".⁶⁷ The sovereign's duty is to promote the common good.⁶⁸ The common good is that which is in the best interests of a society in its entirety. It is what the social contract aims to achieve.⁶⁹ In executing measures in the pursuit of sustainable development but resulting in the violation of investor obligations, the state is carrying out its mandate subject to the social contract.

⁶⁴ Lori Wallach, Beachy B, 'Occidental v Ecuador Award Spotlights Perils of Investor State System: Tribunal Fabricated a Proportionality Test to Further Extend the FET Obligation and Used "Egregious" Damages Logic to Hit Ecuador with \$ 2.4 Billion Penalty in Largest Ever ICSID' *Public Citizen*, 21 November 2012, <https://www.citizen.org/sites/default/files/oxy-v-ecuador-memo.pdf> on 23 September 2017.

⁶⁵ Lori Wallach, Beachy B, 'Occidental v Ecuador Award Spotlights Perils of Investor State System: Tribunal Fabricated a Proportionality Test to Further Extend the FET Obligation and Used "Egregious" Damages Logic to Hit Ecuador with \$ 2.4 Billion Penalty in Largest Ever ICSID' *Public Citizen*, 21 November 2012, <https://www.citizen.org/sites/default/files/oxy-v-ecuador-memo.pdf> on 23 September 2017.

⁶⁶ The Gradesaver, 'The Social Contract' <http://www.gradesaver.com/the-social-contract/study-guide/summary> accessed on 10 February 2018.

⁶⁷ Cress D, 'The Social Contract- Rousseau' *University of Guelph*, 2011/2012, <https://www.studocu.com/en/document/university-of-guelph/introductory-philosophy-social-and-political-issues-fw/summaries/summary-book-on-the-social-contract-the-social-contract/332343/view> accessed on 10 February 2018.

⁶⁸ The Gradesaver, 'The Social Contract' <http://www.gradesaver.com/the-social-contract/study-guide/summary> accessed on 10 February 2018.

⁶⁹ Rousseau J, 'The Social Contract' *Sparknotes*, <http://www.sparknotes.com/philosophy/socialcontract/characters/> accessed on 10 February 2018.

1.7.2 Developmental State Theory

A developmental state is one that places economic development as the key priority of state policy, and which is able to craft effective instruments to promote such a target.⁷⁰ With economic development as its main target, states sign BITs with investors so as to facilitate the entry of foreign direct investment into the country. This foreign direct investment plays a key role in harnessing economic growth in the state.

1.7.3 Third World Approaches to International Law

This is a movement encompassing scholars and practitioners of international law and policy concerned with issues related to the Global South.⁷¹ It is aptly defined by Makau Mutua as the system of international law that is illegitimate as it is a predatory system that legitimises, reproduces and sustains the plunder of the Third World by the West.⁷² Under TWAIL, international law is a regime of domination and subordination, not resistance and liberation.⁷³ This study highlights the criticism placed on international investment arbitration as a system of neocolonial liberation. Most arbitral cases are brought against developing countries. Developing countries have been punished for executing measures that impede on investor rights but are carried out in the pursuit of sustainable development. Further, the developing countries have been subjected to heavy arbitral awards that may have a significant effect on their economy. We therefore derive the inference that investor-state arbitration is biased against developing countries.

1.8 Hypothesis

This study will be based on the following hypotheses:

1. The current ICSID framework in which Kenya is a party is insensitive to the social, economic, and political factors of developing countries.
2. The investor-state dispute tribunals will seek to ensure that investors are adequately compensated for state actions that infringe on their profit margins while ignoring the rationale of the state's actions.

⁷⁰ United Nations Economic and Social Council, “The Developmental State”, 2.

⁷¹University of Windsor, ‘About TWAIL’ 2015, <http://www.uwindsor.ca/twail2015/2/test-page> on 10 February 2018.

⁷²Nigam S, ‘Third world approaches to international law’ *Canadian Lawyer*, 16 July 2012, <http://www.canadianlawyermag.com/author/sonya-nigam/third-world-approaches-to-international-law-1672/> accessed on 10 February 2018..

⁷³Nigam S, ‘Third world approaches to international law’ *Canadian Lawyer*, 16 July 2012, <http://www.canadianlawyermag.com/author/sonya-nigam/third-world-approaches-to-international-law-1672/> accessed on 10 February 2018. <http://www.canadianlawyermag.com/author/sonya-nigam/third-world-approaches-to-international-law-1672/> accessed on 10 February 2018.

3. The current ICSID framework favours investors from developed capital exporting countries such as United States and the United Kingdom at the expense of developing countries.

1.9 Research Design and Methodology

This research is a qualitative study. It will utilise primary and secondary sources in the search for information. In using primary sources, I will use statutes and cases that touch on the topic of the study.

The secondary sources will avail access to the wide span of content in relation to the study. I will refer to books, journal articles, dissertations, and conference papers related to the topic. This will enable me to acquire a strong grasp on the research done on the topic. Also, online sources *inter alia* LexisNexis and JSTOR will ensure that I can access quality academic content and jurisprudence touching on the matter.

I will also carry out interviews with relevant parties. The key interview will be with a lawyer who specializes in the field of investor-state arbitration. He will provide a hands-on approach to the practical aspects of investment arbitration as regards the study herein.

2. CHAPTER TWO: THEORETICAL AND CONCEPTUAL FRAMEWORK

2.1 Introduction

This chapter entails a discussion on the various theories that underpin this study. This study finds its basis in three theories. I will first examine the social contract and thus observe the state's engagement with the dynamics of investor-state arbitration. Subsequently, I will examine the developmental state theory in relation to the ambit of international investment. I will also examine the contemporary third world approaches to international law theory in highlighting a third world view to investment arbitration law. The final section of this chapter will involve a conceptual framework that seeks to define 'public policy'. It will also entail a brief discussion on the 'legitimacy crisis'. This framework will provide the visualisation that will be used in this study.

2.2 Social Contract Theory

The theory of the social contract is that of why people form governments based on how people lived in a state of nature before government.⁷⁴ There were different views on what the state of nature encompassed. Thomas Hobbes stated that in the state of nature, life was solitary, nasty, poor, brutish, and short.⁷⁵ It is this desire to escape this state, that people enter into two agreements: *Pactum unionis* and *Pactum subjectionis*.⁷⁶ *Pactum unionis* entails an agreement where people sought protection of lives and property.⁷⁷ *Pactum subjectionis* involved the agreement to obey an authority and surrender rights and obligations to that authority.⁷⁸ The authority or the government or the sovereign came into existence due to these two agreements.⁷⁹ Rousseau states that modern states repress the physical freedom that is our birthright, and seldom secure the freedom which we desire for the sake of which we embrace community. Rousseau seeks the basis of a legitimate, political authority which

⁷⁴ DeMichele T, 'The social contract theory and the state of nature' *Fact/Myth*, 9 August 2016, <http://factmyth.com/social-contract-theory-and-the-state-of-nature/> accessed on 10 February 2018.

⁷⁵ Munro A, 'State of nature' *Encyclopaedia Britannica*, <https://www.britannica.com/topic/state-of-nature-political-theory> accessed on 2 December 2017.

⁷⁶ Manzoor E, 'Summary of Social Contract Theory by Hobbes, Locke and Rousseau', 1 http://www.sophia-project.org/uploads/1/3/9/5/13955288/elahi_socialcontract.pdf accessed on 2 December 2017.

⁷⁷ Manzoor E, 'Summary of Social Contract Theory by Hobbes, Locke and Rousseau', 1

⁷⁸ Manzoor E, 'Summary of Social Contract Theory by Hobbes, Locke and Rousseau', 1

⁷⁹ Manzoor E, 'Summary of Social Contract Theory by Hobbes, Locke and Rousseau', 1

people must sacrifice their liberty.⁸⁰ He states that legitimate political authority arises from a social contract agreed upon by all citizens for their mutual preservation.⁸¹ Rousseau defines this collective body as a sovereign.⁸² Each individual has a particular desire that aims for personal gain, but the sovereign expresses the general will that aims for the common good.⁸³

Thomas Hobbes proposes the erection of a common power that will defend people from the invasion of foreigners and injuries of one another.⁸⁴ The common power, by their own industry and the fruits of the earth, will ensure the people live contentedly.⁸⁵ This common power will be conferred to one entity that will have one will. The citizens by consent will give up their right to self-government to an entity it authorises to concern itself with its common peace and safety.⁸⁶ This entity will be known as the commonwealth.⁸⁷ John Locke opined that the chief end of uniting into commonwealths and under governments is the preservation of property.⁸⁸ For the purpose of this paper, the state is the commonwealth. In a state's engagement with investor-state arbitration, apart from ensuring that an investor's rights are protected, such investment must not result in the encroachment on the socio-economic rights of the citizens.

Rousseau opined that the social contract solves a problem. It solves the problem of finding an association that protects the person and goods of all while uniting itself with all as a free institution that is obeyed.⁸⁹ Further, the sovereignty of a state signifies its independence.⁹⁰

⁸⁰ The Gradesaver, 'The Social Contract' <http://www.gradesaver.com/the-social-contract/study-guide/summary> accessed on 10 February 2018.

⁸¹ The Gradesaver, 'The Social Contract' <http://www.gradesaver.com/the-social-contract/study-guide/summary> accessed on 10 February 2018.

⁸² The Gradesaver, 'The Social Contract' <http://www.gradesaver.com/the-social-contract/study-guide/summary> accessed on 10 February 2018.

⁸³ Cress D, 'The Social Contract- Rousseau' *University of Guelph*, 2011/2012, <https://www.studocu.com/en/document/university-of-guelph/introductory-philosophy-social-and-political-issues-fw/summaries/summary-book-on-the-social-contract-the-social-contract/332343/view> accessed on 10 February 2018.

⁸⁴ Hobbes T, 'Leviathan or the Matter, Forme and Power of a Common-wealth Ecclesiasticall' *Oregon State University*, 2006, 105, -<<http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/hobbes/Leviathan.pdf>> on 31 January 2017.

⁸⁵ Hobbes T, 'Leviathan or the Matter, Forme and Power of a Common-wealth Ecclesiasticall' *Oregon State University*, 2006, 105, -<<http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/hobbes/Leviathan.pdf>> on 31 January 2017.

⁸⁶ Hobbes T, 'Leviathan or the Matter, Forme and Power of a Common-wealth Ecclesiasticall' *Oregon State University*, 2006, 106, -<<http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/hobbes/Leviathan.pdf>> on 31 January 2017.

⁸⁷ Hobbes T, 'Leviathan or the Matter, Forme and Power of a Common-wealth Ecclesiasticall' *Oregon State University*, 2006, 106, -<<http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/hobbes/Leviathan.pdf>> on 31 January 2017.

⁸⁸ Locke J, 'Two Treatises of Government' 5 Second Treatise of Civil Government '1690, 159.

⁸⁹ Rousseau J, 'The Social Contract' Wildside Press LLC, Maryland, 2010, 10.

State sovereignty connotes that it may legislate and regulate at will issues of concern to its people, including issues of public interest.⁹¹ This study examines the limiting aspect of investor-state arbitration on a state's policy discretion. It discusses how the investor-state dispute resolution framework curtails a state's regulatory capacity and thus contravenes the sovereign will of its people. The state, in exercising its duty to its people, has an obligation to protect its people, their property and chart a regulatory path that seeks their prosperity.

Citizens have delegated to the state the obligation to ensure their protection and fortitude. Therefore, the state has a duty to ensure that it protects the interests of its citizens. BITs which were initially seen as safe investment destination have become avenues of political and economic controversy.⁹² BITs which were meant to encompass reciprocal economic obligations have ended up being single-sided.⁹³ There has been an increased risk of litigation by investors against host states and thus a negative impact on the net benefit of investment to recipient countries.⁹⁴ Furthermore, most BIT provisions align with the investor's interests instead of the sovereignty of the developing country.⁹⁵ Arbitral awards that find states liable for actions taken in safeguarding the interests of her citizens contravene the social contract. Actions taken by a state that may impede on the rights of investors to ensure the prosperity of its citizens are in line with the doctrine of protection of citizen property. Citizens democratically take part in the election of their government. Thus, a government holds the goodwill it requires to enable it protect the wealth of its citizens while ensuring that its citizens heed to its course.

2.3 Developmental State Theory

In discussing the developmental state theory, the starting point is the importance of the state. This theory places the state as undeniably the most important socio-economic and political institution in the society.⁹⁶ It is from this viewpoint that the state must be

⁹⁰ Choudhury B, 'Recapturing public power: Is investment arbitration's engagement of the public interest contributing to the democratic deficit?' 41 *Vanderbilt Journal of Transnational Law*(2008), 777.

⁹¹ Choudhury B, 'Recapturing public power', 777.

⁹² Kollamparambil U, ' Why developing countries are dumping investment treaties' *The Conversation Africa*, 23 March 2016, <http://theconversation.com/why-developing-countries-are-dumping-investment-treaties-56448> accessed on 27 January 2018.

⁹³ Chalamish E, 'The future of bilateral investment treaties: A de facto multilateral agreement'34(2) *Brooklyn Journal of International Law*(2009), 309.

⁹⁴ Kollamparambil U, ' Why developing countries are dumping investment treaties' *The Conversation Africa*, 23 March 2016, <http://theconversation.com/why-developing-countries-are-dumping-investment-treaties-56448> accessed on 27 January 2018.

⁹⁵ Chalamish E, 'The future of bilateral investment treaties', 310.

⁹⁶ United Nations Economic and Social Council, " The Developmental State:What options for Africa?" Third meeting of the committee on governance and popular participation, Addis Ababa, 20-21 February 2013, 1.

visualized. A developmental state is one that places economic development as the key priority of state policy, and which is able to craft effective instruments to promote such a target.⁹⁷ Thandika Mkandawire defines in two spheres: ideological and structural.⁹⁸ As regards ideology, a developmental state's mission is to ensure economic developments vide high rates of industrialisation.⁹⁹ It establishes its principle of legitimacy as that of promotion of sustained development.¹⁰⁰ In terms of structure, a development state is one which has capacity to implement economic policies sagaciously and effectively.¹⁰¹

The developmental state gives precedence to industrial policy and associates itself with the structure of domestic industry and with promoting the structure that enhances the state's international competitiveness.¹⁰² The state industrialization framework is fueled by a nationalistic desire to catch up with the advanced industrialized nations.¹⁰³

In its mission to ensure high economic development vide high rates of industrialisation, the state must attract investors who will introduce foreign direct investment (FDI) into the country. Investors will sign BITs with host states and subsequently invest in Kenya. This will introduce money into the economy and avail employment to people. Indeed, a study has shown that the economic growth of countries is strongly influenced by foreign direct investment.¹⁰⁴ A unit increase in foreign direct investment in Kenya translates to an increase in economic growth in Kenya.¹⁰⁵

2.4 Third World Approaches to International Law

This paper will also be based on the theory of third world approaches to international law (TWAIL). Theorists opine that the regime of international law is illegitimate in that it is a predatory system that seeks to uphold the plunder and subordination of the third world by Western countries.¹⁰⁶ The TWAIL has viewed international law as a regime and discourse of domination and not liberation. It is argued that international law prescribes rules that

⁹⁷ United Nations Economic and Social Council, "The Developmental State", 2.

⁹⁸ Mkandawire T, 'Thinking about developmental states in Africa' 25 *Cambridge Journal of Economics*, May 2001, 290.

⁹⁹ Mkandawire T, 'Thinking about developmental states in Africa', 290.

¹⁰⁰ Mkandawire T, 'Thinking about developmental states in Africa', 290

¹⁰¹ Mkandawire T, 'Thinking about developmental states in Africa', 290

¹⁰² Heep S, *China in global finance, Global power shift*, Springer International Publishing, Switzerland, 2014, 7.

¹⁰³ Heep S, *China in global finance, Global power shift*, 7.

¹⁰⁴ Mwangi M, 'Effect of foreign direct investments on economic growth in Kenya' Unpublished Masters Thesis, University of Nairobi, October 2013, 30.

¹⁰⁵ Mwangi M, 'Effect of foreign direct investments on economic growth in Kenya' Unpublished Masters Thesis, University of Nairobi, October 2013, 31.

¹⁰⁶ Mutua M, 'What is TWAIL' 94 *Proceedings of the Annual Meeting* (American Society of International Law), 2000, 31.

deliberately ignore the phenomena of uneven development in favour of prescribing global standards.¹⁰⁷ Julius Nyerere succinctly defined the notion of TWAIL. He described the third world as consisting of victims and the powerless in the international economy who yield no control and barely influence the mode in which nations of the world plan their economic affairs.¹⁰⁸ In this study, we observe that the BITs are wholly imbalanced and biased towards investors from developing states. Further, investor-tribunals are fixated on protecting the investors from developed nations to the detriment of developing nations.¹⁰⁹ The tribunals begin from a notion that the state has unfairly reneged on the rights of investors even without assessing the rationale of the state action.¹¹⁰ This has led to significant financial awards to investors at the expense of developing states. This state of affairs breeds the criticism that investor-state arbitration is inherently biased to developing states.

The main aim of TWAIL is to highlight the *problematique* of colonialism to the centre.¹¹¹ TWAIL adumbrates that by having exercised substantial economic, military, political power over the former colonies, Europe and the United States (U.S) have set patterns of dominance that exist to date.¹¹² Under this theory, international law guarantees sovereign equality and self-determination, it promotes the legacy of imperialism and colonial conquest.¹¹³ Antony Anghie argues that international law cannot be conceived as a manifestation of a philosophical sovereignty doctrine but as being created by problems relating to colonial order.¹¹⁴ TWAIL highlights the clear disregard by the United Nations of crises in third world countries and the selective use of UN organs to advance foreign policies of Western powers.¹¹⁵ The Western superpowers monitor all global policies and pounce on those it deems a threat to its interests.¹¹⁶ Statistics show that developing countries are not only subject to the most claims but they are subject to many more claims than their share of global investment.¹¹⁷ Thus, this theory is line with the study's argument.

¹⁰⁷Chimni S, 'Third world approaches to international law: A Manifesto' 8 *International Community Law Review*, 2006, 5.

¹⁰⁸ Mutua M, 'What is TWAIL' *Proceedings of the 94th Annual Meeting*, 5-8 April 2008, 35.

¹⁰⁹ Interview with Ruwange M on 13 February 2018.

¹¹⁰ Interview with Ruwange M on 13 February 2018.

¹¹¹ Gathii J, ' TWAIL: A Brief History of its Origins, Its Decentralized Network, and a Tentative Bibliography', 3(26) *Trade, Law and Development*(2011), 38.

¹¹² Gathii J, ' TWAIL', 38.

¹¹³ Gathii J, ' TWAIL', 30.

¹¹⁴ Gathii J, ' TWAIL', 31.

¹¹⁵ Mutua M, 'What is TWAIL' *Proceedings of the 94th Annual Meeting*, 5-8 April 2008, 37.

¹¹⁶ Mutua M, 'What is TWAIL' *Proceedings of the 94th Annual Meeting*, 5-8 April 2008, 37.

¹¹⁷ Gallager K, Shretsha E, 'Investment treaty arbitration and developing countries: A re-appraisal' Working Paper No.10-10 *Global Development and Environment Institute* (2011), 8.

The current framework of investor-dispute resolution framework is focused on compensating investors for state action regardless of the purpose of the measures.

Apart from exploring the problem, TWAIL also seeks to expound on the solution. The concept of third world approaches to international law seeks to ensure that all voices, be it non-state, non-governmental, rural, urban, state-based, can be heard in the scope of international law.¹¹⁸ As enunciated by Upendra Baxi, third worldism is based on the insistence on the recognition of radical cultural and civilizational plurality and diversity.¹¹⁹ TWAIL seeks to build resistance towards actions of metropolitan power over third world citizens; whether the power be it military, economic, political, and cultural.¹²⁰ The study seeks to advocate for the consideration of the divergent social, political and economic variations of developing countries like Kenya in the adjudication of investment disputes. The investor-state tribunals should balance the interests of investors with the ability of states to regulate in the public interest.

2.5 Definition of Public Policy

This section seeks to enunciate a definition of public policy that will be utilised in this study. Public policy can be defined as the overall framework within which government actions are undertaken to achieve public goals.¹²¹ It encompasses the study of government decisions and actions designed to deal with a matter of public concern.¹²² Public policy are filtered through a certain policy process, adopted, implemented through legislation, regulatory measures, courses of government action, and funding priorities, and enforced by a public agency.¹²³ It is a concept that evolves continually to meet the changing needs of society, including political, social, cultural, moral, and economic dimensions.¹²⁴ It is the judicial benchmark for the protection of public interest.¹²⁵

¹¹⁸Mutua M, 'What is TWAIL', 37.

¹¹⁹Eslava L and Pahuja S, 'Beyond the (Post) Colonial: TWAIL and Everyday Life of International Law 45(2) *Law and Politics in Africa, Asia and Latin America*, 2012, 195.

¹²⁰Gathii J, 'TWAIL', 35.

¹²¹ Cochran C and Malone E, *Public policy: Perspectives and choices*, 5ed, Lynne Rienner Publishers, Colorado, 2005, 3.

¹²² Cochran C and Malone E, *Public policy: Perspectives and choices*, 3.

¹²³ Cochran C and Malone E, *Public policy: Perspectives and choices*, 3.

¹²⁴Lawteacher, 'Public policy as a limit to the enforcement of foreign arbitral' <https://www.lawteacher.net/free-law-essays/international-law/public-policy-as-a-limit-to-the-enforcement-of-foreign-arbitral-law-essay.php#ftn48> accessed on 28 January 2018.

¹²⁵ Lawteacher, 'Public policy as a limit to the enforcement of foreign arbitral' <https://www.lawteacher.net/free-law-essays/international-law/public-policy-as-a-limit-to-the-enforcement-of-foreign-arbitral-law-essay.php#ftn48> accessed on 28 January 2018.

The doctrine of public policy as espoused in the case of *Edgerton v The Earl of Brownlow* is also indicative of the gist of the doctrine. The averments of the judges as to public policy in this case help us in determining what public policy is. Lord Truro holds public policy to be the principle that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good.¹²⁶ Moreover, Justice Baron Parke opined that public policy in its ordinary sense meant political expedience or that which is best for the common good of the community.¹²⁷

Farsad Ghodoosi states that public policy is not a monolithic concept but consists of three distinct yet intertwined notions of *public*: public interest, public morality, and public security.¹²⁸ In expounding on the aspect of the public interest, public policy is a reflection of the people's will.¹²⁹ Governments should enforce public policies that reflect the interest of all, enacted by the people's representatives.¹³⁰ Vide their elected representatives, the people voice opinions that shape the public policy. It is not only a manifestation of sovereignty but a critical component of it. Public policies aim to maximise profits and increase opportunity for its citizens.¹³¹ Public policy in international investment law entails the freedom of a host state to regulate policy and legislation in the public interest.¹³² Public policy and the regulatory actions of states have been highlighted where they encroach on the subjective rights of foreign investors in property held in a host state.¹³³ This study will look at the case of South Africa where the state was subjected to an investor-claim as a result of a policy which sought to enhance equality among its citizens pursuant to the Black Economic Empowerment programme.

In current investor-state dispute resolution practice, a key conception of public policy is that of state regulation in the event of illegality.¹³⁴ This involves a situation where an investor does not comprehensively comply with all the legal requirements needed to

¹²⁶*Edgerton v The Earl of Brownlow* [1853] 4 H L Cas 1.

¹²⁷*Edgerton v The Earl of Brownlow* [1853] 4 H L Cas 1.

¹²⁸ Ghodoosi F, 'The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements' 94 *Nebraska Law Review*(2016), 689.

¹²⁹ Ghodoosi F, 'The Concept of Public Policy in Law', 724.

¹³⁰ Ghodoosi F, 'The Concept of Public Policy in Law', 724.

¹³¹ Ghodoosi F, 'The Concept of Public Policy in Law', 725.

¹³² Maruta A, 'State Sovereignty and Foreign Investors' Rights: Persistent Imbalances from Cape to Hamburg' Unpublished LLM thesis, Maastricht University, 23 May 2014, 4.

¹³³ Maruta A, 'State Sovereignty and Foreign Investors' Rights: Persistent Imbalances from Cape to Hamburg' Unpublished LLM thesis, Maastricht University, 23 May 2014, 4.

¹³⁴ Interview with Melly K on 5 February 2018.

properly establish their investment in a host state.¹³⁵ An example can be through the improper allocation of a license.¹³⁶ Thus, the state in its regulatory capacity, cancels the licenses as it views that there is no lawful investment worthy of expropriation.¹³⁷ As the investment was acquired illegally, there is no investment.¹³⁸ This aspect of illegality entails a conception of public policy. This study also examines the case of Kenya where Cortec Mining received a license through illegal meanings. This led to the state cancelling the license in the exercise of its regulatory capacity.

The 'Legitimacy Crisis'

Investor-state arbitration has been regarded as being in a legitimacy crisis in recent years.¹³⁹ The legitimacy crisis in investor-state arbitration has been crystallised into *inter alia* three key issues: investor-state arbitration awards are deferential to the need for sovereign states to regulate in the public interest, fail to respect the rights of states to take national emergency action in response to a fundamental national security threat, and are skewed in favour of investors at the expense of a state's other policy goals.¹⁴⁰ The term legitimacy for this purpose means the acceptance of a rule-making institution which itself exerts a call for compliance on by its addressees because the addressees believe that the rule or institution operates in conformity with the principles of right process.¹⁴¹

The concept of legitimacy in this study relates to the justification and acceptance of the decisions of the arbitral tribunals.¹⁴² Indeed, critics of investor-state dispute resolution have pointed to an overall lack of legitimacy of the process as private arbitrators decide multi-million dollar claims against sovereign states.¹⁴³ Further, they allege that through investor-state arbitration, foreign corporations have been empowered to interfere with a state's ability to regulate for the benefit of the public at large.¹⁴⁴ They have placed the respondent at the mercy of private individuals that are far too removed from host states to properly consider the public policy implications of the contested state's course of action.

¹³⁵ Interview with Melly K on 5 February 2018.

¹³⁶ Interview with Melly K on 5 February 2018.

¹³⁷ Interview with Melly K on 5 February 2018.

¹³⁸ Interview with Melly K on 5 February 2018.

¹³⁹ Cosmas J, 'Legitimacy crisis in investor-state international arbitration system', 2.

¹⁴⁰ Behn D, 'Legitimacy, evolution, and growth in investment treaty arbitration: empirically evaluating the state-of-the-art' 46 *Georgetown Journal of International Law* (2015), 367.

¹⁴¹ Brower C, Schill S, 'Is arbitraton a threat or a boon to the legitimacy of international investment law?' 9 *Chicago Journal of International Law* (2009), 471.

¹⁴² Leonhardsen E, 'Looking for legitimacy: exploring proportionality analysis in investment treaty arbitration' 3 *Journal of International Dispute Settlement* (2011), 8.

¹⁴³ Korzun V, 'The right to regulate in investor-state arbitration: Slicing and dicing regulatory carve-outs' 50 *Vanderbilt Journal of Transnational Law*(2016), 358.

¹⁴⁴ Korzun V, 'The right to regulate in investor-state arbitration', 360.

¹⁴⁵International investment law and arbitration has been adjudged as a regime that safeguards foreign investments without sufficient regard to other non-investment related interests of host states.¹⁴⁶ In the same vein, similar concerns were also shared in the public consultation on investment protection and investor-state dispute resolution in Transatlantic Trade and Investment Partnership (TTIP) conducted by the European Commission.¹⁴⁷ Multiple submissions touched on the state's right to regulate and moreover, the submissions considered investor-state dispute resolution to be a 'threat to democracy and public finance or to public policies.'¹⁴⁸

The investor-state arbitration statistics have proved that this legitimacy crisis is justified. 61 percent of appointees to investor-tribunals are of Western European or North American origin.¹⁴⁹ According to statistics released by UNCTAD, approximately sixty percent of the cases in the year 2015 were brought against developing countries.¹⁵⁰ Further, between 1972 and 2014, 111 cases accounting for a fifth of all documented investment-treaty based cases were against African countries.¹⁵¹ Moreover, the opportunity costs for losing a case are much higher for developing rather than developed nations.¹⁵² In making a comparison, while the average award Canada is to pay the United States for losing arbitration is \$ 3.9 million but in the reverse, Argentina is to pay \$ 107 million.¹⁵³ Also, awards have had a higher impact on developing state economies as compared to the developed states.¹⁵⁴ The awards against developing countries relative to their government expenditure is 0.53% while for Canada, the effect is 0.003% of their expenditure.¹⁵⁵

This conception of the legitimacy crisis will be of great importance in the ensuing discussion in Chapter four of this study.

¹⁴⁵ Korzun V, 'The Right to Regulate in Investor-State Arbitration', 360.

¹⁴⁶ Brower C, Schill S, 'Is arbitration a threat or a boon to the legitimacy of international investment law', 474.

¹⁴⁷ Jennings M, 'The international investment regime and investor-state dispute settlement: States bear the primary responsibility for legitimacy' 17 *Business Law International* (2016), 132.

¹⁴⁸ Jennings M, 'The international investment regime and investor-state dispute settlement', 132.

¹⁴⁹ <http://www.nortonrosefulbright.com/knowledge/publications/148969/trends-in-investor-state-dispute-settlement> accessed on 14 February 2018.

¹⁵⁰ Nyombi C, 'A case for a regional Investment Court for Africa', SOAS/CRICA Arbitration Conference, Cairo, 3-5 April 2017.

¹⁵¹ Nyombi C, 'A case for a regional Investment Court for Africa', SOAS/CRICA Arbitration Conference, Cairo, 3-5 April 2017.

¹⁵² Gallager K, Shretsha E, 'Investment treaty arbitration and developing countries, 9.

¹⁵³ Gallager K, Shretsha E, 'Investment treaty arbitration and developing countries, 9.

¹⁵⁴ Gallager K, Shretsha E, 'Investment treaty arbitration and developing countries, 9.

¹⁵⁵ Gallager K, Shretsha E, 'Investment treaty arbitration and developing countries, 9.

3. CHAPTER THREE: CASE STUDIES

3.1 Introduction

The objectives of this chapter are: to examine the constitutive elements of international investment, examine the place of public policy in international investment and study how public policy in investment arbitration has been handled in different jurisdictions. This chapter seeks to answer the question on what is the current disposition of public policy in the investor-state dispute resolution framework. We will begin with an examination of ICSID. This section will encompass a scrutiny of the history of the Convention and also the Convention itself in examining the place of public policy. Subsequently, we will then proceed to explore how South Africa has sought to expand the ambit of public policy in their international investment law framework. Ultimately, we will examine the investor-dispute resolution framework in Kenya. We will investigate how the structure of the BITs and the investment regulatory framework leaves Kenya's public policy discretion in a precarious position.

3.2 The Space of Public Policy in ICSID

The ICSID is one of the five organisations of the World Bank Group, along with the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), and the Multilateral Investment Guarantee Agency (MIGA).¹⁵⁶ It is created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other states which provides procedures of arbitration to settle investment disputes between states and foreign investors.¹⁵⁷ It is of immense importance to note that many BITs contain clauses on investor-state dispute resolution through international arbitration that refers disputes to ICSID or tribunals established under UNCITRAL rules.¹⁵⁸ The Republic of Kenya is a

¹⁵⁶ICSID, 'ICSID and the World Bank Group' *ICSID*, <https://icsid.worldbank.org/en/Pages/about/ICSID%20And%20The%20World%20Bank%20Group.aspx> accessed on 14 February 2018.

¹⁵⁷ Article 1(1) *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, March 18 1965, ICSID 15; Ma Y, 'The ICSID review and enforcement mechanisms and the backlash against the investor-state Arbitration' Published Doctoral Thesis, Central European University, February 2016, 9.

¹⁵⁸ Organisation for Economic Co-operation and Development, *Dispute Settlement Provisions in international investment agreements: A large sample survey*, 2012, at 24.

party to the ICSID Convention.¹⁵⁹ Thus, investor-state dispute resolution under the ICSID forms the crux of the discussion of this section.

There are various investor-state dispute resolution forums available to enable parties adjudicate their disputes. The arbitration forums that have been mostly utilised in BITs are: ICSID arbitration, UNCITRAL Arbitration, arbitration under the Stockholm Chamber of Commerce and arbitration under the International Chamber of Commerce.¹⁶⁰ The key factor that sets aside ICSID is the final and binding nature of ICSID arbitral awards.¹⁶¹ The ambit of international arbitration has come under the assumption that an award rendered pursuant to the ICSID Convention is enforceable within the contracting states with no resistance to the enforcement possible.¹⁶² Moreover, articles 53, 54, and the drafting history of the Convention reinforce the assumption that resistance to the enforcement of ICSID awards is not possible.¹⁶³

Article 53 of the ICSID Convention provides as follows:

“The award shall be binding and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each part shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.” Article 54 provides that each contracting state shall recognise an award as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgement of a court in that state. The gist of these two provisions is that that the award is binding on the parties and that not it is not subject to any appeal or to any other remedy except those which provided for in the Convention.¹⁶⁴ The maxim is thus clear that a failure to abide by and comply with the

¹⁵⁹ ICSID, ‘ Database of ICSID member states’ *ICSID*, <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> on 13 November 2017.

¹⁶⁰ Coleman M, Aldridge H, Innes T, ‘ Choosing an arbitral forum for investor-state arbitration’ *Step toe*, 27 January 2015, <https://www.step toe.com/en/news-publications/choosing-an-arbitral-forum-for-investor-state-arbitration.html> on 16 September 2017.

¹⁶¹ UNCTAD, ‘ ICSID: Binding force and enforcement’ *UNCTAD*, 2003, http://unctad.org/en/Docs/edmmisc232add8_en.pdf accessed on 13 February 2018.

¹⁶² Baldwin E, Kantor M and Nolan M, ‘ *Limits to Enforcement of ICSID Awards*’ *Journal of International Arbitration*, (2006), 3.

¹⁶³ Baldwin E, Kantor M and Nolan M, ‘ *Limits to Enforcement of ICSID Awards*’ 3.

¹⁶⁴ Parra A, “The enforcement of ICSID arbitral awards” 24th Joint Colloquium on International Arbitration, Paris, November 16 2007, 2.

award is therefore a violation not only of its undertaking to arbitrate, but also of an international treaty obligation.¹⁶⁵

The channel for review of an ICSID award also plays an important role in showing certain characteristics of the ICSID Convention. Non-ICSID arbitrations allow awards to be challenged in local courts subject to the seat of the arbitration.¹⁶⁶ Also, other forums like the UNCITRAL arbitration enunciate various grounds on which can be raised in a domestic court that may lead to the setting aside or non-recognition of an arbitral award.¹⁶⁷ For example, the UNCITRAL model law states that an arbitral award may be set aside or non-enforced if the subject matter of the dispute cannot be settled by arbitration or the recognition or enforcement would be contrary to the public policy of a state.¹⁶⁸ In stark contrast, ICSID utilises a self-contained system for self-review through the formation of an ad-hoc committee which may annul an award on the request of a party.¹⁶⁹ The following exhaustive grounds are provided: the tribunal was not properly constituted, the tribunal has manifestly exceeded its powers, that there was corruption on the part of a member of a tribunal, a serious departure from a fundamental rule of procedure and that the award has failed to state the reasons it is based on.¹⁷⁰

The ICSID Convention does not accept any other basis for overturning an ICSID apart from the prescribed grounds. This is a distinctive feature of the Convention as other arbitration regimes leave enforcement to domestic law or other applicable treaties, and the same domestic laws and treaties provide a minimum standard of review of arbitral awards in setting aside proceedings and provide limited grounds for refusal to recognise and enforce arbitral awards, including uncertain public policy grounds.¹⁷¹

An examination of the history of the ICSID Convention clearly portrays its indifference to the review of awards specifically on the ground of public policy. In examining the history of ICSID, the comments made by Aron Bronhces who served as the founding Secretary

¹⁶⁵ Parra A, “The enforcement of ICSID arbitral awards” 24th Joint Colloquium on International Arbitration, Paris, 16 November 2007, 2

¹⁶⁶ Schreier C, ‘ICSID annulment revisited’ 30 *Legal Issues of Economic Integration*, 2003, 8, <http://www.univie.ac.at/intlaw/pdf/67.pdf> on 16 September 2017.

¹⁶⁷ Schreier C, ‘ICSID annulment revisited’, 8.

¹⁶⁸ Article 36(1), *UNCITRAL Model Law on International Commercial Arbitration*, 21 June 1985

¹⁶⁹ Schreier C, ‘ICSID Annulment Revisited’, 8.

¹⁷⁰ Article 52(1), *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, March 18 1965, ICSID 15.

¹⁷¹ Reed L, Paulsson J and Blackaby N, *Guide to ICSID Arbitration*, 2ed, Kluwer Law International, 2010, 15.

General of ICSID will be of much importance.¹⁷² The drafting of the ICSID Convention involved four Regional Consultative Meetings of Local Experts which discussed a draft of the Convention between the year 1963 and 1964.¹⁷³ Member states of the World Bank were required to send representatives to a Legal Committee in Washington so as to gain consensus on the Convention.¹⁷⁴ Broches was in-charge of the World Bank staff work on the Convention and also the Chairman of the Regional Consultative meetings.¹⁷⁵

During the drafting of the Convention, one of the previous drafts included a public policy defence similar to the one found in the UNCTRAL law. Article 57 of the previous draft provided that recognition or enforcement could be refused if the competent authority of the state in which recourse is sought finds that such recognition or enforcement is contrary to public policy of that state.¹⁷⁶ Various arguments were proffered for the need to include public policy as an impediment to the recognition and enforcement of arbitral awards. The Italian delegation stated that ICSID awards should either be treated as national awards or be subject to the exceptions of article 5 of the New York Convention.¹⁷⁷ The German delegation submitted that a losing state should be allowed to invoke its public policy as he felt that equalization of the award with the final judgement of a court would cause great difficulty.¹⁷⁸

The British team sought to expand the scope and submitted that apart from public policy, an award should be set aside if it violates the laws relating to the enforcement of the judgments in its own courts.¹⁷⁹ In his reply to the submissions, Mr. Broches stated the averments of the Italian delegation showed the weakness of the draft that encompassed the public policy angle. Furthermore, he stated that if certain countries had constitutional problems in permitting their Government to go to arbitration, conversely, other countries might have difficulties with respect to the enforcement of awards. Also, the essential

¹⁷² Parra A, 'Remembering Aron Bronches' *Oxford University Press*, 14 October 2016, <http://oxia.oup.com/page/icsid-aron-broches> on 13 November 2017.

¹⁷³ Broches A, 'Awards rendered pursuant to the ICSID Convention: Binding force, finality, recognition, enforcement and execution' 2 *Foreign Investment Journal*, 287.

¹⁷⁴ Broches A, 'Awards rendered pursuant to the ICSID Convention', 313.

¹⁷⁵ Broches A, 'Awards rendered pursuant to the ICSID Convention' 313.

¹⁷⁶ The International Centre for the Settlement of Investment Disputes, *History of the ICSID Convention*, 1968, at 885.

¹⁷⁷ The International Centre for the Settlement of Investment Disputes, *History of the ICSID Convention*, 1968, at 888.

¹⁷⁸ Bronches A, 'Awards rendered pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement and Execution' 2 *Foreign Investment Journal*, 313.

¹⁷⁹ The International Centre for the Settlement of Investment Disputes, *History of the ICSID Convention*, 1968, at 889.

problem was to provide for a balance between the positions of the parties. He thought that if enforcement of awards was to be governed by rules similar to those set forth in the New York Convention, one should then eliminate the provisions for annulment under the Convention since otherwise a double set of appeals might be created.¹⁸⁰ The doubts highlighted by Bronches eventually led to the current form of the ICSID Convention which does not include public policy as a ground for review.

Ibrahim Shihata, Secretary-General of ICISD opined that the history of the Convention made it clear that the draftsmen intended to: assure the finality of ICSID awards, distinguish carefully an annulment from an appeal and construe narrowly the grounds for annulment so that procedure remains exceptional.¹⁸¹ From the analysis of the articles of the Convention and its history, we can clearly deduce the aversion that is placed towards the ground of public policy.

The lack of public policy vis-à-vis the Argentina financial crisis

The effect of the lack of consideration of public policy in review of ICSID awards was seen in the disputes that faced Argentina after her economic meltdown. In 2001, Argentina suffered a biting financial crisis that saw the Argentine Peso lose 40% of its value and half the population below the poverty line.¹⁸² To rescue the situation, Argentina passed a convertibility law among other measures that indeed stabilised the economy but substantially affected the investments of foreigners.¹⁸³

The measures taken by Argentina resulted in the greatest wave of claims by foreign investors against a host state in recent history.¹⁸⁴ Of the over forty claims filed against Argentina, four involved claims against U.S investors in Argentina's gas transportation and distribution facilities.¹⁸⁵ Argentina was found liable and was ordered to pay damage awards in excess of \$100 million which are among the highest ICSID awards ever.¹⁸⁶

¹⁸⁰ The International Centre for the Settlement of Investment Disputes, *History of the ICSID Convention*, 1968, 888.

¹⁸¹ Buckley R, 'Now we have come to the ICSID party: Are its awards final and enforceable' 14 *Sydney Law Review*, (1992), 362.

¹⁸² Burke-White W, 'The Argentine financial crisis: State liability under BITs and The legitimacy of the ICSID system' *Penn Law: Legal Scholarship Repository* (2008), 3.

¹⁸³ Burke-White W, 'The Argentine Financial Crisis', 4.

¹⁸⁴ Alvarez J and Khamisi K, 'The Argentine Crisis and foreign investors' in Sauvant K(ed), *The Yearbook on International Investment Law and Policy 2008/2009*, Oxford University Press, 2009, 379.

¹⁸⁵ Alvarez J and Khamisi K, 'The Argentine Crisis and Foreign Investors' 379.

¹⁸⁶ Alvarez J and Khamisi K, 'The Argentine Crisis and Foreign Investors' 380.

3.3 The South African backlash against investor-State Arbitration

In the beginning of 2012, South Africa terminated its BITs with Belgium, Luxembourg, Spain, Germany, Switzerland, the Netherlands, and Denmark.¹⁸⁷ South Africa stated that it did not seek to do away with investor-state arbitration but maintain its right to implement policies to address the country's social and economic requirements.¹⁸⁸ The termination was motivated by a shared concern that BITs and the international system of investor-state arbitration inhibit the ability of governments to enact legislation and regulatory measures aimed at promoting public policy objectives.¹⁸⁹

South Africa's decision was fueled by the decision of Italian investors to file a claim against South Africa under the ICSID Additional Facility Rules in 2007. A matter is filed under the ICSID Additional Facility Rules if one of the parties in an investment dispute is not an ICSID member state.¹⁹⁰ South Africa is not an ICSID member state.¹⁹¹ The claimants argued that South Africa had breached both the Italian and Luxembourg BIT prohibitions on expropriation by passing the Mineral and Petroleum Resources Development Act (MPRDA).¹⁹²

They asserted that the passing of the MPRDA extinguished the claimants' old order mineral rights by repealing the common law to the extent that its principles were in conflict with the MPRDA.¹⁹³ Further, the claimants argued that their shares in the Operating Companies have been expropriated by operation of the Black Economic Empowerment

¹⁸⁷Kron J, 'Bilateral investment treaties in South Africa' *Norton Rose Fulbright*, July 2014, <http://www.nortonrosefulbright.com/knowledge/publications/118456/bilateral-investment-treaties-in-south-africa> accessed on 6 October 2017.

¹⁸⁸ Lang J, 'Bilateral Investment Treaties- a shield or a sword?' *Bowman Gilfillan*, <http://www.bowman.co.za/FileBrowser/ArticleDocuments/South-African-Government-Canceling-Bilateral-Investment-Treaties.pdf> on 20 September 2017.

¹⁸⁹ Maydham, 'South Africa overhauls its investment treaty regime' *Maydham Briefing Paper*, <http://www.madhyam.org.in/wp-content/uploads/2014/07/South-Africa-Overhauls-its-Investment-Treaty-Regime.pdf> accessed on 6 October 2017.

¹⁹⁰ICSID, 'Overview of arbitration under the ICSID additional facility' *ICSID*, <https://icsid.worldbank.org/en/Pages/process/Overview-ICSID-Additional-Facility-Arbitration.aspx> accessed on 28 January 2018.

¹⁹¹Mahliz M, 'The ICSID club: List of members and non-members' *Bilic Investment Treaty Forum*, 20 June 2007, https://www.biiicl.org/files/2916_icsid_club_malik_.pdf accessed on 28 January 2018.

¹⁹² Piero Foresti, Laura de Carli & Others, ICSID Case No. ARB(AF)/07/01,14.

¹⁹³ Piero Foresti, Laura de Carli & Others, ICSID Case No. ARB(AF)/07/01,14.

(BEE) equity divestiture requirements established by the twin operation of the Mining Charter and the MPRDA.¹⁹⁴ The Mining Charter required foreign investors to sell 26% of their shares in relevant companies to the Historically Disadvantaged South Africans.¹⁹⁵ The claimants argued that the selling of shares expropriated their rights. The government responded by stating that it had an obligation to promote equality under both international human rights and the Constitution together with the mining policy was to this effect.¹⁹⁶ In the end, the case was settled on merits with the tribunal only requiring an award on costs.¹⁹⁷ The tribunal acknowledged that some elements of the claimant's claim were abandoned rather than settled.¹⁹⁸ This was because the respondent had given the claimant new rights that may have warranted the claimant to make a commercial decision to not proceed with the arbitration.¹⁹⁹

In this case, the claimants lost but the South African government, bruised by the encounter, decided to a launch of the review of BITs in 2010.²⁰⁰ The *Foresti* case showed the South African government that the ability of the state to regulate its domestic public policy objectives was under serious threat from the BIT obligations and specifically international investment arbitration.²⁰¹ The review carried out by the Department of Trade and Industry concluded that the BITs extended too far to the policy sphere and that aspects of BITs were incompatible with the Constitution and other South African laws.

The review revealed that BITs can pose risk to legitimate policy making in the public interest. South Africa was particularly concerned with investor-state dispute provisions that open the door for narrow commercial interests to unpredictable international arbitration outcomes and may lead to direct challenges to constitutional and democratic policy-making.²⁰² The review by the Department of Trade led to the Cabinet making five key policy decisions: first, to develop a new Investment Act to codify and clarify typical BIT provisions into domestic law, terminate first generation BITs and offer partners possibility to renegotiate, refrain from entering into BITs in future unless there are compelling

¹⁹⁴ *Piero Foresti, Laura de Carli & Others*, ICSID Case No. ARB(AF)/07/01,17.

¹⁹⁵ *Piero Foresti, Laura de Carli & Others*, ICSID Case No. ARB(AF)/07/01,17.

¹⁹⁶ *Piero Foresti, Laura de Carli & Others*, ICSID Case No. ARB(AF)/07/01,18.

¹⁹⁷ *Piero Foresti, Laura de Carli & Others*, ICSID Case No. ARB(AF)/07/01, 31.

¹⁹⁸ *Piero Foresti, Laura de Carli & Others*, ICSID Case No. ARB(AF)/07/01,28.

¹⁹⁹ *Piero Foresti, Laura de Carli & Others*, ICSID Case No. ARB(AF)/07/01,28.

²⁰⁰ Green A, 'South Africa: BITs in pieces' *Financial Times*, 19 October 2012, <https://www.ft.com/content/b0eec497-5123-3939-92f7-a5fbc73dd33> on 6 October 2017.

²⁰¹ Mossallam M, 'Process matters: South Africa's experience exiting its BITs' GEG Working PAPER 2015/97

²⁰² Carim X, *Rethinking Bilateral Investment Treaties* pg. 61

economic and political reasons, develop a new model BIT as a basis for renegotiation, and establish an inter-Ministerial Committee to oversee the whole process.²⁰³

Therefore, a new Promotion and Protection of Investment Bill was introduced in November 2013.²⁰⁴ In November 2015, the Protection of Investment Act 22 of 2015 was passed in Parliament.²⁰⁵

3.3.1 South Africa's Public Policy vis-à-vis the Protection of Investment Act

In analysing this act, we observe how South Africa has sought to strengthen the state's policy space vis a vis its effect on protection afforded to investors. This section will highlight key provisions in the Act that portray South Africa's desire to enhance its regulatory capacity. For the purpose of this paper, we will examine three specific sections of the Act. These two sections entail the adumbrations on the right to regulate and dispute resolution.²⁰⁶

3.3.1.2 The Right to Regulate

Section 12 of the Act contains the provision on the right to regulate. Section 12 grants the government the power to take measures with a view to addressing historical, social and economic injustices with a view to ensuring the progressive realization of socio-economic rights and the fostering of economic development and industrialization. It also grants the state the power to take any measures necessary for the protection of the security interests including its financial stability.²⁰⁷

The right to regulate symbolises the ability of the host state to adopt policies and laws to achieve a variety of policy objectives.²⁰⁸ It signifies the freedom to participate in political,

²⁰³ Mossallam M, 'Process matters: South Africa's experience exiting its BITs' 12.

²⁰⁴ Farish A, 'Protection of Investment Acts- A balancing Act between policies and Investments' De Rebus, April 25 2016, < <http://www.derebus.org.za/protection-investments-act-balancing-act-policies-investments/>> accessed on 3 November 2017.

²⁰⁵ Farish A, 'Protection of Investment Acts- A balancing Act between policies and Investments' De Rebus, April 25 2016, < <http://www.derebus.org.za/protection-investments-act-balancing-act-policies-investments/>> accessed on 3 November 2017.

²⁰⁶ Weiniger M, Satryani G, Ambrose H, 'Dawn of a new era for investment protection in South Africa – draft investment law to replace protections offered under investment treaties published for public comment' *Lexology*, 14 November 2013, <https://www.lexology.com/library/detail.aspx?g=96d40965-04ff-4c22-9025-d23fc78d467d> accessed on 13 February 2018.

²⁰⁷ Section 12, *Protection of Investment Act*(South Africa)

²⁰⁸ Qumba F, 'Balancing the protection of foreign direct investment and the right to regulate for public benefit in South Africa, Unpublished LLM Mini-Dissertation University of Pretoria, University of Pretoria, 30.

economic, legislative and other activities as the state deems necessary.²⁰⁹ During the public participation sessions to collect views on the Protection of Investment Act 2015, the Department of Trade stated the importance of the right to regulate as found in section 12.²¹⁰ South Africa reaffirmed its right to regulate investments in the public interest in the face of challenges that she faced against various state measures.²¹¹

Section 12 has however been critiqued for placing South Africa's interests above that of investors.²¹² The use of the word 'including' before the list of measures implies that the list is not exhaustive.²¹³ Therefore, South Africa has taken a pro-regulatory approach where the state regulatory power trumps an investor's foreign investment rights. The fixation on regulatory power has seen the lack of balance between investment protection and the state's regulatory power.

3.3.1.3 Dispute Resolution

The Protection of Investment Act also discusses the controversial matter of investment arbitration as regards South Africa. An investor that has a dispute with the state first has to resort to the appointment of a mediator within six months of the commencement of the dispute.²¹⁴ Secondly, the investor has the option of approaching any judicial body within the state for a resolution of the dispute.²¹⁵ The last measure is the most controversial. It states that the government may consent to international arbitration in respect of investments subject to the exhaustion of local remedies.²¹⁶ Further, the Act states that the arbitration will be conducted between the host state and the home republic of the investor.²¹⁷

²⁰⁹ Qumba F, 'Balancing the protection of foreign direct investment and the right to regulate for public benefit in South Africa, Unpublished LLM Mini-Dissertation University of Pretoria, University of Pretoria, 30.

²¹⁰ Summary of submissions for the promotion and protection of investment bill' 2015, http://pmg-assets.s3-website-eu-west-1.amazonaws.com/150922Summary_of_Matrix.pdf accessed on 27 January 2018.

²¹¹ Summary of submissions for the promotion and protection of investment bill' 2015, http://pmg-assets.s3-website-eu-west-1.amazonaws.com/150922Summary_of_Matrix.pdf accessed on 27 January 2018..

²¹² Qumba F, 'Balancing the protection of foreign direct investment and the right to regulate for public benefit in South Africa, Unpublished LLM Mini-Dissertation ,University of Pretoria, University of Pretoria, 59

²¹³ Swart D, 'Legal protection of foreign investment in South Africa' Unpublished LLM Thesis, University of Pretoria, June 2016, 34.

²¹⁴ Section 13(1), Chapter 22, *Protection of Investment Act*(South Africa)

²¹⁵ Section 13(4), Chapter 22, *Protection of Investment Act*(South Africa)

²¹⁶ Section 13(5), Chapter 22, *Protection of Investment Act*(South Africa)

²¹⁷ Section 13(1), Chapter 22, *Protection of Investment Act*(South Africa)

The South African process does not assure the investor that he or she will have an opportunity to present his or her case.²¹⁸ This is due to two key factors: the requirement of government consent to arbitration which due to the risk of international arbitration, is rarely given and secondly, the fact that an investor has to persuade its home government to pursue such a matter against the government of South Africa.²¹⁹

The issue of exhausting local remedies may also prove to be a hindrance to investors. Avoiding the use of domestic courts is a key purpose of investment arbitration.²²⁰ The avenue of local courts before commencing international arbitration would mean delay and additional costs to the investor.²²¹ This provision restricting the form of dispute resolution goes against international practice that allows investors to bring cases against states directly. This provision may result in investors refraining from investing in South Africa as they would fear lacking a viable medium for judicial recourse.

In my view, the inclusion of this provision shows the trickle-down effect of the imbalance that has permeated investor-state arbitration. The desire to prevent direct access to investor-state dispute tribunals is a result of the attack on South's Africa's ability to pursue its policy objectives.

South Africa's approach to the resolving of dispute shows its preference of the traditional diplomatic protection model of dispute settlement. Diplomatic protection is the method where the state espouses a claim of its nationals and pursues it in its own name.²²² Investment disputes adjudicated using this model have led to protracted litigations between a host state and the state of the investor's nationality as seen in the *Mavrommatis* case in the Permanent Court of International Justice.²²³ In Unlike ICSID, an investor cannot approach a tribunal on its own motion against a state. This hostility to the use of ICSID stems from South Africa's criticism of investor-state arbitration. This criticism finds its roots in the heavy scrutiny of government initiatives like the BEE in the *Foresti* case where

²¹⁸ Swart D, 'Legal protection of foreign investment in South Africa' Unpublished LLM Thesis, University of Pretoria, June 2016, 39.

²¹⁹ Swart D, 'Legal protection of foreign investment in South Africa' Unpublished LLM Thesis, University of Pretoria, June 2016, 39.

²²⁰ Schreuer C, 'Interaction of international tribunals and domestic courts in investment law' *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2010), 71.

²²¹ Schreuer C, 'Interaction of international tribunals and domestic courts in investment law', 73.

²²² Schreuer C, 'Investment protection and international relations' in Reinsich A, Kriebaum U(eds), 'The law of international relations- Liber amicorum hanspeter Neuhold' Eleven International Publishing, 2007, 345.

²²³ Schreuer C, 'Investment protection and international relations', 346.

such citizen-centered actions are deemed as indirect expropriation.²²⁴ The aversion to public policy in the ICSID framework has seen South Africa take stringent measures to protect its citizens' interest. South Africa has decided to strengthen its public policy hold as regards investment.

3.4 Investor-State Arbitration in Kenya

In the previous section, we observed South Africa's move towards widening her policy scope in investment law arbitration. South Africa was of the view that the investment arbitration framework had adversely inhibited the ability of government to act in the interests of its citizens. This led to the passage of the Protection of Investment Act so as to strengthen the grasp of public policy in investment arbitration. In this section, we will study Kenya's investment law framework. Subsequently, we will seek to determine whether this framework affords the state the requisite opportunity to execute its public policy without attracting liability from investor-state tribunals.

In the year 2014, United Nations Conference on Trade and Development (UNCTAD) Secretary General Mukhisa Kituyi stated that the Kenya should consider renegotiating decade old bilateral agreements indicating that they favour foreign investors at the expense of locals.²²⁵ Dr. Kituyi urged the state to follow the example of South Africa where the government had thrown out decades old agreements that favoured foreign investors.²²⁶ Kenya has four BITs signed prior to the 21st Century and some date back as early as the 1970s. These include the BITs signed with the Netherlands in 1970, Germany in 1966, Italy in 1996 and the United Kingdom (UK) in 1999.²²⁷

Kenya's BITs have been termed as instruments that seek to protect the interests and rights of investors rather than balancing their rights and obligations with the rights and

²²⁴ Qumba F, 'Balancing the protection of foreign direct investment and the right to regulate for public benefit in South Africa, Unpublished LLM Mini-Dissertation, University of Pretoria, University of Pretoria, 58.

²²⁵ Kariuki J, 'Kenya told to review bilateral trade agreements' *Daily Nation*, 14 September 2014, <http://www.nation.co.ke/business/Kenya-told-to-review-trade-deals/-/996/2452122/-/hwnj81/-/index.html> on 13 November 2017.

²²⁶ Kariuki J, 'Kenya told to review bilateral trade agreements' *Daily Nation*, 14 September 2014, <http://www.nation.co.ke/business/Kenya-told-to-review-trade-deals/-/996/2452122/-/hwnj81/-/index.html> on 13 November 2017.

²²⁷ Mutsau S, 'Revisiting Bilateral investment treaties(BITs) in the 21st Century : A Kenyan and South African Experience' Unpublished LLM thesis, University of the Western Cape, May 2015, 8.

development interests of the host states.²²⁸ They have been described as instruments that shrink states' government policy space. Firstly, most BITs define investment in a broad and open-ended manner, including not only cross-border capital, but essentially all other kinds of assets of an investor in the jurisdiction of the host state.²²⁹ Most definitions of investments cover every 'every kind of asset' owned or controlled by an investor.²³⁰ The UK- Kenya BIT provides a requisite example: an investment means every kind of asset and in particular, though not exclusively, includes movable and immovable property and any other property rights such as mortgages, liens, pledges and resources.²³¹ Broad definitions may preclude foreign investments from compliance with future BITs of host state and thus unnecessarily restricts a state's domestic policy space.²³²

In portraying this statement, this study will utilise the provisions of Kenya's various BITs that deal with expropriation. Expropriation is defined as the governmental taking or modification of an individual's property rights.²³³ Expropriation is divided into direct and indirect expropriation.²³⁴ Direct expropriation is defined as the exercise in which a state transfers title of a project from investors to the state.²³⁵ Expropriation has been termed as the cornerstone of investment agreements due to the arbitrary takings by host governments.²³⁶

²²⁸ Seatini, Investment Policies of EAC Partner States: Linkages with National Development Plans, Human Rights, Gender and Environment Sustainability' Research Study Report, <http://www.seatiniuganda.org/publications/research/160-investment-policies-of-eac-partner-states-research-study-report/file.html> accessed on 31 January 2018,33,

²²⁹ Yazbek N, 'Bilateral Investment treaties: the foreclosure of domestic policy space' 17 *South African Journal of International Affairs*, (2010), 106.

²³⁰ Yazbek N, 'Bilateral Investment treaties', 106.

²³¹ Article 1, *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments* (13 September 1999) Treaty Series No.8.

²³² Yazbek N, 'Bilateral Investment treaties', 106.

²³³ Garner B(ed), *Black's Law Dictionary*, 8th ed, West Group, 2004.

²³⁴ Roche P, 'Expropriation- Investment protection and mitigating the risks' *Norton Rose Fulbright*, September 2010, <http://www.nortonrosefulbright.com/knowledge/publications/30459/expropriation-investment-protection-and-mitigating-the-risks> accessed on 31 January 2018.

²³⁵ Roche P, 'Expropriation- Investment protection and mitigating the risks' *Norton Rose Fulbright*, September 2010, <http://www.nortonrosefulbright.com/knowledge/publications/30459/expropriation-investment-protection-and-mitigating-the-risks> accessed on 31 January 2018.

²³⁶ Kanithasen P, 'Safeguarding public policy in international investment agreements: An ASEA perspective' 1(1) *Thamsaat Review of Economic and Social Policy* (2015), 17.

The desire for comprehensive protection of property has been the single greatest imperative for investors.²³⁷ It is this quest for certainty of protection that has made Kenya include a provision of expropriation in its BITs with Netherlands, Switzerland, the United Kingdom, Germany, and Italy.²³⁸

An examination of Kenya's BITs reveals a common stance on the resolve to protect foreign investment. Kenya has only three BITs that are currently in force: the BITs with Netherlands, Germany and the United Kingdom.²³⁹ The UK-Kenya BIT provides that investments shall not be expropriated or subjected to measures equal to expropriation except for a public purpose related to the internal needs of that party on a non-discriminatory basis and against prompt and adequate compensation. Further, it states that compensation shall amount to the genuine value of the investment before the expropriation or before the impending expropriation became public knowledge and shall include interest at a normal commercial rate until the date of payment. The provision is also observed in article 4 of the Germany-Kenya BIT and article 9 of the Netherlands BIT.

The main bone of contention is not the direct cases of expropriation as enunciated in the above BITs but rather indirect expropriation.²⁴⁰ Indirect expropriation occurs when measures of a host government deprives an investor of his property even though his assets are not *de jure* transferred to the state.²⁴¹ The issue with expropriation has been drawing the line between a compensable indirect taking(where there is no formal transfer of title) and a regulatory measure seeking a legitimate public policy which has an unfavourable effect on the foreign investors.²⁴² We therefore observe that the BITs do not afford the Kenyan state opportunity to escape liability for acts taken in the interest of its citizens that hurt investors. Unlike the Promotion of Investment Act in South Africa, Kenya's legislation does not augment her policy discretion in the face of investor challenge.

²³⁷ Njambi E, 'Safeguarding the state's regulatory autonomy: Rethinking Bilateral Investment Treaties in Kenya', Unpublished Masters Thesis, University of Nairobi, December 2017,58.

²³⁸ Njambi E, 'Safeguarding the state's regulatory autonomy: Rethinking Bilateral Investment Treaties in Kenya', Unpublished Masters Thesis, University of Nairobi, December 2017,58.

²³⁹ Simiyu F, ' Rethinking the use of bilateral investment treaties as tools for sustainable development: The Kenyan experience' *Kabarak University Repository*, July 2014, 4, <http://ir.kabarak.ac.ke/bitstream/handle/123456789/431/Rethinking%20BITs%20PPT%20Presented%2017.7.pdf?sequence=1&isAllowed=y> on 31 January 2018.

²⁴⁰ Kanithasen P, 'Safeguarding public policy in international investment agreements', 17.

²⁴¹ Kanithasen P, 'Safeguarding public policy in international investment agreements', 17.

²⁴² Sauvart K, Ortino F, 'Improving the international investment law and policy regime: Options for the future' *Ministry for Foreign Affairs of Finland*, 66.

The BITs entered into by the Republic of Kenya are imbalanced in their obligations towards investors and the state.²⁴³ They are fixated on offering protection to foreign investments but do not have effective exception clauses.²⁴⁴ The exception clauses, as seen in article 5 of the Kenya-UK BIT are ineffectual and inoperable.²⁴⁵ The UK-Kenya BIT provides that expropriation shall not be deemed to have occurred if an act is done for a public purpose. This provision is vague and does not accentuate the specific dynamics on how this provision will be effected.²⁴⁶

Also, Rosemary Mwanza's examination of the place of human rights in China's foreign investment framework in Kenya highlights the weaknesses of the signed BITs. Mwanza acknowledges the arguments of critics that foreign direct investment undermines human rights due to the investor-centric nature of investment agreements.²⁴⁷ Pursuant to the workings of stabilization clauses, the jury is still out on whether corporations or non-state actors are subject to international human rights law.²⁴⁸ Critics have stated that the restrictive approach of IIAs to human rights have led to a fragmentation of international law that has resulted in its weakening.²⁴⁹ Thus, the limiting aspect of IIAs vis-à-vis human rights has led to governments fearing the adoption of policies to adopt human rights protection in fear of attracting liability by offending BIT provisions.²⁵⁰ Kenya's BIT with China lacks substantive provisions on human rights.²⁵¹ Therefore, we observe that the protection of human rights lacks a foothold in the international investment framework. Yet, the observance of human rights is a critical development need for African countries in the quest for growth.²⁵²

Indeed, a study carried out for the United Nations Special Representative of the Secretary General on the issue of Human Rights and Transnational Corporations and other Business Enterprise (SRSRG) revealed the potential for IIAs to limit the host state's governance capacity in terms of human rights.²⁵³ The study specifically highlighted the role of

²⁴³ Interview with Melly K on 5 February 2018.

²⁴⁴ Interview with Melly K on 5 February 2018.

²⁴⁵ Interview with Melly K on 5 February 2018.

²⁴⁶ Interview with Melly K on 5 February 2018.

²⁴⁷ Mwanza R, 'Chinese foreign direct investment and human rights in Kenya: A mutually-affirming relationship?' 2(1) *Strathmore Law Journal*. August 2016, 135.

²⁴⁸ Mwanza R, 'Chinese foreign direct investment and human rights in Kenya', 135.

²⁴⁹ Mwanza R, 'Chinese foreign direct investment and human rights in Kenya', 145.

²⁵⁰ Mwanza R, 'Chinese foreign direct investment and human rights in Kenya', 145.

²⁵¹ Mwanza R, 'Chinese foreign direct investment and human rights in Kenya', 147.

²⁵² Mwanza R, 'Chinese foreign direct investment and human rights in Kenya', 148.

²⁵³ Simmons P, 'International law's invisible hand and the future of corporate accountability for violations of human rights' 3(1) *Journal of Human Rights and the Environment*, March 2012, 16.

stabilization clauses.²⁵⁴ The report revealed that contracts between investors and OECD host states had stabilisation clauses crafted to preserve public interest considerations.²⁵⁵ However, IIAs signed with non-OECD states had stabilisation clauses that were significantly more constraining on the regulatory powers of the state as compared to that of OECD states.²⁵⁶ The SRSB stated that the imbalance created by the above agreements were specifically problematic for developing countries as regulatory development is most needed in those states.²⁵⁷

Moreover, the Kenyan state has not sufficiently legislated in the field of investor-state arbitration.²⁵⁸ Our laws do not have firm guidance as regards safeguarding Kenya's policy space in the ambit of investor-state arbitration.²⁵⁹ Kenya's Investment Disputes Convention Act of 1996 does not include the ground of public policy as a caveat to the recognition and enforcement of awards. The Act provides that, " an award rendered pursuant to the relative provisions of the Convention shall be binding in Kenya and the pecuniary obligations of the award may be enforced in Kenya as if it were a final decree of the High Court."²⁶⁰ We can thus observe the unilateral obligation placed on the state to enforce the award. There is no countervailing provision that safeguards the state's regulatory space in the event that it reneges on an investor's rights.

A key point to note is that most investors base their decision to invest in a country on multiple factors that include the legal and regulatory framework of the target state.²⁶¹ Investors generally disfavour occurrences where governments promote policy changes that could result in an adverse effect on their rights and legitimate expectations.²⁶² Therefore, the expropriation provision of the UK-Kenya BIT shows how investment law can limit the state's regulatory ability. Kenya's desire to carry out policy changes for the benefit of its citizens is curtailed by the overarching danger of excessive investor compensation. Therefore, we can deduce that the current BITs place a huge risk on Kenya as regards

²⁵⁴ Simmons P, ' International law's invisible hand and the future of corporate accountability for violations of human rights', 16.

²⁵⁵ Simmons P, ' International law's invisible hand and the future of corporate accountability for violations of human rights', 17.

²⁵⁶ Simmons P, ' International law's invisible hand and the future of corporate accountability for violations of human rights', 17.

²⁵⁷ Simmons P, ' International law's invisible hand and the future of corporate accountability for violations of human rights', 17.

²⁵⁸ Interview with Melly K on 5 February 2018.

²⁵⁹ Interview with Melly K on 5 February 2018.

²⁶⁰ Section 4, *Investment Disputes Convention Act* (Act No. 31 of 1996)

²⁶¹ Mutsau S, ' Revisiting Bilateral Investment Treaties(BITs) in the 21st Century', 21.

²⁶² Mutsau S, ' Revisiting Bilateral Investment Treaties(BITs) in the 21st Century', 22.

investment. In the event that Kenya carries out regulatory actions in the interest of its citizens, she may be subject to stringent penalties as per the investor-state dispute resolution framework. This danger gains traction due to the lack of consideration of public policy in the investor-state dispute resolution framework and the structure of the BITs.

An examination of Kenya's BITs together with the laws dealing with investments has shown the non-consideration of the government's ability to act in the interests of its citizens. BITs may be imbalanced and biased towards investors but regardless Kenya still has to honour those obligations. The treaty obligations with investors form part of our laws.²⁶³ International law proscribes the use of national law to invoke the provisions of its internal law as justification for its failure to perform a treaty.²⁶⁴ This imbalance of Kenya's BITs has thus left us in a vulnerable to litigation in the event that the rights of investors are infringed when executing acts in the interest of the public.²⁶⁵

This state of affairs has been observed in the events that have led to Kenya's current ICSID case versus Cortec Mining. In August 2013, Najib Balala, Kenya's Mining Cabinet Secretary, announced that mining licenses held by 65 firms and individuals had been cancelled.²⁶⁶ The grounds for revocation were non-performance, breach of approval conditions and non-compliance to industry rules.²⁶⁷ Balala stated that most of the licenses were issued under questionable circumstances to unqualified companies.²⁶⁸ The state also announced that royalties on minerals and exploration charges were to be increased. The provisions on applications of licenses and financial provisions were included in a new Mining Act that replaced the Mining Act of 1940.

Cortec Mining Kenya Limited was listed as one of the companies which had their license revoked by the Kenya.²⁶⁹ Cortec Mining had received a license to carry out the exploration and mining of niobium and rare earth metals in Mrima Hills, Kwale County.²⁷⁰ As a result

²⁶³ Article 2(6), Constitution of Kenya 2010.

²⁶⁴ Article 27, *Vienna Convention on the Law of Treaties*, 23 May 1969 1155 UNTS 331, .

²⁶⁵ Interview with Melly K on 5 February 2018.

²⁶⁶ Okulo L, 'Balala revokes 65 mining Licenses as clean up winds up' *The Star*, 13 April 2015, 38.

²⁶⁷ Okulo L, 'Balala revokes 65 mining Licenses as clean up winds up' *The Star*, 13 April 2015, 38.

²⁶⁸ Wangui J, 'Balala cancels mining licenses issued from Jan-May' *Capital Business*, 5 August 2013, <https://www.capitalfm.co.ke/business/2013/08/balala-cancels-mining-licenses-issued-from-jan-may/> on 22 December 2016.

²⁶⁹ Citizen, 'Balala revokes 65 mining licenses' *Citizen Digital*, 10 April 2015, <https://citizentv.co.ke/news/balala-revokes-65-mining-licenses-69067/> on 28 May 2017.

²⁷⁰ Mbogo S, 'Cortec invests \$90m to mine niobium in Kenya' *The East African*, 13 April 2013.

of the cancellation, Cortec Mining approached the High Court to have the decision to cancel the licenses quashed.²⁷¹

Cortec argued that they had fulfilled all the necessary licensing requirements and had received approvals from the relevant environmental bodies for the mining of niobium and other rare metals.²⁷² The Mining Cabinet Secretary on the other hand submitted that Cortec was not incorporated at the time the license was issued and thus it could not meet the requirements.²⁷³ NEMA submitted that an Environment Impact Assessment carried out on the proposed exploration revealed that it was environmentally unsustainable as it would lead to massive deforestation and destruction of cultural sites.²⁷⁴ Ultimately, Justice Mutungi held that Cortec's license application was non-compliant with the law and was void ab initio.²⁷⁵ The court ruled in favour of the state and found no merit in Cortec's application.²⁷⁶ Pursuant to the High Court's decision, Cortec filed a case against Kenya at ICSID seeking compensation worth \$ 2 billion dollars for its investment made at Mrima Hill.²⁷⁷

Cortec's case against Kenya is premised on the implementation of reforms in the legal framework of their mining sector.²⁷⁸ In carrying out reforms in the Mining sector in the interests of its citizens, the Kenyan government is now subject to an ICSID case.

CONCLUSION

In this chapter, we observed the process that led to the removal of public policy as ground for the annulment of arbitral awards. Moreover, we see the effects of the lack of consideration of public policy. This was portrayed in our examination of the South African context and their hostile response to investment arbitration. Lastly, we observed the situation in Kenya. Kenya's investment framework showed the inherent weakness of the building blocks in investment arbitration. Kenya's current case versus Cortec mining is

²⁷¹Okulo L, 'Cortec demands Sh.209.4bn for revoked licence' The Star, 22 June 2015, 38.

²⁷²*Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining and 9 others*(2015) eKLR.

²⁷³*Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining and 9 others*(2015) eKLR.

²⁷⁴*Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining and 9 others*(2015) eKLR.

²⁷⁵ *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining and 9 others*(2015) eKLR.

²⁷⁶ *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining and 9 others*(2015) eKLR.

²⁷⁷ Muchira J, 'Kenya faces \$2 bn lawsuit over mining licence cancellation' *Creamer media correspondent*, 3 July 2015, http://www.miningweekly.com/article/kenya-faces-2bn-lawsuit-over-mining-licence-cancellation-2015-07-03/rep_id:3650 on 28 May 2017.

²⁷⁸ Mutsau S, 'Revisiting Bilateral Investment Treaties(BITs) in the 21st Century : A Kenyan and South African Experience' Unpublished LLM thesis, University of the Western Cape, May 2015, 24.

manifestation of the dangers that a state faces due to the lack of public policy considerations.

4. CHAPTER FOUR:

4.1 Introduction

This chapter heralds a discussion on the legitimacy crisis that has engulfed investor-state arbitration due to the non-consideration of public policy. This chapter answers the question on why public policy should be incorporated in the investor-state arbitration framework. The chapter pursues the objective of investigating why public policy should be incorporated in investor-state arbitration. This chapter begins with an inquiry into the criticism that has swarmed investor-state arbitration. Subsequently, it will investigate the reasons why this criticism has arisen. Lastly, we will examine the various strategies that may be used to enhance the place of public policy in the framework of international investment law.

4.3 The Cause of the Legitimacy Crisis

The legitimacy crisis as defined in Chapter two did not arrive from oblivion. This crisis is as a result of the BITs which developing countries entered into. The rising number and success of BIT claims have made host nations realise that traditional BITs place undue risk on the host nation without considering the development requirements of the host state.²⁷⁹ During the intense economic negotiations of the 1960s and 70s, two sets of opinion were involved; developed countries favoured the protection of international investment through bilateral agreements while developing countries sought state regulation of international investment through legislation.²⁸⁰ Ultimately, the philosophy of the developed countries trumped those of developing countries.²⁸¹ International investment law has a built-in prejudice towards the developed countries as it was intended to protect investors and their investments and not to foster state interests.²⁸² Bilateral investment treaties reflect that built-in bias.²⁸³ Questions thus arise as to why developing countries would sign such BITs even though they are inherently biased towards investors. The states were subject to a number of forces: firstly, foreign direct investment was taken to be

²⁷⁹Kollamparambil U, 'Bilateral investment treaties: an unfair proposition for developing countries' *Economic research southern Africa*, July 2016, <https://econrsa.org/publications/research-briefs/bilateral-investment-treaties-unfair-proposition-developing-countries> accessed on 9 February 2018.

²⁸⁰ Sauvant K(ed), *Yearbook on International Investment Law & Policy 2008-2009*, Oxford University Press, New York, 2009, 276.

²⁸¹ Sauvant, *Yearbook on International Investment Law & Policy*, 276.

²⁸² Sauvant, *Yearbook on International Investment Law & Policy*, 276.

²⁸³ Sauvant, *Yearbook on International Investment Law & Policy*, 276.

critical to economic development.²⁸⁴ Secondly, execution of a BIT provided a means to build a relationship with developed countries and thus provide increase trade and assistance.²⁸⁵ Lastly, in the 1980s and 1990s, foreign financial aid had dried up and thus states viewed BITs as a necessary source of capital.²⁸⁶ Therefore, we observe that developing states did not sign BITs in reciprocity but as unilateral documents that sought to protect investors.

Apart from the trait of imbalance as stated above, BITs have also been criticised for their ambiguity. As regards policy space, the key problem is vaguely drafted and wide-ranging provisions like fair and equitable treatment and indirect expropriation.²⁸⁷ With ambiguous clauses on indirect expropriation, arbitrators have huge room for interpretation.²⁸⁸ Thus, it enables investors to challenge state acts that are not linked to purely economic considerations.²⁸⁹ As a result of the bias towards investors, it is clear that BITs do not serve their purpose of facilitating foreign direct investment (FDI) flows to developing countries but only to serve the purpose of giving comprehensive protection to investments.²⁹⁰

Melly stated subject to the imbalance of BITs, states should question whether indeed BITs result in influx of foreign investment.²⁹¹ Different studies about the link between FDI and BITs indicate that BITs appear to play a minor and secondary role in influencing FDI flows.²⁹² A UNCTAD study of BITs in the 1990s using investment statistics of states showed that the influence on BITs is weak.²⁹³ Indeed, Brazil is one of the largest magnets

²⁸⁴ Fox G, 'A future for international investment? Modifying BITs to drive economic development' 46 *Georgetown Journal of International Law* (2014), 231.

²⁸⁵ Fox G, 'A future for international investment?', 232.

²⁸⁶ Fox G, 'A future for international investment?', 232.

²⁸⁷ Federal Ministry for Economic Cooperation and Development of the Federal Republic of Germany, Developing countries and the future of the international investment regime, *German Development Institute, 13*. https://www.die-gdi.de/uploads/media/giz2015-en-Study_Developing_countries_and_the_future_of_the_international_investment_regime.pdf accessed on 10 February 2018.

²⁸⁸ Federal Ministry for Economic Cooperation and Development of Germany, Developing countries and the future of the international investment regime, 14.

²⁸⁹ Federal Ministry for Economic Cooperation and Development of Germany, Developing countries and the future of the international investment regime, 14.

²⁹⁰ Boone J, 'How developing countries can adapt current bilateral investment treaties to provide benefits to their domestic economies' 1(187) *Global Business Law Review* (2011), 191.

²⁹¹ Interview with Melly K on 5 February 2018.

²⁹² Stichele M, 'Bilateral investment treaties and a WTO investment framework' *Oxfam NL, 2003*, 26, <https://www.somo.nl/wp-content/uploads/2003/08/BITs-and-a-WTO-Investment-Framework.pdf> accessed on 9 February 2018.

²⁹³ Stichele M, 'Bilateral investment treaties and a WTO investment framework', 26.

for inward FDI in Latin America, and yet Brazil does not have a single BIT currently in force.²⁹⁴

A further source of worry is the level of expertise.²⁹⁵ The persons tasked with negotiating Kenya's investment treaties are short of the requisite technical knowledge and quality that allows them to protect Kenya's interests while facilitating suitable conditions for investment.²⁹⁶

Indeed, from the South Africa policy review, we can pick out the stand-out qualm against investment law. The policy space of a country is a key developmental tool for states but current BITs extend far into the policy space of developing countries and impose harmful investment rules with devastating consequences for development.²⁹⁷ Investor-state arbitration has been criticised for undermining local governance by diverting public funds to cover administrative fees, legal fees, and large monetary awards to investors.²⁹⁸ It undermines local governance as it exposes developing countries to unknown potential litigation risk every time they exercise their sovereign legislative and regulatory mandate.²⁹⁹

This 'legitimacy crisis' can be deemed to have pushed South Africa to pass the Protection of Investment Act with a view to enlarging the state's role in investment law and arbitration. It is this legitimacy crisis that has caused India and Indonesia to rethink and seek to amend their investment agreements.³⁰⁰ It is this legitimacy crisis that has pushed Latin America states to rally for the formation of a regional arbitration center to replace the current international tribunals on the backdrop of their hostility towards these states.³⁰¹

²⁹⁴ Kimei M, 'Tanzania's rise in investment treaty disputes' *The East African Lawyer 2017 Annual Conference Edition* (2017), 28.

²⁹⁵ Interview with Melly K on 5 February 2018.

²⁹⁶ Interview with Melly K on 5 February 2018.

²⁹⁷ Bosman K, 'South Africa: Trading international investment for policy space' *Stellenbosch Economic Working Papers*, University of Stellenbosch, 13.

²⁹⁸ Boone J, 'How developing countries can adapt current bilateral investment treaties to provide benefits to their domestic economies', 192.

²⁹⁹ Boone J, 'How developing countries can adapt current bilateral investment treaties to provide benefits to their domestic economies', 192.

³⁰⁰ Kimei M, 'Tanzania's Rise in Investment Treaty Disputes', 29.

³⁰¹ Fiezzoni S, 'The challenge of UNASUR member countries to replace ICSID arbitration' *Beijing Law Review*, (2011), 134.

4.4 Solving the Crisis

Stephan Schill states that international investment law and arbitration should tackle the problem of ‘legitimacy’ by enculturating public law thinking lest it succumb to it.³⁰² Critics have adumbrated that investor-state dispute resolution solves disputes using the classic adversarial commercial litigation model without considering the special position of the host state and of the public nature of the issues at hand.³⁰³ This criticism is observed in two spheres. First, investment disputes challenge a state and its public interest-oriented policies to the commercial interests of a private corporation.³⁰⁴ Also, the award may provide serious consequences to the citizens of the host state as the latter are forced to pay damages using taxpayers’ money and the amendment of government policy to accord enforcement of award.³⁰⁵ In calling for the expansion of public law into international investment law, Schill states that investment arbitration is not only about settling individual disputes under the principle of party autonomy but incorporating good governance and the rule of law for international investment relations.³⁰⁶

Melly adumbrated that it was important for investment law of a country to be anchored on public policy.³⁰⁷ This need to increase the policy space in international investment is observed in the contemporary international investment agreements. Indeed, most of the treaties concluded after 2014 shows include ‘sustainable development-oriented features’.³⁰⁸ These provisions are aimed at upholding the regulatory space for public policies of host states and/or reducing the effects of investor-state arbitration.³⁰⁹ These provisions include: limit treaty scope by excluding certain assets from the definition of investment, clarifying treaty obligations on indirect expropriation, and carefully regulate investment arbitration by excluding certain policy areas from arbitration.³¹⁰

³⁰² Schill S, ‘The public law challenge: killing or rethinking international investment law?’ 58 *Columbia FDI Perspectives* (2012), 1. http://ccsi.columbia.edu/files/2014/01/FDI_58.pdf accessed on 28 November 2017,

³⁰³ Hachez N, Wouters J, ‘International investment dispute settlement in the 21st century: does the preservation of the public interest require an alternative to the arbitral model?’ Working Paper 81 *Leuven Centre for Global Studies* (February 2012), 7.

³⁰⁴ Hachez N, Wouters J, ‘International investment dispute settlement in the 21st century’, 7.

³⁰⁵ Hachez N, Wouters J, ‘International investment dispute settlement in the 21st century’, 7.

³⁰⁶ Schill S, ‘The Public Law Challenge’, 2.

³⁰⁷ Interview with Melly K on 5 February 2018.

³⁰⁸ Mohan M, ‘Asian perspectives on investment agreements and arbitration: An Evolving Marcottage’ in Bjorklund A(ed), *Yearbook on International Investment Law and Policy*, Oxford University Press, 330.

³⁰⁹ Mohan, ‘Asian perspectives on investment agreements and arbitration’, 330.

³¹⁰ Mohan, ‘Asian perspectives on investment agreements and arbitration’, 330.

In looking for a solution to the legitimacy crisis, it will be important to find a correct balance between the desire for investors to protect their investments and for states to maintain their right to regulate in the interest of its citizens. Various pathways by which this balance can be attained have been vouched.

Definition of Investments

States have refined the definitions of investments in their BITs. The definition of investment assumes a very key role in determining the scope of application of rights and obligations under a treaty and the jurisdiction of arbitral tribunals.³¹¹ In the 2016 Indian Model BIT, India moved away from a broad asset based definition of investment to an enterprise based definition of investment.³¹² The Model BIT defines an enterprise as follows:

“Enterprise means

(i)

any legal entity constituted, organised and operated in compliance with the Law of the Host State, including any company, corporation, limited liability partnership or a joint venture; and (ii) having its management and real and substantial business operations in the territory of the Host State.

For greater certainty, “real and substantial business operations” for the purposes of this definition requires an Enterprise to have, without exception, all the following elements:

- (i) made a substantial and long term commitment of capital in the Host State;
 - (ii) engaged a substantial number of employees in the territory of the Host State;
 - (iii) assumed entrepreneurial risk;
 - (iv) made a substantial contribution to the development of the Host State through its operations along with transfer of technological knowhow, where applicable;
- and

carried out all its operations in accordance with the Law of the Host State.”³¹³

The use of the enterprise model of definitions reduces the risk of attracting opportunistic foreign investments that regularly pursue windfalls and subsequently to new locations.³¹⁴ It increases the probability of attracting long term investment which has a high likelihood of

³¹¹ Ranjan P, Anand P, ‘The 2016 model Bilateral Investment Treaty: A critical deconstruction’ 38 *Northwestern Journal of International Law and Business*,(2017), 15.

³¹² Ranjan P, Anand P, ‘The 2016 Model Bilateral Investment Treaty’, 38.

³¹³ Article 1, *Model Text for Indian Bilateral Investment Treaty*(28 December 2015).

³¹⁴ Seatini, ‘Assessment Study of the Draft EAC Framework and Investment Model Treaty: Key Provisions and proposals for pro-development investment policies and agreements’ , (June 2015), 18.

promoting development targets by benefiting its citizens.³¹⁵ Moreover, the requirement that that it must be constituted and operated pursuant to the laws of the state ensures the government to deny rights to an enterprise that has violated obligations related to corruption, disclosures and taxation.³¹⁶

Introduction of non-economic policy objectives

States have also utilised the introduction of non-economic policy objectives in new generation international investment agreements (IIAs).³¹⁷ Exclusive focus on investment protection and the economic aspects of development in the old-age BITs have dissuaded tribunals from balancing the obligations of states to investors and their obligations to their citizens.³¹⁸ An example can be observed in the UK-Argentina BIT which stated that; it was designed to create favourable conditions for greater investment and recognised that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of business initiative and prosperity.³¹⁹ As treaties must be interpreted subject to their overall object and purpose, preambles occupy a key role in the interpretation of 1990 IIAs and subsequently investor-state disputes.³²⁰

This was observed in the case of *Societe Generale de Surveillance v Phillipines*.³²¹ In this case, the tribunal referred to the preamble of the treaty which stated that it was intended to “create and maintain favourable conditions for investments by investors of one territory in the territory of another”.³²² Therefore, the tribunal held that it was legitimate to decipher ambiguities in its interpretation to favour the protection of covered instruments.³²³ We can thus see how the structure of the preamble has influenced tribunals to lean towards investors.

³¹⁵ Seatini, ‘Assessment Study of the Draft EAC Framework and Investment Model Treaty’, 18.

³¹⁶ Seatini, ‘Assessment Study of the Draft EAC Framework and Investment Model Treaty’, 18.

³¹⁷ Spears S, ‘The quest for policy space in a new generation of international investment agreements’ 13(4) *Journal of International Economic Law*, (2010), 1064.

³¹⁸ Spears S, ‘The quest for policy space in a new generation of international investment agreements’, 1065.

³¹⁹ Preamble, *Agreement Between the Government of the United Kingdom of Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments*, 11 December 1990.

³²⁰ Spears S, ‘The quest for policy space in a new generation of international investment agreements’, 1065.

³²¹ *Societe Generale de Surveillance v Phillipines*, (ICSID Case No. ARB/02/6), Decision on Jurisdiction, (29 January 2004).

³²² *Societe Generale de Surveillance v Phillipines*, (ICSID Case No. ARB/02/6), Decision on Jurisdiction, (29 January 2004), para.116.

³²³ *Societe Generale de Surveillance v Phillipines*, (ICSID Case No. ARB/02/6), Decision on Jurisdiction (29 January 2004), para.116.

Moreover, the inclusion of human rights as a non-economic policy objective will be key avenue of reinventing IIAs. Simmons states that the inclusion of human rights obligations, among other sustainable development-oriented targets, in BITs is a means of addressing the power imbalance between host states and investors. The lack of human rights considerations has effected the adjudication of certain outcomes.³²⁴ In the case of *Biwater Gauff v the United Republic of Tanzania*, *Biwater Gauff International Limited (BGF)* received a concession from Tanzania to upgrade and expand the water and sewerage services of Dar es Salaam.³²⁵ In May 2005, Tanzania terminated the contract with BGT due to the alleged failure to meet certain performance guarantees.³²⁶ BGT brought the case before ICSID stating that Tanzania actions had breached their agreement.³²⁷ The tribunal allowed amici submissions which highlighted the point that the respondent's actions were necessary to protect the human rights to clean and safe drinking water.³²⁸ The tribunal ultimately ruled that although the state's actions partly qualified as treaty contraventions, BGT had failed to establish a causal link between that breach and diminution of value of the investment.³²⁹ Therefore, Mwanza observes that the crux of the decision was not based on human rights considerations but the lack of the causal link.³³⁰

In the pursuit to have social and environmental objectives deemed compatible or take precedence over investment disciplines, a number of states have placed such objectives on the same pedestal as investment policy objectives in their preambles.³³¹ Reference is made to the Preamble of the Canada-Colombia Free Trade Agreement (FTA). This agreement's preamble enunciates various provisions that seek to bring balance between the various obligations at play: it states that the parties, recognising the differences in the level of development and size of the parties' economies and the importance of creating opportunities for economic development, have agreed to promote sustainable development,

³²⁴ Mwanza R, 'Chinese foreign direct investment and human rights in Kenya', 146.

³²⁵ White and Case LLP, 'No remedy for an investor's own mismanagement: the award in the ICSID case *Biwater Gauff v Tanzania*' *Lexology*, 7 January 2009, <https://www.lexology.com/library/detail.aspx?g=50b20ce9-bb9a-4d6e-820f-c491ecc0e18c> on 24 April 2018.

³²⁶ Business and human rights resource centre, 'Biwater-Tanzania arbitration' <https://www.business-humanrights.org/en/biwater-tanzania-arbitration> on 24 April 2018.

³²⁷ Business and human rights resource centre, 'Biwater-Tanzania arbitration' <https://www.business-humanrights.org/en/biwater-tanzania-arbitration> on 24 April 2018.

³²⁸ Mwanza R, 'Chinese foreign direct investment and human rights in Kenya', 146.

³²⁹ White and Case LLP, 'No remedy for an investor's own mismanagement: the award in the ICSID case *Biwater Gauff v Tanzania*' *Lexology*, 7 January 2009, <https://www.lexology.com/library/detail.aspx?g=50b20ce9-bb9a-4d6e-820f-c491ecc0e18c> on 24 April 2018.

³³⁰ Mwanza R, 'Chinese foreign direct investment and human rights in Kenya', 146.

³³¹ Spears S, 'The quest for policy space in a new generation of international investment agreements', 1067.

and promote broad-based economic development in order to reduce poverty.³³² Further, the India-Singapore FTA is also indicative of the new approach to investment philosophy. It provides that the parties reaffirm their right to pursue economic philosophies suited to their development goals and their right to regulate activities to realise their national policy objectives.³³³

Utilization of general exception clauses

States have resorted to use general exceptions in their BITs and IIAs.³³⁴ General provisions allow states to include provisions that grant them regulatory discretion shielded from external intervention.³³⁵ Therefore, state measures will deal with future problems or the general exceptions will serve as a justification for existing regulatory measures.³³⁶ The stand-out general exception clause that has served states well in their IIAs is article XX of the General Agreement on Tariffs and Trade (GATT).³³⁷ Canada has included an article XX GATT-like clause in its agreements since 1994. It states that:

“Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures necessary:

- a. to protect human, animal or plant life or health
- b. to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or
- c. for the conservation of living or non-living exhaustible natural resources.”³³⁸

It is important for states to ensure that such exception clauses are only effected within the jurisdictions that they are put in place in.³³⁹ WTO jurisprudence does not allow

³³² Preamble, *Canada-Colombia free trade agreement*, 21 November 2008.

³³³ Preamble, *comprehensive economic cooperation agreement between the Republic of India and the Republic of Singapore*, 29 June 2005.

³³⁴ Stanev S, ‘Is the inclusion of an article containing general exceptions in international investment agreements an appropriate way to respond to the need of protection of non-commercial values’, *SSRN* (6 April 2015), 6.

³³⁵ Stanev S, ‘Is the inclusion of an article containing general exceptions in international investment agreements an appropriate way to respond to the need of protection of non-commercial values’, 6.

³³⁶ Stanev S, ‘Is the inclusion of an article containing general exceptions in international investment agreements an appropriate way to respond to the need of protection of non-commercial values’, 6.

³³⁷ Stanev S, ‘Is the inclusion of an article containing general exceptions in international investment agreements an appropriate way to respond to the need of protection of non-commercial values’, 7.

³³⁸ Stanev S, ‘is the inclusion of an article containing general exceptions in international investment agreements an appropriate way to respond to the need of protection of non-commercial values’, 8,9.

protectionist measures to be executed by a state in response to human rights violations in another country.³⁴⁰ This extra-territoriality restriction addresses the concerns of developing countries which involves developed countries placing their unilateral standards as a proxy for protectionism.³⁴¹

As regards matters dealing with expropriation, several awards have been criticised as encroaching on the police powers of the state by failing to examine the purpose of a challenged measure in deciding whether it amounts to indirect expropriation.³⁴² In searching for a solution, various international agreements have included provisions seeking a balance between investor rights and the state's right to regulate. The Draft Pan African Investment Code is one such example. It states that: "A non-discriminatory measure of a Member State that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute an indirect expropriation under this Code."³⁴³

Utilizing of interpretive language

Lastly, countries have turned to the use of interpretive language.³⁴⁴ Interpretive language provides arbitrators with tools that encourage arbitrators to balance in examining whether a state action has impugned on the investor's rights.³⁴⁵ These forms of interpretive language include: 'least restrictive alternative' adopted the World Trade Organization (WTO), the three levels of scrutiny used in American courts, the 'margin of appreciation' doctrine, the doctrine of necessity used by the European Court of Justice, and the proportionality analysis doctrine and finally the 'reasonable nexus to rational government policies' standard.³⁴⁶ The jury is still out on which approach will be preferred by tribunals in IIAs. Schill advocates for promotion of the use of proportionality analysis to balance investors' rights and host states' regulatory interests, and help to relate investment concepts to principles of public law.³⁴⁷ There is indeed a need to balance between protecting the rights of investors and a host state's obligation to promote the general public interest of its citizens. Proportionality analysis can foster this balance.

³³⁹ Kanade M, 'Human rights and multilateral trade: A pragmatic approach to understanding the linkages' *The Journal Jurisprudence*, (2012), 401.

³⁴⁰ Kanade M, 'Human rights and multilateral trade', 401.

³⁴¹ Kanade M, 'Human rights and multilateral trade', 401.

³⁴² Spears S, 'the quest for policy space in a new generation of international investment agreements', 1050.

³⁴³ Article 11, *Draft Pan-African Investment Code* (26 March 2016).

³⁴⁴ Spears S, 'The quest for policy space in a new generation of international investment agreements', 1048.

³⁴⁵ Spears S, 'The quest for policy space in a new generation of international investment agreements', 1048.

³⁴⁶ Spears S, 'The quest for policy space in a new generation of international investment agreements', 1049.

³⁴⁷ Schill S, 'The public law challenge', 2.

CONCLUSION

In this chapter, we observe that the lack of public policy considerations in the ICSID arbitration forum breeds a legitimacy crisis. This crisis may inevitably result in the obliteration of the investment arbitration system. Thus, we also examined the different techniques that can be used in inculcating public policy in investor-state arbitration. These techniques will ultimately bring a balance between the rights of investors to have protected investments with the rights of governments to regulate in the public interest.

5. CHAPTER FIVE

5.1 Introduction

This chapter seeks to answer the question as to how public policy can be incorporated into the investor-state dispute resolution framework. In addressing the objective of how to incorporate public policy in investor-state arbitration, this paper will provide the main findings and subsequently enunciate recommendations.

5.2 Conclusion

This purpose of this study was to investigate whether public policy is considered in the recognition and enforcement of investor-state arbitration. A review of the history of the ICSID Convention exhibited the reluctance to facilitate the inclusion of public policy in the final Convention Document. The key conception of public policy in this paper is the state's right to regulate in the pursuit of sustainable development of its citizens. The Argentina situation showed the hostility of investor-state tribunals to any state action that suppresses the rights of investors even though the acts are tendered towards the pursuit of sustainable development. This hostility towards a state's public policy has caused states to react. The Republic of South Africa took far-reaching measures to safeguard their public policy space in light of the *Piero Foresti case*. Pursuant to their Protection of Investment Act 2015, we observed South Africa's move to limit the reach of investor-state arbitration due to its effect on their policy space.

This study has discovered that the first-generation BITs signed by developing countries with developed states are inherently imbalanced in favour of investors from developing states. This state of affairs was observed in Kenya's BITs. This imbalance has permeated the investor-state dispute resolution framework resulting in multiple claims and excessive awards against developing. This has resulted in a legitimate crisis that has led developing states to rethink the utility of the investor-state dispute resolution system. Thus, this study examined various ways through which the rights of investors and the rights of a state to pursue the sustainable development of its citizens can be balanced.

5.3 Recommendations

This study proposes the following recommendations:

5.3 Audit of appended BITs

This study revealed that the genesis of the legitimacy crisis in investor-state arbitration is the imbalanced BITs that inherently favour investors. This study highlighted the criticisms

imbued on the BITs which Kenya has signed. Thus, the first recommendation would be for Kenya to carry out a comprehensive audit of all the BITs which it has entered into. Kenya is currently party to 19 BITs.³⁴⁸ Kenya should mirror the approach taken by Ecuador in the audit of its BITs. The team tasked to execute the audit should determine whether: BITs violate Kenya's sovereignty, whether previous tribunals have misinterpreted BITs and whether the BITs are indeed beneficial to the state.³⁴⁹ The audit should assume a multi-stakeholder approach with it being led by members from academia, government, the private sector, special interest groups. This audit will provide a holistic picture of the effect of Kenya's investment obligations on its ability to pursue sustainable development for its citizens.

5.3 Renegotiate BITs

Pursuant to the audit of BITs, BITs that are substantially dangerous to the interests of Kenya should be renegotiated. In lieu of the respect of the rule of law and the general principles of international law, this study does not advocate for the unilateral termination of BITs by the state as observed in South Africa. Termination of BITs can lead to negative effects on the attraction of foreign investment. Moreover, other actions like renouncing BITs would not bear fruits as BITs still offer alternative recourse to investors. This was observed in the arguments of Lavopa in Chapter 1. Biased BITs eventually lead to excessive awards slapped on developing states. Thus, a refusal to renegotiate imbalanced BITs may increase hostilities towards foreign firms which could potentially result in the expropriation of industries due to political pressure.³⁵⁰ Therefore, renegotiation offers a benefit to investors in this regard. Renegotiation will enable investors and host states to find the requisite middle ground in relation to the balance of obligations.

5.3 The creation of a model BIT

The third recommendation would be for Kenya to develop a model BIT. India passed a new model BIT to attract and safeguard foreign investment while protecting the state's

³⁴⁸UNCTAD, 'Kenya' *Investment Policy Hub*, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/108> on 8 March 2018.

³⁴⁹Allen and Overy, 'Ecuador establishes commission to audit its bilateral investment treaties' *Allen and Overy*, 13 November 2013, <http://www.allenoverly.com/publications/en-gb/Pages/Ecuador-establishes-Commission-to-audit-its-Bilateral-Investment-Treaties.aspx> accessed on 8 March 2018.

³⁵⁰ Blindeman K, 'Production- Sharing Agreements; An economic analysis' *Oxford Institute for Energy Services*(October 1999), 9.

public policy discretion.³⁵¹ This model BIT would be used as a blueprint for negotiating future contracts or renegotiating current BITs. As discussed in the previous chapter, the model BITs should include the requisite public policy exceptions that will protect the country's ability to regulate in the public interest. Model BITs promote coherence in a state's external investment policy for future negotiations.³⁵² They also enhance the bargaining positions of a country.³⁵³ Kenya would thus be able to sign investment agreements that assure investors of protection of their investment while also safeguarding the state's discretion to regulate in the public interest.

5.3 Building of expertise in the field of investment law

Lastly, Kenya should seek to build expertise in the field of investor-state arbitration. Kenya has suffered from imbalanced BITs negotiated by government officials with no experience in investment law. Mr. Ruwange gave an example of Kenya's Model Production Sharing Agreement with Tullow Oil. Tullow Oil is carrying out exploration of oil in Turkana. One of the clauses in the agreement states that in terms of cost recovery, if Kenya does not carry out an audit of the cost recovery process in two years, Kenya permanently foregoes the power to audit Tullow's cost recovery. The danger is that with Kenya estopped from reviewing the books of accounts, Tullow can recover expenses which are not involved in the oil exploration process. This may affect Kenya's profit margins. Therefore, the oversight observed in the drafting of the agreement has led to Kenya being placed in a dangerous position. Having experienced negotiators with sufficient knowledge in investment law will enable Kenya to have effective BITs which are contribute to the development of the state while still attracting investors.

³⁵¹ Patnaik P, 'Deconstructing India's Model Bilateral Investment Treaty' *The Wire*, 16 September 2016, <https://thewire.in/economy/deconstructing-indias-model-bilateral-investment-treaty> on 9 March 2018.

³⁵² El-Kady H, 'Revision of model BITs: salient features and global trends' *UNCTAD*, 1-4 October 2013,3 http://investmentpolicyhub.unctad.org/Upload/Documents/DOWNLOAD13-UNCTAD_Revision%20of%20Model%20BITs.pdf on 8 March 2018.

³⁵³ El-Kady H, 'Revision of model BITs: salient features and global trends' *UNCTAD*, 1-4 October 2013,3 http://investmentpolicyhub.unctad.org/Upload/Documents/DOWNLOAD13-UNCTAD_Revision%20of%20Model%20BITs.pdf on 8 March 2018.

5.3 The amendment of the ICSID Convention

This study has examined the need to preserve the public policy space of states in the investor-state dispute resolution framework. Therefore, the ICSID Convention should be amended to include public policy as a ground for the annulment of arbitral awards. Mr. Melly stated that as per current practice, this cause of action would take a long time to materialise. However, introducing the ground of public policy will increase confidence in the dispute resolution system. States will be able to portray how public policy decisions that have impeded investor obligations are imperative for the sustainable development of its citizens. It will thus stem the exodus of countries from utilising the ICSID system as has been observed in the Latin America states.

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