

**PUBLIC PARTICIPATION IN FOREIGN DIRECT INVESTMENT  
PROJECTS IN KENYA**

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the Award of the Degree of Master of Laws (LLM) of the University of  
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**DECLARATION**

This thesis is my original work and has not been presented for a degree at the University of Nairobi or any other university or examination body.

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## **DEDICATION**

This thesis is dedicated to my family, with deepest gratitude.

## **ACKNOWLEDGEMENT**

I express my utmost gratitude to my thesis Supervisor Dr. Njaramba Gichuki who consistently allowed this paper to be my own work, but steered me in the right the direction whenever he thought I needed it.

## **ABBREVIATIONS AND ACRONYMS**

AGOA.....	African Growth and Opportunity Act
BITs.....	Bilateral Investment Treaties
CAF.....	County Assemblies Forum
CAJ.....	Commission on Administrative Justice
CBO.....	Community Based Organizations
CDF.....	Constituencies Development Fund
CIC.....	Constitution Implementation Commission
CKRC.....	Constitution of Kenya Review Commission
CLOs.....	Community Liaison Officers
CoE.....	Committee of Experts
CoG.....	Council of Governors
CSOs.....	Civil Society Organisations
CSR.....	Corporate Social Responsibility
DAC .....	District Advisory Committee
DFRD .....	District Focus for Rural Development
EAC.....	East African Community
EPZ.....	Export Processing Zone
EPZA.....	Export Processing Zones Authority
ERC.....	Energy Regulatory Commission
ESIA.....	Environmental and Social Impact Assessment
FDI .....	Foreign Direct Investment
FGD .....	Focus Group Discussions
FIPA .....	Foreign Investments Protection Act
FSEOs.....	Field Stakeholder Engagement Officers
GATT .....	General Agreement on Tariffs and Trade
GDP.....	Gross Domestic Product
GoK.....	Government of Kenya
ICBC .....	Industrial & Commercial Bank of China
IGRTC .....	Intergovernmental Relations Technical Committee
IPA.....	Investment Promotion Act
IPR.....	Investment Policy Review
IUCN.....	International Union for Conservation of Nature
KENSUP .....	Kenya Slum Upgrading Project

KII .....	Key Informant Interviews
KLRC .....	Kenya Law Reform Commission
KNCHR .....	Kenya National Commission on Human Rights
KIA .....	Kenya Investment Authority
KNBS .....	Kenya National Bureau of Statistics
KPR .....	Kenya Police Reserve
KRA .....	Kenya Revenue Authority
LAPSSET.....	Lamu Port – South Sudan – Ethiopia Transport
LASDAP .....	Local Authority Service Delivery Action Plan
MFN.....	Most Favoured Nation
MITs .....	Multilateral Investment Treaties
MDA.....	Ministries, Departments and Agencies
MoEP.....	Ministry of Energy and Petroleum
MP.....	Member of Parliament
NCSC .....	National Civil Society Congress
NEMA.....	National Environmental Management Authority
NET .....	National Environment Tribunal
NGO .....	Non-Governmental Organisation
NIC .....	National Investments Council
NGEC .....	National Gender and Equality Commission
OAG .....	Office of the Attorney General
PAPs.....	Project Affected Persons
PIC .....	Project Implementation Committee
PLC .....	Public Listed Company
PPP .....	Public Private Partnership
PSC .....	Public Service Commission
TISA .....	The Institute for Social Accountability
TRIPs .....	Trade Related Aspects of Intellectual Property
UNCITRAL .....	United Nations Commission on International Trade Law
UNCTAD .....	United Nations Conference on Trade and Development
UNDP .....	United Nations Development Program
VSOs.....	Village Socialization Officers
WTO .....	World Trade Organization

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## **ABSTRACT**

The stumbling block in public participation processes lies in the slow progress in achieving the goal of inclusivity of all affected stakeholders. Even though Kenya remains one of the leading as well as most active recipients of Foreign Direct Investment in the African continent, its level of development is still relatively weak. Since 2010, FDI inflows have considerably increased, and the Kenyan government has embarked on passing best-practice policies that would bring about positive effects in terms of opening up markets, improving technology, managing finances, and refining skills. This study sought to explore whether the legislative framework on FDI in Kenya provides for public participation in the decision-making process. This study investigated the current legislative framework on FDI in Kenya and whether the legislation specifically includes public participation. The study also examines lessons learnt from cases that Kenya has been involved in following a decision on FDI: the Tullow Oil Project and the Lamu Coal Power Project. The study also evaluates whether public participation of the local population is essential before Kenya makes a decision on foreign direct investment. These are discussed under different thematic areas in this study. The study established that the Constitution of Kenya 2010 is the backbone to the legal framework on public participation. Generally, Kenya lacks a robust system of legislation that would make the government accountable for various FDI-funded projects, which calls for a sustained political and macroeconomic policy environment backed up with an in-depth assessment of emerging best-practice policies in attracting FDI especially by examining the role of public participation.

## CHAPTER ONE

### 1.0 INTRODUCTION

This paper is a critical appraisal on public participation in the legal framework of foreign direct investments (FDI) projects in Kenya. The Constitution of Kenya necessitates that the public actively take part in key processes before the government reaches the final decision in matters that affect their well-being. Since Kenya is ethnically diverse and geographically spread-out, both the national and county governments find public participation a costly process as well as tough to manage. This study will focus on the government's commitment to providing a robust framework that guarantees all stakeholders to be part of all key decisions related to FDI projects and the protection of local industries against unwarranted competition from multinational firms.

Since the Constitution of Kenya does not specify the mechanism which public participation in FDI projects should be effected, what then can the government do to manage the tension between multinational firms and local industries to realize greater economic growth? This paper examines legislation on FDI in Kenya and the extent to which they allow participation of the people as mandated by Article 10 of the Constitution of Kenya. The Constitution dictates that county governments must make sure that all citizens are allowed to practice their right to public participation in every area that affects their livelihoods.<sup>1</sup> Consequently, since Kenya has attracted large FDI inflows in the past decade and beyond, there is need to address the current public participation mechanisms that are allied to the proposed FDI projects.

### 1.1 Background to the Problem

Many countries in the world today have increasingly acknowledged that private capital in terms of FDI is important when it comes to the economic prosperity of a number of Third World nations. Even though Kenya remains one of the leading as well as most active recipients of FDI in the African continent, its level of development is still relatively weak considering the fact that it is ranked as the 65<sup>th</sup> largest economy globally.<sup>2</sup> Since 2010, FDI inflows have considerably increased, and the Kenyan government has embarked on passing best-practice policies that would bring about positive effects in terms of opening up markets, improving technology, managing finances, and refining skills.<sup>3</sup> However, through the years, especially

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<sup>1</sup> Article 196 (1) (b) of the Constitution

<sup>2</sup> Kinuthia, Bethuel Kinyanjui, and Syed Mansoob Murshed. "FDI determinants: Kenya and Malaysia compared." *Journal of Policy Modeling* 37, no. 2 (2015): 388-400.

<sup>3</sup> Stevens, Charles E., and Aloysius Newenham-Kahindi. "Legitimacy spill overs and political risk: The case of FDI in the East African Community." *Global Strategy Journal* 7, no. 1 (2017): 10-35.

after the promulgation of the Constitution of Kenya in 2010, the country has experienced a number of negative effects hence the sizeable quantity of FDI inflows has failed to generate economic growth and reduce poverty as previously envisioned. The most pressing issue is that the statutes and policies providing for FDI do not comprehensively provide the legal structure for public participation, meaning, the interests of the local population are ignored.

In host countries, the positive effects of public participation in FDI projects are not spontaneous because a number of factors must be at play to ratify them. This starts with effective policies, which take account of specific industrial policies along with key macro-economic policies that are indispensable in attracting FDI and improving ties between local people and domestic firms.<sup>4</sup> Host countries must acknowledge the significance of these policies because they help to streamline their development strategy with the aim of achieving the pre-defined objectives of each FDI project with reference to the various local industries. Many developed nations are endowed with sufficient public resources as well as local competencies to take huge risks in FDI projects, while the situation for developing countries is a complete opposite.<sup>5</sup>

In Africa, Kenya is one of the leading countries that has seen a significant increase in FDI inflows since the year 2010.<sup>6</sup> The main investors include Belgium, China, Netherlands, South Africa and the United Kingdom. As stated by the United Nations Conference on Trade and Development (UNCTAD) 2018 World Investment Report, the amount of FDI inflows to Kenya was USD 672 million in 2017, which also showed an annual increase of 70 percent.<sup>7</sup> Since the onset of the installation of fibre optics in 2009, the sector that has attracted the most FDI is the ICT sector, with the banking industry and tourism industry as well as the infrastructure and extractive industries following closely.<sup>8</sup> Generally, FDI has helped to boost and revive many sectors of the Kenyan economy either directly or indirectly.

Over the years, the national government has actively taken measures for implementing key reforms to attract FDI. As a result, the country made remarkable progress in the Doing Business ranking published by the World Bank after it jumped up 16 places in the 2017 report, and gained another 12 places in the 2018 report, it advanced another 19 places in the 2019 report,

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<sup>4</sup> *Ibid*, pg. 6

<sup>5</sup> *Supra* note 3 pg. 6

<sup>6</sup> *Kinuthia*, *supra* note 1 at 15

<sup>7</sup> Sauviant, Karl P "International Investment Facilitation: By Whom and for What?" (2018).

<sup>8</sup> Wang, Bijun, and Kailin Gao "Forty Years Development of China's Outward Foreign Direct Investment: Retrospect and the Challenges Ahead." *China & World Economy* 27, no. 3 (2019): 1-24.

reaching the rank 61<sup>st</sup> out of 190 countries.<sup>9</sup> This commendable progress and momentum is attributed to the simplifying of a number of procedures for business registration and property registration as well as strengthening the access to credit and minority investor protections and made paying taxes and resolving insolvency easier.<sup>10</sup>

Another positive impact of FDI inflows is the development of public-private partnerships, which emanates from the 'Vision 2030' approach. Kenya plays a pivotal role in the East African Community by acting as a regional economic hub. It benefits from a strategic geographic location with sea access, a growing entrepreneurial middle class, a diversified agriculture and expanding services sector, and recently discovery of hydrocarbons resources. Nevertheless, numerous obstacles to investment persist, notably poor-quality infrastructure, skills shortages, ineffective rule of law, economic instability resulting from terrorism as well as political, social and ethnic divisions.

### **1.1.1 Overview of FDI-Specific Constitutional and Institutional Frameworks**

In April 2013, the Public Private Partnerships Act was enacted in order to incorporate and oversee the involvement of the private sector in the funding and operations of government infrastructure projects<sup>11</sup>. The far-reaching privatisation programmes took account of a number of sectors: construction, energy, equipment, food processing, and education. The recent amendment of the Mining Law also restricts foreign based firms to participate in the exploration and production of oil and gas as well as related minerals in the country.

Enacted in 2015, the original objective of the Companies Act<sup>12</sup> was to mandate foreign companies carrying out infrastructural developments in the country to allocate a minimum of 30% of their capital to the local people. However, the clause did not see the light of the day, even though the law still streamlines the process of and cuts costs for registering and operating a company in the country through the Business Registration Services Act.<sup>13</sup> Furthermore, in

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<sup>9</sup> 'Explore Economies' (*World Bank*, 2019) <<http://www.doingbusiness.org/en/data/exploreconomies/kenya>> accessed 31 May 2019.

<sup>10</sup> Dana, Leo-Paul, Vanessa Ratten, and Ben Q. Honyenuga, eds. *African Entrepreneurship: Challenges and Opportunities for Doing Business*. Springer, 2018.

<sup>11</sup> Preamble of the Public Private Partnerships Act Number 15 of 2013

<sup>12</sup> 'The Companies Act, 2015' (*kenyalaw.org*, 2015) <[http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheCompaniesAct\\_No17of2015\\_RevisedCompressed.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheCompaniesAct_No17of2015_RevisedCompressed.pdf)> accessed 31 May 2019.

<sup>13</sup> 'The Business Registration Services (BRS) Act' (*kenyalaw.org*, 2015) <<http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/BusinessRegistrationServiceAct15of2015.pdf>> accessed 31 May 2019.

2015, the enactment of the Insolvency Act<sup>14</sup> was completed with the intention of improving the legal processes once a company is declared bankrupt. The adoption of the Kenya Investment Policy in 2017 was necessitated by the need create a conducive environment for investment growth in the country.

The Investment Policy Review (IPR) acknowledged that it would be a long-drawn-out process if the government embarks on upgrading the entire investment framework. Therefore, in order to ensure that the existing legal framework is effective, a number of thematic IPR recommendations were laid out for implementation.<sup>15</sup> The Constitution brought together a dualistic legal and administrative framework, which led to the devolved national and county governments. In addition, the IPR presented a fresh public finance system as well as a comprehensive model of addressing issues of human rights.<sup>16</sup>

The Foreign Investments Protection Act and the Investment Promotion Act (IPA) still oversees Kenya's legislative and institutional framework on foreign investments<sup>17</sup>. The Investment Promotion Act stimulates and expedites investment by helping investors through the process of applying for investment licences and business permits, while the Foreign Investments Protection Act gives protection to certain approved foreign investments. Investment policies as well as its related institutions, such as the Kenya Investment Authority (KIA) remain under the oversight of the Ministry of Industry, Trade and Cooperatives.<sup>18</sup>

## 1.2 Statement of the Problem

In democracies, citizens are recognised as key stakeholders because they have the right to indirectly take part in the adoption and implementation of important laws through elected representatives. Thus, participation of the people is fundamental in building the relationship between governments and its citizens.<sup>19</sup> There is a need to analyse how the gaps in the legal framework for public participation in FDI projects affects those projects.

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<sup>14</sup> 'The Insolvency Act In 2015' (*kenyalaw.org*, 2015) <[http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Insolvency\\_Act18of2015\\_-\\_compressed.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Insolvency_Act18of2015_-_compressed.pdf)> accessed 31 May 2019.

<sup>15</sup> Kinaro, Elijah Onyancha. "Determinants of Foreign Direct Investment in Kenya." *Institut African de Développement Economique et de Planification. Dakar* (2006).

<sup>16</sup> *Ibid*, pg. 8

<sup>17</sup> Chapter 518 Laws of Kenya and Chapter 485B, Revised Edition 2009 (2004)

<sup>18</sup> *Supra* note 3 pg. 6

<sup>19</sup> Bryson, John M., Barbara C. Crosby, and Laura Bloomberg. "Public value governance: Moving beyond traditional public administration and the new public management." *Public Administration Review* 74, no. 4 (2014): 445-456.

## Theoretical/Conceptual Framework and Literature Review

### 1.2.1 Micro Level Theory of Multinational Enterprise

This study focused on Stephan Hymer's micro level theory of multinational enterprise, which centres on foreign direct investment with respect to the notion of ownership advantage and firm-specific assets.<sup>20</sup> Invented in 1976, this theory unequivocally recognises that since FDI inflows predominantly thrives in imperfect markets, it's not rational to claim that firms in these markets experience perfect competition. The author argues that countries that attract high amounts of FDI can gain a competitive edge in their regional markets with respect to a number of trade conditions. In addition, the host countries can fully benefit from the influx of various skills and competencies that the foreign enterprises attract in order to accomplish the objectives of infrastructural projects.

The invention of Stephan Hymer's micro level theory in 1976 coincided with histrionic changes not only in political beliefs, but also in economic systems. The term "globalisation" started to intensify in the early 1980s, which led to many governments having a dramatic shift of attitude towards multinational enterprises. During the time, many researchers defined and critiqued "globalization" as the intensification of exchange of goods, services and capital between countries as a way of integrating various markets.<sup>21</sup> In 2016, the United Nations released a report on the extent to which FDI enhances interdependence.<sup>22</sup> According to the report, FDI refers to a long-term investment that builds a lasting relationship and profound interest between a foreign direct investor and an enterprise resident in a host economy.<sup>23</sup> With the recognition that FDI-related development strategies leads to a long-standing interdependence, a number of governments have embarked on actively seeking FDI inflows to have a competitive edge over other regimes. As explained by Stephan Hymer, FDI-focused infrastructural development intensifies when there is of a relationship between political intervention and economic contributing factors.

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<sup>20</sup> Dunning, John H., and Christos N. Pitelis. "Stephen Hymer's contribution to international business scholarship: an assessment and extension." *Journal of international business studies* 39, no. 1 (2008): 167-176.

<sup>21</sup> Pitelis, Christos N. "Hymer, Stephen Herbert (1934–1974): The MNE and International Business." *The Palgrave Encyclopedia of Strategic Management* (2016): 1-6.

<sup>22</sup> Na, Na. *The United Nations and business: A partnership recovered*. Springer, 2016.

<sup>23</sup> *Ibid*, pg. 4

Baharumshah, Slesman and Devadason<sup>24</sup> argue that even though capital inflows in terms of FDI are important to the development of a country, they come with pros and cons. When it comes to short-term investments, the recipient nation could suffer adverse consequences because most of these capitals can be withdrawn impromptu. These short-term investments are usually held within EPZs and do not affect the supply and demand relationship of the local community. This makes them extremely susceptible to fluctuating costs, such as wages.<sup>25</sup> On the other hand, compared to short term investments, long-term FDI is considered a more stable capital inflow which positively affects a country's infrastructural development. For that reason, even though political interference is required, host countries must minimise their political risks in order to draw long-term investments.<sup>26</sup>

According to the micro level theory, it is important to examine the characteristics of FDI receiving countries individually rather than focusing on them as a homogenous group.<sup>27</sup> Advocates of FDI should focus on each host country because one expected occurrence is placing domestic investments on the periphery to give room for foreign investments. This usually happens due to the obvious reason that foreign investors are not only more financially prepared to start a company, but they can also produce goods and offer services at lower costs compared to the local counterparts. Often, host governments usually offer foreign investors tax holidays to exempt them from paying taxes, while local entrepreneurs continue to pay their taxes as usual. However, the government usually loses significant amounts of tax revenues when foreign investors exceed local entrepreneurs, and thus discourage local trade. In the end, the foreign investors create a sweeping consumer culture in the host nation that can destabilise traditional values while promoting different consumption lifestyles.<sup>28</sup>

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<sup>24</sup> Baharumshah, Ahmad Zubaidi, Ly Slesman, and Evelyn Shyamala Devadason. "Types of foreign capital inflows and economic growth: New evidence on role of financial markets." *Journal of International Development* 29, no. 6 (2017): 768-789.

<sup>25</sup> Cleeve, Emmanuel A., Yaw Debrah, and Zelealem Yiheyis. "Human capital and FDI inflow: An assessment of the African case." *World Development* 74 (2015): 1-14.

<sup>26</sup> Cleeve *supra* note 1 at 13

<sup>27</sup> Araujo, Juliana D., Antonio C. David, Carlos van Hombeeck, and Chris Papageorgiou. "Non-FDI Capital Inflows in Low-Income Countries: Catching the Wave?" *IMF Economic Review* 65, no. 2 (2017): 426-465.

<sup>28</sup> Hoggarth, Glenn, Carsten Jung, and Dennis Reinhardt. "Capital inflows—the good, the bad and the bubbly." *Bank of England Financial Stability Paper* 40 (2016).

### 1.2.2 Literature Review

An in-depth assessment of a number of best practice policies that are currently being used to attract FDI helps to examine their significant role in many developing countries. Even though many countries have experienced a positive effect of FDI in their economies, explicitly identifying those that have successfully implemented public participation to enhance their growth and productivity in terms of FDI is not easy. A handful of emerging markets in developing countries, such as Brazil, China, Mexico, Singapore, and Thailand have been successfully attracting and effectively managing large FDI flows in the past decade.<sup>29</sup> However, with their expansive domestic market, it is difficult to come up with a straightforward evaluation of the ultimate influence of public participation in FDI projects on their economies.

He & King<sup>30</sup> conducted an empirical study to explore the role and impact of user participation in information systems development. According to the authors, the development of information systems requires the involvement of all stakeholders who are predominantly the end users. This is because they are generally presumed as providing important mechanisms to improve the quality of the entire system, which translates to its successful implementation. From a survey of 200 production managers, the empirical study pinpointed a common assumption that when users actively take part in the implementation process of a system, it leads to information satisfaction. The results showed that carrying out conferences to encourage the participation of users further enhances both user satisfaction and effective system usage.

Marks & Davis<sup>31</sup> carried out a study to examine whether the establishment of rural water systems in Sub-Saharan Africa encourages user participation, and eventually results in a sense of ownership among the local people. Globally, rural areas in Sub-Saharan Africa have the lowest access rates to improved water sources, with approximately 278 million rural dwellers lacking access.<sup>32</sup> In developing countries, the leading factors attributed to the low levels of access to clean water include poor management of water resources, inappropriate system designs, limited institutional capacity, and rent-seeking behaviour.<sup>33</sup> According to the study, in recent decades, rural water sub-sectors in Sub-Saharan Africa have incorporated the

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<sup>29</sup> Abbas, Sherif, and Dalia El Mosallamy. "Determinants of FDI flows to developing countries: an empirical study on the MENA region." *Journal of Finance and Economics* 4, no. 1 (2016): 30-38.

<sup>30</sup> He, Jun, and William R. King. "The role of user participation in information systems development: implications from a meta-analysis." *Journal of Management Information Systems* 25, no. 1 (2008): 301-331.

<sup>31</sup> Marks, Sara J., and Jennifer Davis. "Does user participation lead to sense of ownership for rural water systems? Evidence from Kenya." *World Development* 40, no. 8 (2012): 1569-1576.

<sup>32</sup> Ndikumana, Léonce, and Lynda Pickbourn. "The impact of foreign aid allocation on access to social services in sub-Saharan Africa: the case of water and sanitation." *World Development* 90 (2017): 104-114.

<sup>33</sup> Ibid.



participation of local people in the planning and construction of water projects with the intention of addressing this sustainability challenge.<sup>34</sup> The findings of the study demonstrated that only some types of participation in rural water projects enhance a sense of ownership among community members. For example, the installation of water systems by community members without external support created an elevated sense of ownership because most of them were aware of the project before construction commenced. However, the involvement of external support, such as government agencies and non-governmental organisations (NGOs) suppressed the sense of ownership because the project administrators did not fully involve local actors. Village residents were ignored to a great extent as they did not influence most decisions related to service levels, tariff structure and the amounts of contributions required.

Migot and Paul<sup>35</sup> carried out a study to find out the determinants of successful implementation of integrated tax projects by the Kenya Revenue Authority (KRA). In the literature review, the authors compared the efforts of the Kenyan government to that of the Rwandese government by examining how the latter has constantly succeeded in the implementation community-based projects. As echoed by Bakunzibake, Grönlund & Klein<sup>36</sup>, Rwanda has recorded immense achievements when it comes to implementing most of its governmental projects. The factors behind the success include transformational leadership backed by good governance that is intolerable of various acts of corruption and commands that all citizens along with key government officials must be answerable for their actions. Such colossal efforts are a complete opposite in the Kenyan scenario because the tax compliance levels and tax collections in the integrated tax projects administered by KRA have remained low and they are constantly below set targets. Even though the law mandates that all ministries must fulfil the terms in the performance contracts of all projects, the 2016 Kenya National Bureau of Statistics (KNBS) report indicated that i-tax project was marred by late filings, which led to a success rate of only 33% at KRA and no follow ups were done. In Rwanda, all government ministries from the national level to all leaders at the local level usually have a comprehensive evaluation of their projects followed by a bi-annual meeting overseen by the President.<sup>37</sup>

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<sup>34</sup> Graham, Jay P., Mitsuki Hirai, and Seung-Sup Kim. "An analysis of water collection labour among women and children in 24 sub-Saharan African countries." *PloS one* 11, no. 6 (2016): e0155981.

<sup>35</sup> Migot, Lucas Otieno, and Samson Nyanga'u Paul "Determinants of Successful Implementation of Integrated Tax Projects of Kenya Revenue Authority, KENYA." *Journal of Entrepreneurship and Project Management* 4, no. 1 (2019): 26-51.

<sup>36</sup> Bakunzibake, Pierre, Åke Grönlund, and Gunnar O. Klein. "Organisational Challenges in the Implementation of 'one-stop'e-Government in Rwanda." *Electronic Journal of e-Government* 17, no. 1 (2019): 1-19.

<sup>37</sup> Ibid

Meredith & MacDonald<sup>38</sup> carried out a study to investigate the role of community support in the upgrading of Kibera Slum in Nairobi, Kenya with reference to the various innovations that were done. The study focused on examining the pilot project, which commenced in 2003, to find out how the government implemented an adaptive management model to promote community engagement. In the earlier stages of the process, the project displayed significant success to build community engagement, but afterwards it was engulfed with a number of key challenges. One of the nagging problems was that residents who were relocated to pave way for the upgrade started moving back into Kibera as an opportunity to rent out their newly found houses amid skyrocketing rents. Since the programme steered by the Kenya Slum Upgrading Project (KENSUP) gave them apartments without the need to pay rent, Kibera residents rented them out as a way of making extra money.<sup>39</sup> According to the findings of the study, for similar projects to succeed by achieving a high level of community acceptance and support, financial resources and professional expertise of large institutions are indispensable to their vision and implementation.

There are also a number of macro-economic policies that affect public participation of local firms in FDI projects.<sup>40</sup> The first one is labour mobility between multinational firms and local firms, which stands out as an important factor in public participation and the second one is general education of the local people. With specific focus on Sub-Saharan nation, it is worrisome that education levels are wanting in this region as well as infrastructural development, such as paved roads and telephone mainlines. In Kenya, Chinese companies have undertaken several key mega-infrastructure projects over the past decade and this has been a valuable learning opportunity for the local players in various industries. For example, the Nairobi-Thika Superhighway project and the Mombasa-Nairobi Standard Gauge Railway (SGR) project offered local firms an opportunity to learn from the Chinese, and benefit from the spill over effects of the investments. This showed that the FDI projects play a significant

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<sup>38</sup> Meredith, Thomas, and Melanie MacDonald. "Community-supported slum-upgrading: Innovations from Kibera, Nairobi, Kenya." *Habitat International* 60 (2017): 1-9.

<sup>39</sup> Abby Higgins, 'Why Residents of Kibera Slum are Rejecting New Housing Plans - ONE' (*ONE*, 2013) <<https://www.one.org/international/blog/why-residents-of-kibera-slum-are-rejecting-new-housing-plans/>> accessed 31 May 2019.

<sup>40</sup> Mensah, James Kwame, Kwame Ameyaw Domfeh, Albert Ahenkan, and Justice Nyigmah Bawole. "Policy and institutional perspectives on local economic development in Africa: The Ghanaian perspective." *Journal of African Studies and Development* 5, no. 7 (2013): 163-170.

role not only in increasing the attractiveness of the host economy, but also encouraging the public participation of local people through knowledge sharing.<sup>41</sup>

### **1.3 Objectives of the Research**

#### **1.3.1 Main Objective**

The general objective of this study was to explore whether the legislative framework on Foreign Direct Investment in Kenya provides for a public participation in the process of making the decision whether or not to allow a particular project.

#### **1.3.2 Specific Objectives**

To investigate the above objective, the following specific objectives were used:

1. To examine the current legislative framework on public participation in FDI projects in Kenya.
2. To examine how the gaps in the legal framework on public participation in FDI projects affect the FDI projects.

### **1.4 Broad Argument Layout/Structure**

Existing FDI laws in Kenya did not foresee the increase in foreign direct investments following the promulgation of the Constitution. The most pertinent concern is the government's commitment to providing a framework for the participation of the people in FDI projects as well as the protection of local industries against unwarranted competition from multinational firms.

### **1.5 Assumptions or Hypotheses**

The following are the assumptions of the study:

1. The FDI legislation does not provide a comprehensive framework for public participation in FDI projects.
2. The government is not committed to engage local people in FDI projects.

### **1.6 Research Questions**

The study sought information to answer the following questions:

1. What is the legal framework for public participation in FDI projects?
2. What are FDI projects?
3. How do the gaps in the legal framework on public participation in FDI projects affect the FDI projects?

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<sup>41</sup> Wissenbach, Uwe, and Yuan Wang. "African politics meets Chinese engineers: The Chinese-built Standard Gauge Railway Project in Kenya and East Africa." *Washington, DC* 13 (2017).

## **1.7 Methodology to be used**

This thesis provides an in-depth analysis of the statutes governing foreign direct investments in Kenya and any framework therein on public participation. The above described theoretical framework functioned as a guideline for this research.

### **1.7.1 Research Strategy**

This thesis used library research and internet searches. While the intrinsic principles of FDI studies as discussed in the literature review focused on wide-ranging measurable and analogous investigation, this study also discusses the motives of foreign investors, the approaches of government representatives and the experiences of local people. This helped to narrow down on the various patterns that encourage public participation in FDI projects in Kenya and the anomalies in the behaviour of investors that discourage public participation.

### **1.7.2 Data Sources**

The researcher based her main sources of data on legal instruments with much focus on the Constitution of Kenya. Library research, internet searches, and consultations with key personalities, such as lawyers, local people and activists also broadened this empirical research. This provided the much-needed vital information to find the most appropriate answers to research questions, choose the right case studies to expound on the importance of public participation in the economic development discussion. In addition, the internet and library researches helped to compare a number of findings against each other in order to pinpoint the key processes that are accountable for the current situation. Through the process known as triangulation, the researcher comprehensively consulted web pages, online articles, NGO reports and annual company publications to classify comparisons and to generalise conclusions. Therefore, the thesis entails a qualitative analysis of legal documents and publications that support the assumptions or hypothesis by identifying and narrowing down certain legal guidelines and provisions. As soon as the researcher identified the specific legal rules, general legal statutes that underlie public participation in FDI projects automatically emerged. This helped to categorise uncertainties, censures and explanations that may exist within the existing legal provisions and frameworks.

## **1.8 Chapter Breakdown**

### **Chapter 1: Introduction**

This chapter provides the introduction of the study, which takes account of the background of the problem, the problem statement; the theoretical framework, the objectives, the assumptions/hypothesis and the methodology to be used.

### **Chapter 2: The Concept of Public Participation in Kenya**

This chapter provides an introduction to the concept of public participation, discusses categories of public participation, key stakeholders of public participation and the legal framework on public participation in Kenya.

### **Chapter 3: The Legal Framework on Foreign Direct Investment in Kenya**

This chapter discusses the Constitution of Kenya and the extent to which it allows foreign investment, the Acts of Parliament on Foreign Investment and the challenges in managing FDI

### **Chapter 4: Lessons from case studies on FDI in Kenya**

The following cases will be discussed:

- a. The Tullow Oil Case
- b. Lamu Coal Case

### **Chapter 5: Conclusions and Proposals for Reforms.**

This chapter summarises the study and gives conclusions and proposals.

## CHAPTER TWO

### 2.0 THE CONCEPT OF PUBLIC PARTICIPATION IN KENYA

#### 2.1 Introduction

In this chapter, the concept of public participation will be analysed in the context of Kenya by exploring the various obligations that the government and the citizens owe each other. This chapter also demonstrates the extent to which the concept of public participation helps in achieving a number of objectives outlined in the Constitution of Kenya. In Kenya, the participation of citizens is a right that is embedded in the national principles of governance<sup>42</sup>. Public participation revolves around the practical notion that citizens have the right to take part in the key decision-making processes on matters affecting their livelihoods and wellbeing; therefore, the government must arrange for and recognise this principle.

#### 2.2 Historical Overview of Public Participation in Kenya

Public participation is a two-way political concept or practice whereby an organisation collaborates with interested or affected parties in order to reach more binding and acceptable decisions.<sup>43</sup> It is also recognised as a rightful way of engaging stakeholders because it seeks the involvement of interested entities as well as the opinions of potentially affected individuals in a critical decision-making process regarding various development projects. Public participation is anchored on the principle that all individuals and organisations who are affected by a decision must take part in the policymaking process by reviewing each decision made. As an effective approach of democratic governance, public participation is a vital element of empowering individuals to express their opinions as enshrined in Article 33 of the Constitution in terms of freedom of expression.<sup>44</sup>

In Kenya, the need for citizens to actively take part in development projects started at the community level, which is also the case in a number of countries.<sup>45</sup> In the 1960s, with the help of Sessional Papers, the national government tried to introduce its programmes to citizens through devolved planning and implementation. However, it took approximately over two decades before a breakthrough was made in 1983 with the District Focus for Rural Development (DFRD) Strategy. It was not as successful as anticipated because it aimed at

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<sup>42</sup> Article 10 (2) (a) Constitution of Kenya

<sup>43</sup> Marks, Sara J., and Jennifer Davis. "Does user participation lead to sense of ownership for rural water systems? Evidence from Kenya." *World Development* 40, no. 8 (2012): 1569-1576.

<sup>44</sup> Sihanya, Bernard. *Constitutional implementation in Kenya, 2010-2015: Challenges and Prospects*. Nairobi: Friedrich-Ebert-Stiftung, 2012.

<sup>45</sup> Salome, Nyambura. "Has Kenya's ICT revolution triggered more citizen participation?" (2016).

integrating field workers from the national government to actively take part or rather supervise various community programmes. Such an arrangement was utterly rejected by many community leaders and local people as it contradicted the essence of public participation. Rather than helping local people to pinpoint shortcomings affecting their community projects and seeking sustainable solutions for them, Chitere and Ileri<sup>46</sup> state the civil servants from the central government oversaw the community projects almost singlehandedly.

With no Act of Parliament to set limits for committees working under the umbrella of the DFRD Strategy, the coordination and implementation of various community projects was constantly flawed. Since the overseers mandated by the central government did not have any legal backing, they executed their work administratively instead of legally. In Kenya, Acts of Parliament have been used to create a number of decentralised policies in the past without legal backing, which do not warrant any sense of permanency.<sup>47</sup> In 1996, the Physical Planning Act was enacted and it marked a major breakthrough in legal policies associated with participatory development. However, the biggest shortcoming with the statute is that it lacks the crucial component that addresses the extent to which community members can take part in various physical and development plans. Furthermore, since physical planning in Kenya mostly takes place in urban areas, those living in remote rural areas have little or no idea of the ins and outs of participatory planning.<sup>48</sup>

At the local level, the two main approaches of community participation that are popular in Kenya are the 2001 Local Authority Service Delivery Action Plan (LASDAP) and the 2003 Constituencies Development Fund (CDF).<sup>49</sup> A ministerial circular was used to introduce LASDAP with the purpose of eradicating poverty by engaging local communities on issues related to education, health, and infrastructure. The LASDAP executes the planning, budgeting and development of opportunities that local people in identified communities can engage in in order to reduce the levels of poverty. Similarly, the CDF Act enacted the CDF to combat poverty at the grassroots level by focusing on development projects that local people can take part in through a number of well-orchestrated committees. Members of Parliament (MPs) are

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<sup>46</sup> Chitere, Orieko, and Onesmus N. Ileri. *District focus for rural development in Kenya: its limitations as a decentralisation and participatory planning strategy and prospects for the future*. No. 46-2004. Institute of Policy Analysis and Research, 2004.

<sup>47</sup> Bosire, Lydiah Kemunto, and Gabrielle Lynch. "Kenya's search for truth and justice: The role of civil society." *International Journal of Transitional Justice* 8, no. 2 (2014): 256-276.

<sup>48</sup> Kimani, Mary, and Titus Musungu. "Reforming and Restructuring the Planning and Building Laws and Regulations in Kenya for Sustainable Development." In *Unpublished paper presented at the 46<sup>th</sup> ISOCARP Congress. Nairobi, Kenya*. 2010.

<sup>49</sup> Ibid

the ones mandated to oversee the process of legally selecting members of the CDF Committee (CDFC). In addition, local stakeholders must be consulted in the process of appointing members of the Project Implementation Committee (PIC).<sup>50</sup>

Both the CDF and LASDAP have not lived up to the promise of engaging community members in decision making processes due to ineffective and piecemeal mechanisms of engagement. Such major weaknesses have led to disharmony between policy and practice even after the LASDAP framework was intricately revised in 2009. Without well-thought-out engagement mechanisms as well as inclusive elucidation of community welfares, public participation plans in the devolved government will continue to falter. In Kenya, the legislative and budget processes depend on public participation,<sup>51</sup> with asset disposal and public procurement processes as well.<sup>52</sup>

Kenya's Judicial and Constitutional Review processes of the 1990s and 2000s helped popularize public participation in the country. The Constitution of Kenya Review Commission (CKRC) Act, 1998 had important public participation provisions. The CKRC Act required Commissioners to consult widely, to carry out intensive and extensive civic education and to ensure peoples' views were reflected in the Constitution. The Committee of Experts (CoE) drafting Kenya's 2010 Constitution regularised public participation. Partnering with NSAs, the CoE conducted civic education in all constituencies. The CoE had a thirty-day period for intensive public engagement before the people voted during the constitutional referendum that approved the Draft Constitution.<sup>53</sup>

The Judiciary has integrated public participation by establishing Court Users' Committees and the National Council on the Administration of Justice. This has been enhanced after the adoption of the Judiciary Transformation Framework (2012-2016) and Sustaining Judiciary Transformation Framework (2017-2021), which provides better mechanisms for engaging the public in the administration of justice. The Frameworks proposed the development and implementation of a structured approach to ensuring interactions with the public through Open

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<sup>50</sup> Kimani *supra* Note 1 at 9

<sup>51</sup> Thompson, Lisa, Naila Kabeer, Arilson Favareto, Doctor Celestine Nyamu-Musembi, Duncan Okello, Idaci Ferreira, Jibrin Ibrahim et al. *Mobilizing for democracy: citizen action and the politics of public participation*. Zed Books Ltd., 2013.

<sup>52</sup> It is a requirement under section 3 of the Public Procurement and Asset Disposal Act, 2015 that public procurement by the state organs and public entities be guided by values and principles of the Constitution and relevant laws including national values and principles as provided for under Article 10 of the Constitution

<sup>53</sup> Franceschi, Luis Gabriel, Linet Muthoni, and Emmah Senge Wabuke. "Judicial review and public power in Kenya: Revisiting judicial response to select political cases." In *Rule of Law, Human Rights and Judicial Control of Power*, pp. 77-109. Springer, Cham, 2017.



Days, Judicial Marches and Public and Student Visitation Programs, all meant to make the judiciary more accessible to the public. Other aspects have included the Chief Justice' Annual State of the Judiciary Address, court's emphasis on open court rather than chamber hearings and establishment of an elaborate media strategy.<sup>54</sup>

Overall, both levels of Governments have guidelines on public participation and also initiated processes through which the public participate. However, the absence of an overarching national policy to provide clear objectives, principles and the framework for coordination of public participation in Kenya, which sets countrywide standards, is a deficit which this thesis aims to address.

### **2.3 Categories of Public Participation**

Public participation takes account of a series of actions that a citizen takes in order to take part in government activities or community affairs. As illustrated in the International Law Association, there are three elements that support the principle of public participation.<sup>55</sup> These include the human right of expression (Article 33 of the Constitution); the right to access correct and sensible information from the government (Article 35 of the Constitution); and the right to access to justice (Article 48 of the Constitution). Therefore, transparency in the decisions made through public participation as well as the right to information access is not only paramount but also a fundamental human right.<sup>56</sup> Article 35(1) of the Constitution states that every citizen has the right to access information held by the State. Further, Article 35(3) states that the State shall publish and publicize any important information affecting the nation. Pursuant to this provision, the enactment of the Access to Information Act obliges all government authorities to disclose information upon public request. It also enables the public to put all public entities to task to explain their actions, policies or decisions upon request.

Three main categories of public participation exist, and they can be further disintegrated into eight stages. The three categories include non-participation (manipulation and therapy), tokenism (informing, consultation, placation or peace-making), and citizen power (partnership, delegated power, citizen control).<sup>57</sup>

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<sup>54</sup> Maseh, Elsebah, and Shadrack Katuu "The Kenyan judiciary's open government initiative: prospects and challenges." *Journal of Science and Technology Policy Management* 8, no. 1 (2017): 76-94.

<sup>55</sup> Adede, Philip Bonasera. "An Analysis of the Concept of Public Participation in Kenya." *International Journal of Law and Policy* 1, no. 2 (2017): 46-57.

<sup>56</sup> Kabata, Victor, and Francis Garaba "The legal and regulatory framework supporting the implementation of the Access to Information Act in Kenya." *Information Development* (2019): 0266666919856646.

<sup>57</sup> Ibid

Non-participation is the first category and is usually seen as the lowest form of participation. It does not have much impact as the inputs exerted by those in authority are not readily recognised because they only try to make citizens feel ‘happy’ through two stages: manipulation and therapy. In manipulation stage, the government agents or those in power plan ways in which citizens can take part in public projects without involving them in decision making activities. While the public do not have any direct participation, to some extent, they may be manipulated to believe that their opinions and ideas were integrated in all the decisions made. When it comes to the “therapy” stage, the people in power promise to incorporate the opinions of interested individuals and affected citizens in the decision making process. They diffuse the community members’ anxieties to appease them and at the same time to make them feel important. Both manipulation and therapy stages aims to inform the public of their various concerns.<sup>58</sup>

Tokenism is the second category of public participation that involves three stages, namely informing, consultation, and placation or peace-making and involves citizens to a certain degree. Generally, the aim of tokenism is to give citizens the right to hear, to be heard, and advice power holders. The “informing” stage usually enlightens the public about what is going on, in this case, the projects that the government intend to execute. While the “consultation” stage is usually given as an option for the public, when citizens try to consult about the issues raised, a number of people in power typically feel that their opinions negatively affect or drag their decisions. The final stage in this category is called “placation or peace-making”, which involves appeasing or pacifying the public. While a few citizens may be selected to represent the public at the decision-making body, it is important to equalize the ratio of citizens to power holders. If not, the opinions of either side, especially the public, would remain unproductive.

Considered the most effective category of public participation, citizen power ensures that the citizens directly influence the decision-making process, and ensures that their voices are heard by forming partnerships with those in power to keep both parties satisfied. The key objective is to make sure that the citizens are fully involved both in practice and the making of decisions. The “partnership” stage facilitates various ways through which citizens can take part in negotiations or engage in decision-making duties with power holders. The “delegated power” stage is where power holders transfer part of their authority to individuals or community groups and the citizens have the ability to take control and negotiate. Since most citizens usually make

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<sup>58</sup> Adede *supra* note 2 at 11

up the quorum of board members, the power holders would be obliged to negotiate with them in order to reach agreeable decisions. The final stage in this category is “citizen control”. It is considered the upper-most stage with growing levels of “citizen power”, as the public usually bears greater power over the decision-making process. This can take the form of being involved in key meetings and having more seats in a number of committees. As such, most decisions related to a number of projects lie with the citizens because they bear the outright power to change the course of various projects through referendums.<sup>59</sup>

The constitutional mandate and rationale behind public participation is to place sovereign power on citizens. As stated by the High Court of Kenya:

*“Public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictate. County Assemblies [must] enact legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is the duty of the County Assembly to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public barazas, national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.”<sup>60</sup>*

#### **2.4 Key Stakeholders of Public Participation in Kenya**

In the context of public participation, various stakeholders promote the sharing of information, capacity building, and actively engaging citizens to take part in the carrying out of projects and delivery of services. The major stakeholders include the national and county governments, the private sector, and civil society organisations (CSOs). Citizens are the main pillars of the public participation policy and have to actively be involved in the implementation of this policy including being actively engaged in monitoring, evaluation and learning. They have a duty to attend public participation meetings and to contribute effectively. Being the overall consumers of public participation, citizens are expected to exercise their sovereignty by holding duty bearers and all other agencies to account.

The national and county governments are key role players in the public participation process through various parastatals, politicians, consultants, authorities, and other stakeholders who

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<sup>59</sup> Simonsen, William. *Citizen participation in resource allocation*. Routledge, 2018.

<sup>60</sup> Petition 532 of 2013 & 12, 35, 36, 42, & 72 of 2014 & Judicial Review Miscellaneous Application 61 of 2014 (Consolidated) eklr.

each bring their own perspectives. Their involvement in the public participation process is legally justified and inherently mandated since they act as guides in matters related to regulatory requirements and as arbitrators to potential trade-offs.<sup>61</sup> The final decisions regarding various development and infrastructural projects lie with the national and county governments after learning about key concepts and reviewing stakeholder concerns as well as key suggestions on behalf of other interested authorities. Therefore, the government's commitment is vital in making sure that the public participation process is transparent and comprehensively carried out at all levels.<sup>62</sup>

Government Ministries, Departments and Agencies (MDAs) including Constitutional Commissions as well as Independent Offices play a significant role in ensuring that there exist a conducive environment for the public participation process. These authorities are mandated to establish the relevant departments or offices as well as appointing officers in charge of a smooth public participation process. As provided in the Constitution, County Governments also promote the principles of public participation in line with the County Governments Act. As entrenched in the Public Participation Draft Bill, both the national and county governments should nurture a number of relationships with various development partners who assist in leveraging resources and facilitating capacity building for public participation.<sup>63</sup>

CSOs are considered forerunners in the creation of public watchdog linkages as well as the facilitation of citizen consultative groups that go a long way in the overseeing the public participation process from the community level to the national level.<sup>64</sup> As key stakeholders in the public participation arena, they usually have an in-depth understanding of underlying concepts and vital ideas that may affect the decision making processes and the overall participation of citizens. As soon as the CSOs have a clear position regarding their mandates, they take an active role in supporting citizens to take part in the decision-making process; seize important opportunities to express their opinions; and address a number of challenges affecting the citizens. In Kenya, CSO are still striving to overcome various internal obstacles instigated by hostile political contexts that prevent informed policy engagements when it comes to public participation.<sup>65</sup>

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<sup>61</sup> Otieno, Ibrahim, and Elijah Omwenga. "Citizen-centric critical success factors for the implementation of e-government: A case study of Kenya Huduma Centres." In *2015 IST-Africa Conference*, pp. 1-9. IEEE, 2015.

<sup>62</sup> Bienen, Henry. *Kenya: The politics of participation and control*. Princeton University Press, 2015.

<sup>63</sup> Kenya Draft Public Participation Bill. Revised Draft (6th) September, 2018

<sup>64</sup> Pratt, Brian, and Rachel Hayman, eds. *Civil Society Sustainability: New challenges in organisational legitimacy, credibility, and viability*. Routledge, 2018.

<sup>65</sup> Ibid

Public participation without the private sector can be disastrous because the private sector play an important role in offering sustained monetary support to the governments and local communities.<sup>66</sup> They act as the backbone of the economy by ensuring that democracy is upheld and citizens are empowered to fight for their rights legally, especially through Citizen Advisory Boards. However, in Kenya, there exist some deeply embedded controversies regarding the participation of the private sector in public domain, including government projects. Incorporating the private sector in Public Private Partnership (PPP) contracts is the main controversy because their presence interferes with transparency in public service and infrastructure projects.<sup>67</sup> Private entities have been criticised for losing control of service delivery promises in projects allied to PPPs because they overstep their mandate by engaging in abortive practices that are associated with the general public.<sup>68</sup> These concerns usually lead to resistances from the public, unprecedented delays, costly conflicts, and lengthy PPP processes.<sup>69</sup>

Non-state actors collaborate with the government to mobilize citizens and resources, disseminate the policy and participate in capacity building for both citizens and duty bearers. They also collaborate with the government in public participation processes including civic education and mobilizing the citizens to participate in diverse aspects of public governance.<sup>70</sup> The role of non-state actors in deepening local democracy is anchored on Article 1 and Article 33 of the Constitution of Kenya and cannot be undermined by the government. Article 1 bestows the sovereign power to Kenyan citizens, and they can exercise that power directly or indirectly through their democratically elected legislatures. Therefore, citizens remain at the centre of governance by effectively exercising their inherent powers through sustainable civic education and enlightenment programs geared towards public service.

## **2.5 The Legal Framework on Public Participation in Kenya**

The Constitution of Kenya extensively explicates the transition from a centralised government to a two-level devolved government: national and county. With the birth of devolution, the Constitution emphasises on the need to implement public participation without hesitation since

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<sup>66</sup> Harris, Leila M., Jacqueline A. Goldin, and Christopher Sneddon, eds. *Contemporary water governance in the global south: Scarcity, marketization and participation*. Routledge, 2015.

<sup>67</sup> Pratt *supra* note 1 at 7

<sup>68</sup> Odhiambo, George O. "Quality assurance for public higher education: context, strategies and challenges in Kenya." *Higher Education Research & Development* 33, no. 5 (2014): 978-991.

<sup>69</sup> Yoong, Joanne, Nicholas Burger, Connor Spreng, and Neeraj Sood. "Private sector participation and health system performance in sub-Saharan Africa." *PLoS One* 5, no. 10 (2010): e13243.

<sup>70</sup> Salome, Nyambura. "Has Kenya's ICT revolution triggered more citizen participation?" (2016).

it is a key element in achieving democracy in Kenya. The Constitution obliges that both the national and county government must carry out public participation processes to establish a strong foundation for government representatives and entities who make key decisions. However, since the public participation process newly enshrined in the Constitution, unstructured and complex process, understanding it has become a long-drawn-out responsibility, which makes people take it in a tokenism manner.<sup>71</sup>

In 2012, the Ministry of Justice and Constitutional Affairs and the Kenya Constitution Implementation Commission (CIC) prepared and conducted a conference that included a number of public participation stakeholders to brainstorm on a potential framework. The organisers' main objective was to bring together the executive, the legislature, the judiciary, CSOs, academia, international experts and various cherry-picked non-state actors to share their opinions and ideas regarding the need to put into practice key public participation principles. As a constitutional principle, public participation is one of the foundational ideologies of democracy even in the legislative activities of parliament.<sup>72</sup>

As enshrined in Article 2 of the Constitution, both the national and county governments must allow citizens to exercise their sovereign power because most democratic decisions lie with the populace. Article 10 clarifies that public participation is one of the most important principles of governance that provides a cohesive voice when state organs and public officers interpret the Constitution, various laws and apply a number of legally ratified public policy decisions. Article 10 (2) postulates that accountability, good governance, inclusiveness, integrity, transparency and participation of the people are the key national values and principles of governance.<sup>73</sup>

The above-mentioned principles are emphasised in Article 33, which demonstrates that freedom of expression is an important element of public participation. All citizens have a right to express their opinions, lay out their ideas, and be heard by the government. On the same note, Article 61 gives an individual or group of persons the right to express their view when it comes to the purchase, management, allocation, disposal, or possession of public, private, or community land. With land being directly related to the environment, Article 69(1) states that the government must inspire Kenyan citizens to engage in environmental conservation, land

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<sup>71</sup> Maseh, Elsebah, and Shadrack Katuu "The Kenyan judiciary's open government initiative: prospects and challenges." *Journal of Science and Technology Policy Management* 8, no. 1 (2017): 76-94.

<sup>72</sup> Ibid

<sup>73</sup> Kenya Draft Policy on Public Participation. Revised Draft (6<sup>th</sup>) September, 2018

management, and protection of flora and fauna.<sup>74</sup> Article 184(1) supports this by stating that national legislation shall provide citizens with the necessary tools and resources to have dominion over urban areas.<sup>75</sup>

Article 118 (1) focuses on parliament, which must incorporate the public by conducting its business in such a way that their activities are open and their sittings exercise the principles of public participation and contribution. Article 119(1) accentuates this by putting forward that all citizens have a right to request legislators in parliament to debate any pressing issue in the public domain and use its authority to enact, modify, or revoke any legislation in question.<sup>76</sup> In a deeper legal perspective, both the citizens and the media have the right to be present at all sittings in parliament, and their exclusion can only be justified in exceptional circumstances found relevant by the Speaker. And still far too little notice is being given of some opportunities to participate, with Parliament being a major offender.<sup>77</sup>

Article 174(c) outlines the objects of devolution, which play a significant role in providing the much-needed authority to citizens with respect to self-governance and boosts or builds their capacity to actively participate in decision-making processes. This provision is extended in Article 174(d) which provides that every community shall exercise their sovereign authority and indispensable right to manage their internal activities pertaining to their development agenda. Since devolution gave birth to the 47 counties, Article 196(1) explicitly states that every county assembly shall conduct its business in an open manner by ensuring that all sittings and committee meetings are publicly held. Fourth Schedule Part 2(14) state that the county government must exercise its power to coordinate the active participation of community members in all relevant governance processes.

When it comes to the management of public funds, Article 201 articulates the need to exercise openness and ensure that accountability is upheld in all matters regarding public finances. Through public participation, all Kenyan citizens including those in the grassroots are able to take part in governance processes, which gives them an opportunity to monitor the extent to which public resources are used.<sup>78</sup> This is emphasised in Article 232(1) (d), which states that

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<sup>74</sup> George Githinji, 'What the Constitution Says about Public Participation in Kenya' (*AfroCave*, 2019) <<https://www.afrocave.com/public-participation-kenya/>> accessed 2 August 2019.

<sup>75</sup> *Ibid*

<sup>76</sup> George *supra* note 1 at 10

<sup>77</sup> Finch, Christopher. "Participation in Kenya's local development funds: Reviewing the past to inform the future." (2019).

<sup>78</sup> Machoka, Paul Omuya. "Public Procurement Practices and Performance of Selected Constituency Development Fund Projects in Kenya." PhD diss., COHRED, JKUAT, 2017.

public service principles take in the active participation of citizens in the policymaking process as well as a transparent provision of accurate information to the public in a timely fashion. The government also depends on public participation in sensitising citizens on the budgeting process as well as enhancing the collection of revenue.<sup>79</sup>

The constitutional mechanisms for public participation have not been fully open to the public. For example, citizens have experienced challenges accessing information pertaining to discussions within the parastatals and public institutions responsible for ratifying treaties.<sup>80</sup> Furthermore, although there are legitimate cases where access to information can be legally limited, pursuant to Articles 24 and 35 (1) of the Constitution and Section 6 of the Access to Information Act, 2016, the line between making the necessary information available to the public while avoiding revealing information that can hurt the state remains unclear.

### **2.5.1 The Public Participation Bill, 2018**

The Bill underscores Kenya's commitments to the inclusion of the citizens in public governance and binds levels of Government, as well as the private bodies and the non-state actors to the extent that their actions affect the public. This commitment is demonstrated by the numerous provisions of the Constitution on public participation and devolution. . The Bill defines the important public participation priority areas taking into consideration the Constitution, within the provisions of Articles 2, 10, 33, 61, 69, 118,119, 124, 174, 184, 196, and 232 as well as in the National Assembly Standing Orders and other existing policies and laws.<sup>81</sup>

Since the promulgation of the Constitution, some efforts have been put into enabling public participation. A number of laws and policies have been enacted while some county governments have completed and adopted County Public Participation Guidelines, which define the framework for citizen engagement with and also aim at empowering the citizens to demand for effective participation in matters of public governance. In some cases, citizens have gone to court to enforce the law. Standards for public participation and the mechanisms for coordination have not been developed by either level of government, and important policies,

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<sup>79</sup> Micale, Valerio, Chiara Trabacchi, and Leonardo Boni. "Using Public Finance to Attract Private Investment in Geothermal: Olkaria III Case Study, Kenya." *Climate Policy Initiative, Venice, Italy. Available at: [http://climatepolicyinitiative.Org/wp-content/uploads/2015/06/150601\\_Final\\_Olkaria\\_ForWeb.Pdf](http://climatepolicyinitiative.Org/wp-content/uploads/2015/06/150601_Final_Olkaria_ForWeb.Pdf)* (2015).

<sup>80</sup> Nyarango, Archibold Ombongi "A Jigsaw Puzzle or a Map? The Role of Treaties under Kenya's Constitution." *Journal of African Law* 62, no. 1 (2018): 25-50.

<sup>81</sup> Kenya Draft Policy on Public Participation. Revised Draft (6th) September, 2018



legislations and guidelines on public participation are not fully formulated. Key institutions and agencies have also not fully embraced public participation.

The development of the Bill was done through a consultative, and participatory process under leadership of the Office of the Attorney General (OAG) and Department of Justice. The process started in 2012, during a three-day stakeholder conference at the Great Rift Valley Lodge, Naivasha, 24<sup>th</sup> – 26<sup>th</sup> September, 2012 where the stakeholders discussed and agreed to develop a policy to guide public participation processes in Kenya. The Bill has nine specific objectives that national and county governments will endeavour to achieve. The nine objectives which constitute key priority areas will be achieved taking into consideration fourteen principles listed in section 4, which include sovereignty of the people and equal opportunities for all; and provision of adequate and effective mechanisms and opportunities for participation for those interested in, or affected by decisions and special interest groups. The Bill's priority areas were identified through public in interviews, Focus Group Discussions (FGDs) and regional hearings conducted countrywide.<sup>82</sup>

The Public Participation Bill contains General Public Participation Guidelines. The guidelines require that the responsible authority provides reasonable and meaningful opportunities for public participation. In considering what is reasonable, the responsible authority will be guided by among other things, the intensity of the impact of the decision on the public. The guidelines also provides that the responsible authority should develop a public participation programme which shall identify among other things the community, profession or groups to be consulted and the length of consultations and the issue under consideration.<sup>83</sup>

## **2.6 Conclusion**

From the reviewed literature, most sources indicate that public participation is indispensable for the implementation of a number of programmes as well as the successful execution of key projects. Further, the GoK is undergoing immense pressure locally, regionally, and internationally to accelerate decision-making processes associated with FDI projects. The Chapter discusses a number of dimensions of efficiency through the categories of public participation which gives an undivided focus on public participation in decision making, community welfare, and increased budgetary transparency on public resources. The Constitution is the backbone to the legal framework on public participation and provides a

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<sup>82</sup> Ibid

<sup>83</sup> The Public Participation Bill, 2018, Schedule.

unique way of enhancing the role of citizens in the decision making process. To capitalise on this opportunity, citizens must put both the national and county governments to task in defining public participation comprehensively, and the drafting of relevant laws to enhance rather than undermine Constitutional mandates.

## CHAPTER THREE

### 3.0 THE LEGAL FRAMEWORK ON FOREIGN DIRECT INVESTMENT IN KENYA

#### 3.1 Introduction

This chapter captures the legal framework on FDI, which is found in a number of legislations that are appraised in this study. The list of such legislations takes account of the core legal framework regulating FDI in Kenya starting with the Constitution and in various Acts of Parliament. Although the legislations govern specific foreign investment domains, there is a collective measure that can be recognised in each of them.<sup>84</sup> This provides a basis for Kenya to review her international trade and foreign investments legislative regime in order to infuse international best practices aimed at enhancing and promoting international trade and public participation in foreign investment projects.

#### 3.2 Foreign Direct Investment

According to the OECD definition, direct investment is a category of international investment made by a resident entity in one economy (direct investor) with the objective of establishing a lasting interest in an enterprise resident in an economy other than that of the investor (direct investment enterprise)<sup>85</sup>. Thus direct investment reflects the aim of obtaining a lasting interest by a resident entity of one economy (direct investor) in an enterprise that is resident in another economy (the direct investment enterprise). Foreign Direct Investment (FDI) is the category of international investment that reflects the objective of a resident entity in one economy to obtain a lasting interest in an enterprise resident in another economy<sup>86</sup>.

#### 3.3 The Constitution of Kenya

Kenya has enacted a number of legislations that seek to facilitate and promote international trade and foreign investments. They provide for the protection and creation of a viable environment for the development of international trade and attraction of foreign investments. The Constitution of Kenya which was enacted in the year 2010 provides that the general rules of international law and treaties are part and parcel of the laws of Kenya.<sup>87</sup> This brings

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<sup>84</sup> Abala, Daniel O. "Foreign direct investment and economic growth: an empirical analysis of Kenyan data." *DBA Africa Management Review* 4, no. 1 (2014): 62-83.

<sup>85</sup> OECD (Organisation for Economic Cooperation and Development) 1996, Benchmark Definition of Foreign Direct Investment, 3rd Edition, Paris stats.oecd.org

<sup>86</sup> *ibid*

<sup>87</sup> Republic of Kenya, Constitution of Kenya, Art. 2(5) and (6).

international investment treaties ratified by Kenya into focus and as such exemplifies the country's position in international commerce.

Article 159 of the Constitution enhances the practice of arbitration in the country and holds in the highest regard it as one of the guiding principles in Kenyan courts.<sup>88</sup> The Treaty Making and Ratification Act, 2012, which gives effect to Articles 2(5) and 2(6) lays down the procedure on how Kenya should make and ratify treaties.<sup>89</sup> These provisions of the Constitution are relevant in foreign investments regime because Kenya is part of the globalized market and such is party to a number of international investment treaties as well as conventions that establish legal and implementation frameworks to advance global business including FDI.<sup>90</sup> Examples include the Agreement Establishing the World Trade Organization (WTO), the General Agreement on Tariffs and Trade (GATT), the UNCITRAL Model Law on International Commercial Arbitration, etc.<sup>91</sup>

Article 65 (1) of the Constitution contains restrictions on land holding by non-citizens, which reads as below:

*"A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years."*

Pursuant to the provisions of Article 65, foreigners are allowed to own land on a leasehold tenure restricted to a maximum of 99 years. When it comes to evaluating the nationality of corporate bodies, they are deemed fit to own land only if its entirety is owned by Kenyans. Therefore, any organisation that has all its shareholders as foreigners are not legally recognised or allowed to possess freehold land. In addition, if the property is held in a trust, all the individuals who are beneficiaries must be Kenyans. There are a number of transitional and consequential provisions that are contained in the Sixth Schedule of the Constitution of Kenya. In paragraph 8 (1), it is noted that as of 27<sup>th</sup> August 2010, any freehold interest held by non-citizens were automatically seized by the State, as the government now has the power to grant

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<sup>88</sup> Article 159 (2)(c)

<sup>89</sup> Republic of Kenya, Treaty Making and Ratification Act, 2012

<sup>90</sup> The Kenya Law's website: [www.kenyalaw.org](http://kenyalaw.org) provides a database of treaties and conventions and shows that these treaties are ratified by Kenya <<http://kenyalaw.org/treaties/search>>accessed 09 August 2019.

<sup>91</sup> Isaac, Menjo Kibiwot, and Kotut Cheruiyot Samwel. "Effects of fiscal policy on private investment and economic growth in Kenya." *Journal of Economics and sustainable development*3, no. 7 (2012): 8-16.

them fresh lease of 99 years.<sup>92</sup> Therefore, understanding of such legal provisions regarding property ownership is imperative to avoid unnecessary legal battles, partnerships and worries.<sup>93</sup>

Although the Kenya's Constitution provides for categories of taxation and their imposition under Article 209, it does not explicitly provide the active role of parliament in monitoring and evaluation to ensure that county governments do not enact legislation that hinders international trade and foreign investments.<sup>94</sup> The devolved system of governance in Kenya aims to enhance development by conveying timely services to citizens through legislation as well as public participation policies that promote development. However, county governments have been enacting finance legislations that introduce multiplicity of taxes that not only hinder inter-county trade but also hinders the movement of goods from other East African Community (EAC) trading partners. The lack of EAC Trade Policy also acts as a hindrance to efficient administration of trade within the EAC region.<sup>95</sup>

Under the Fourth Schedule of the Constitution of Kenya, the international trade function is allocated to the national government, a function implemented by the then Ministry of Foreign Affairs.<sup>96</sup> The Ministry's strategy on economic cooperation, international trade and investment is premised on the fact that international trade is central to Kenya's determinations to accomplish increased international trade and foreign investments. The Ministry seeks to achieve its strategic goals based on three key strategic thrust.<sup>97</sup> These take account of promoting the exportation of products and services in a number of untapped local markets as well as internationally recognised emerging markets. These markets should have the potential to support international trade policies, regional trade strategies and national export strategies that can support different magnitudes of FDI inflows.<sup>98</sup>

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<sup>92</sup> Evers, Sandra, Caroline Seagle, and Froukje Krijtenburg. *Africa for Sale? Positioning the State, Land and Society in Foreign Large-scale Land Acquisitions in Africa*. Brill, 2013.

<sup>93</sup> Kronenburg, A. J. N., G. Baltissen, G. Betsema, and J. Schuurman. "Food security and land governance factsheet Kenya." (2015).

<sup>94</sup> Standard Digital Newspaper, "Stop double taxation, Kenyan counties told"

<http://www.standardmedia.co.ke/business/article/2000186152/stop-double-taxation-kenyan-counties-told> accessed 09 August 2019.

<sup>95</sup> Mbugua, Frida W, <Devolution And Its Impact on Regional Trade in East Africa: A Case Study of Kenya' < <http://erepository.uonbi.ac.ke/handle/11295/95299> > accessed 09 August 2019

<sup>96</sup> Constitution of Kenya, 2010, Fourth Schedule, Para 1

<sup>97</sup> Ibid

<sup>98</sup> Voorpijl, Ruth. "Foreign Direct Investments in Kenya: The gains and losses of foreign involvement." (2011).

### **3.4 Acts of Parliament on FDI in Kenya**

The Investment Promotion Act, 2004 is a substantive legislation on promotion and facilitation of FDI. This Act repealed the Investment Promotion Centre Act, Cap. 485 by streamlining the administrative and legal procedures with a view of creating a more attractive investment climate in Kenya.<sup>99</sup> The main objective of this legislation is to boost and expedite the investment process by helping individuals and organisations to acquire the essential documentation for purposes of investment as well as in matters related to funding. This Act was established the Kenya Investment Authority which is mandated to promote investments in Kenya, facilitate the implementation of new investment projects, provide after care services for new and existing investments, as well as organizing investment promotion activities both locally and internationally.<sup>100</sup>

The Foreign Investments Protection Act, 1964 is an independence legislation that closely casts the colonial master's-Britain investment regime. Foreign Investments Protection Act (FIPA) has however undergone various amendments in order to align it with the ever changing local and global business environment. FIPA seeks to protect certain approved foreign investments and creates investment incentives as well to attract foreign direct investments.<sup>101</sup> It guarantees a foreign investor with regard to the capital remittance and the reimbursement of interests accrued as well as dividends. Although FIPA creates a viable climate for foreign investments, there is missing link as regards fair administrative treatment, physical security of property of foreign investors and a clear dispute resolution mechanism.

The Companies Act, 2015 and the Investment Promotion Act provides the foundation for company and investments law in Kenya. These are the substantive laws that provide the mechanisms for registration and carrying out foreign investments in Kenya. The Companies Act, 2015 seeks to facilitate processes regarding the incorporation, operation, administration and regulation of companies in Kenya. This Act has provisions that cast the current commercial realities and technological developments locally and globally. Key examples of the features of the statute include the “walking company” provisions that legally ratifies the individuals to operate companies as single shareholders.<sup>102</sup> Not only does the Act allow companies to operate

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<sup>99</sup> Investment Promotion Act (revised 2009) long title.

<sup>100</sup> Ibid section 15

<sup>101</sup> Republic of Kenya, Foreign Investments Protection Act, S. 7.

<sup>102</sup> Republic of Kenya, Companies Act, 2015, long title.

outside the activities outlined in their Memorandum of Association,<sup>103</sup> but also legally permits them to write company resolutions electronically. Section 3 of the Act provides that:

“...the objects of this Act are to facilitate commerce, industry and other socio-economic activities by enabling one or more natural persons to incorporate as entities with perpetual succession, with or without limited liability, and to provide for the regulation of those entities in the public interest, and in particular in the interests of their members and creditors.”<sup>104</sup>

This departs from the repealed company statute which previously dictate that setting up a private company required at least two directors.

The Business Registration Act, 2015 is closely related to the Companies Act and establishes the Business Registration Service as well as the office of the Registrar-General, which oversees the laws associated with companies’ registration, operation and administration.<sup>105</sup> This is intended to make registration of business in Kenya easier, provides for quicker registration mechanisms, reduction of bureaucracy and therefore enhances faster setting up of foreign companies in Kenya as provided under the Companies Act.<sup>106</sup> Since Kenya’s FDI is based on market-seeking principles, such enactment is likely to woo investors into the Country, boost Kenya’s FDI portfolio and spur economic development.

The Public Private Partnerships Act, 2013 also taps into FDI in Kenya because good infrastructural facilities such as roads, rails and ports play a significant role in attracting FDI. Capital is one thing that almost everyone is short of, especially developing countries like Kenya, and setting up better infrastructural facilities is an investment that is large and extended on timeline. Therefore, the government often has to reach out to private enterprises to acquire the much-needed capital, while providing policy and administrative support in return for a say on the pricing of the infrastructural services, which stands out as the essence of Public private partnerships.<sup>107</sup> Kenya being a developing country, in order to raise enough capital to put up better roads, rails, ports and other transport networks and other infrastructure, that usually requires heavy capital, enacted the Public Private Partnerships Act, 2013. This Act provides

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<sup>103</sup> Ibid; see also section 11 of the Act.

<sup>104</sup> See Companies Act Cap. 486, s. 4.

<sup>105</sup> Republic of Kenya, Business Registration Act, 2015, long title.

<sup>106</sup> Nduna, James Musee "A Practitioners Perspective on the Impact of the New Companies Act 2015 in Improving the Ease of Business Registration in Kenya." PhD diss., United States International University-Africa, 2017.

<sup>107</sup> Republic of Kenya, Public Private Partnerships Act, 2013.

for the participation of the private sector in the financing, construction and maintenance of infrastructural or development projects.<sup>108</sup>

The Capital Markets Act lays down the general regulatory foundation for the stock market, which is a reliable barometer to measure the economic condition of a country.<sup>109</sup> It is an integral factor in any economy and it is one of the gauges of the performance of the economy. Movements in the stock markets can have a profound effect on the economy and its collapse can have adverse effects on the economy. Investment in stock exchange in any country is reliant on a number of measures such as political stability and reform-oriented governance, security and transparency in governance.<sup>110</sup> In situations where such measures are not reinforced, a foreign investor who has huge investment in the form of stocks may pull out leading to unstable stock market hence weakening the economy. This is the reason why in countries with rampant insecurity, wars and such like activities, there exist low capital markets investments. The strength of stock market is therefore evidence of a sound economy and serves as an attraction to foreign investors in any given economy. The Act empowers the cabinet secretary of finance to issue rules and regulations prescribing the procedure for the participation of foreign investors in the securities market. The authority has the mandate to protect local and foreign investors in the stock market and the development of technologies and adoption of measures that promote the securities market in Kenya capable of attracting FDI.

Kenya's FDI relies on market-seeking ideologies; therefore, it is important for the creation of a fair competition regime to attract foreign direct investors, and this is ratified by the Competition Act, 2012, which strengthens the ability of the GoK to compete in global markets, and to actively attract FDI.<sup>111</sup> Not only does the Competition Act, 2012 create a conducive environment for local firms to engage in healthy competition nationally, but it also facilitate the implementation of best international practices for both local and foreign investments. The Act also create a level playing field for local industries and foreign investors to compete fairly under the umbrella of national competition law and regional integration initiatives. This Act establishes the Competition Authority and the Competition Tribunal as institutions to provide implementation and enforcement mechanisms in competition matters in the country. This law

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<sup>108</sup> Obosi, Joseph Okeyo. "Impact of public-private partnership on water service delivery in Kenya." *Open Journal of Political Science* 7, no. 02 (2017): 211.

<sup>109</sup> Republic of Kenya, Capital Markets Act, Cap. 485A, long title.

<sup>110</sup> Ibid section 13

<sup>111</sup> Republic of Kenya, Competition Act, long title and section 3.



has facilitated the stabilization of the Kenyan market creating a conducive foreign direct investment climate in Kenya.<sup>112</sup>

The Anti-counterfeit Act, 2008 establishes the Anti-Counterfeit Agency to prohibit trade in counterfeit goods imported in Kenya. The Agency is tasked with the responsibility of eradication and presenting the trade of counterfeit products and notifying the public on counterfeiting issues in Kenya. The body also develops and facilitates a number of training programmes that focus on fighting counterfeiting nationally, regionally, and internationally in accordance with the Act.<sup>113</sup> However, the Agency faces a number of challenges among them lack of clarity regarding its role compared to related agencies in intellectual property rights protections such as Kenya Industrial Property Institute and Kenya Bureau of Standards. The legislative and regulatory framework on anti-counterfeit is essential in promoting FDI in Kenya. Foreign investors want a market that is not flooded with anti-counterfeit products for the sake of ensuring fair competition and protection of their intellectual property rights. This law together with its regulatory regime posits an attractive investment climate for FDI.<sup>114</sup>

The Economic Processing Zones Act provides for the establishment of export processing zones (EPZs) as well as the Export Processing Zones Authority (EPZA), which mutually coordinate to seek, oversee and promote export oriented investments. The Authority has the duty to the develop EPZs with much focus on providing a consultative platform for investors, removing barriers to the production process associated with export goods and services in the country. Furthermore, the Act regulates and manages a number of approved activities within the EPZs as well as protecting government revenues and forex earnings.<sup>115</sup> Foreign direct investors who want to set up industries or firms with a market presence not only in Kenya but with capacity to export then finds this essential.<sup>116</sup>

### **3.5 Bilateral and Multilateral Treaties**

An in-depth analysis of FDI inflows to Kenya since the promulgation of the new Constitution shows that the country's Gross Domestic Product (GDP) has not benefitted as initially projected.<sup>117</sup> Between 1970 and 2017, FDI inflows have been less than 1% with an exception

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<sup>112</sup> Andiva, Barnabas. "Mobile Financial Services and Regulation in Kenya." In *1st Annual Competition and Economic Regulation (ACER) Conference*. 2015.

<sup>113</sup> Republic of Kenya, Anti-counterfeit Act, 2008, long title.

<sup>114</sup> Ibid section 7.

<sup>115</sup> Republic of Kenya, Export Processing Zones Act, long title and section 3.

<sup>116</sup> Ibid section 9

<sup>117</sup> Abala, Daniel O. "Foreign direct investment and economic growth: an empirical analysis of Kenyan data." *DBA Africa Management Review* 4, no. 1 (2014): 62-83.

of only 8 years within that period as indicated by the database of World Development Indicators.<sup>118</sup> Regionally, East Africa received FDI inflows amounting to \$7.6 billion in 2017, which is a downward trend compared to the previous year in which it attracted 3% more. In the same year, 2016, Ethiopia managed to receive only \$3.6 billion worth of FDI, but one year later, the landlocked country located on the Horn of Africa received the second largest FDI in the continent. While Kenya's FDI inflows increase by 71% in 2017, this was only 0.9% of GDP (\$74.94 billion). These statistics confirm the extent to which developing countries compete to attract foreign investors, which are as a result of provisions in a number of Bilateral Investment Treaties (BITs) and Multilateral Investment Treaties (MITs).

BITs and MITs refer to binding agreements, pacts or contracts that give comprehensive details regarding the expected treatment or handling of investors from all of the signatory states.<sup>119</sup> National treatment elucidates that foreign investors that operate in a state that is signatory to the treaty will be treated equally or without favourability as compared to the domestic investors. When it comes to the Most Favoured Nation (MFN) obligations, the foreign investors are deemed to be accorded better treatment compared to the signatory state that they invest in. Some of the MFN benefits include enjoying better trade terms; prioritised settlement of disputes; and the right to access logistic infrastructure and intermediate goods.<sup>120</sup> In Kenya, the facilitation and implementation of both national treatment signals and MNF remain controversial.

According to the UNCTAD's database, Kenya has ongoing bilateral investment treaties (BITs) with a number of countries including Burundi, China, Finland, France, Germany, Iran, Italy, Kuwait, Libya, Netherlands, Slovakia, Switzerland, and the United Kingdom.<sup>121</sup> Currently, the EAC and the USA are negotiating for the extension of the African Growth and Opportunity Act (AGOA) after almost two decades in force. The USA endorsed the Act in the year 2000 with the intention of strengthening trade between the two regions. In 2015, the bilateral treaty was extended and include Sub Saharan countries, such as Sudan, Somalia, Lesotho, Namibia,

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<sup>118</sup> Sauvart, Karl P. "International Investment Facilitation: By Whom and for What?" (2018).

<sup>119</sup> Salacuse, Jeswald W. "BIT by BIT: The growth of bilateral investment treaties and their impact on foreign investment in developing countries." In *Globalization and International Investment*, pp. 25-45. Routledge, 2017.

<sup>120</sup> Seid, Sherif H. *Global regulation of foreign direct investment*. Routledge, 2018.

<sup>121</sup> Redonda, Agustin, Santiago Diaz de Sarralde, Mark Hallerberg, Lise Johnson, Ariel Melamud, Ricardo Rozemberg, Jakob Schwab, and Christian von Haldenwang. "Tax expenditure and the treatment of tax incentives for investment. Economics Discussion Papers, No 2018-57." *Kiel Institute for the World Economy*. <http://www.economics-ejournal.Org/economics/discussionpapers/2018-57> Received July 12 (2018).

Egypt, Togo, Ghana, South Africa, Botswana, Swaziland, and many others.<sup>122</sup> With the recent discovery of oil and minerals in Kenya, many foreign companies are already using the BITs as backups for their negotiations. It's prudent that Kenya let the signed bilateral and multilateral treaties expire, and abstain from any new ones.

In Africa, the USA, the UK, and France are the leading First World nations with the largest contribution of FDI.<sup>123</sup> Other investors include China, Singapore, Hong Kong, and South Africa. In 2017, firms in Morocco and South Africa contributed the bulk of FDI outflows from Africa. With an 8% increase in FDI expenditures to other countries, South Africa contributed \$7.4 billion, Morocco \$960 million, and Nigeria did not increase its share from the previous year with \$1.3 billion. In 2020, the projections show that Africa will record a 20% increase of FDI inflows amounting to approximately \$50 billion.<sup>124</sup>

### **3.6 Challenges in Managing the Legal Framework of FDI in Kenya**

Kenya lacks a sound policy framework governing FDI. Quality legislations would therefore be informed by quality policy frameworks.<sup>125</sup> For instance, the United States, Singapore and South Africa have elaborate Trade and Investment policy frameworks that inform the laws governing international trade and foreign investments. These Trade and Investment policies have helped these countries to set and enforce rules of fair competition in the global economy by lowering tariff barriers, protecting intellectual property rights, and improving the treatment of foreign investors. The policies have also facilitated the enactment of quality legislations, development of regulations and establishment institutional frameworks to effectively govern international trade and foreign investments within their jurisdictions. Such undertakings have led to the realisation that trade and investment policy must be reviewed and reinforced to improve the capacity of their local firms and investors to compete in the global economy.<sup>126</sup>

As such, the countries have embarked on promoting the larger foreign policy interests, developing open FDI policies as bases for multinational companies to engage in high end manufacturing and product development. It has become effortless to settle investment disputes

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<sup>122</sup> Feldman, Mark. "International Investment Obligations and Industrial Policy: Evolution in Treaty Practice." *RTA Exchange (International Centre for Trade and Sustainable Development and Inter-American Development Bank)* (2018).

<sup>123</sup> Titi, Catharine. "Most-favoured-nation treatment: survival clauses and reform of international investment law." *Journal of International Arbitration* 33, no. 5 (2016): 425-440.

<sup>124</sup> de Boysson, Olivier, and Clément Gillet. "Africa needs investments beyond its pockets of growth." (2019).

<sup>125</sup> Harris, Richard G. *Trade, Industrial Policy, and International Competition*. McGill-Queen's Press-MQUP, 2015.

<sup>126</sup> Ibid

and promote free, open and stable multilateral trading to achieve the development objectives of host states as FDI can have critical impacts on economic development of the state.<sup>127</sup> However, Kenya is yet to implement policy measures that seeks to enhance adequate security and offer protection to all foreign investors; and preserve the sovereign right to regulate international trade and foreign investments, in the public interest.

One of the biggest threat to FDI in Kenya is corruption because it adversely affects the allocation of resources and leads to the misuse or abuse of public resources without legal accountability.<sup>128</sup> Corruption negative affects economic growth and thwarts the extent to which investments are allocated as well as the quality of infrastructure and development projects. These factors on corruption influence investors' choice of locating their firm and as a result, foreign investors barely have any interest in a highly corrupt country. Inefficient prosecution of corruption cases hampers effective management and reduction of corruption. The Ethics and Anti-corruption Commission does not have prosecutorial powers which are instead vested with the Director of Public Prosecution hence this brings about improper coordination on investigation and prosecution of corruption offences.<sup>129</sup>

Political violence especially when nearing elections in Kenya scares away foreign investors. As such, there is need to review electoral and political parties' legislations to regulate elections and reduce the possibility of violence during general elections in Kenya. Kenya as earlier stated elsewhere in this paper, has the requisite legislative and institutional framework on international commercial arbitration but has not implemented some provisions and there is a poor implementation and enforcement mechanism to effectively realize the profits of international commercial arbitration regime.<sup>130</sup>

### **3.7 Conclusion**

This chapter delved into the legal framework on FDI, and discussed a number of legislations that seek to facilitate and promote foreign investments in Kenya. In order to attract and accommodate foreign investors, the government must create an enabling investment environment first before marketing a number of investment opportunities. Therefore, attaining

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<sup>127</sup> Garcia, Frank J., Lindita Ciko, Apurv Gaurav, and Kirrin Hough. "Reforming the international investment regime: Lessons from international trade law." *Journal of International Economic Law* 18, no. 4 (2015): 861-892.

<sup>128</sup> D'Arcy, Michelle, and Agnes Cornell. "Devolution and corruption in Kenya: Everyone's turn to eat?" *African Affairs* 115, no. 459 (2016): 246-273.

<sup>129</sup> Machoka, Paul Omuya. "Public Procurement Practices and Performance of Selected Constituency Development Fund Projects in Kenya." PhD diss., COHRED, JKUAT, 2017.

<sup>130</sup> D'Arcy *supra* note 1 at 5

this objective starts with enforcing the rule of law, applying rigorous macroeconomic policies, improving infrastructure and eliminating policy reversals risks. The current legislation on FDI in Kenya does not specifically provide for public participation or even advocate for it. In fact the legislation in place appears to be focussed on promoting and attracting foreign investors, protecting the investors and their investments and offering them incentives. There is no involvement of the local community that would be affected by the commencement and carrying on of a particular investment venture.

## CHAPTER FOUR

### 4.0 LESSONS FROM CASE STUDIES ON FDI IN KENYA

#### 4.1 Introduction

This chapter outlines the key lessons learnt from specific case studies on FDI in Kenya. The researcher presents an in-depth discussion and comprehensive review of two major FDI related case studies from varying sectors of the Kenyan economy. The following case studies are discussed: the Tullow Oil Case and the Lamu Coal Power Plant Case. These cases were selected because of the kind of issues they have sparked which touch on the environment, culture and livelihoods of the local population and health. The case study strategy was used because it helped the study to focus on a specific context, and investigated one particular occurrence elaborately and broadly.<sup>131</sup> Since related literature on the above case studies are not widespread largely because of data constraints, in order to clearly bring out the relationship between FDI and its execution processes, support strategies, financial models, legal issues, and public participation in Kenya, the research relied on secondary data for the research. The study used indicators of both direct effects and selected financial and macroeconomic effects as evidence even though the shortage of scientifically collected data sometimes presented these indicators as more qualitative than quantitative.

#### 4.2 The Tullow Oil Case Study

##### 4.2.1 Project Description, Design and Justification

Tullow Oil Public Listed Company (PLC) is an international energy company dealing mainly in oil and gas. The company was formed in Tullow, Ireland and is headquartered in London, United Kingdom. Tullow has stakes across 25 countries and 67 oil-rich fields where it owns and operates more than 150 licenses. As of 2012, the company was producing an average of 79,200 barrels of oil daily. Its activities are mainly in Africa and the Atlantic region, where the company has explored and discovered oil deposits in countries like Ghana, Kenya, Uganda and French Guiana. Currently, the company has established the next growth phase with a specific focus on the Atlantic Margins and Africa, where it has successfully dominated most of the countries.<sup>132</sup>

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<sup>131</sup> Yin, Robert K. *Case study research and applications: Design and methods*. Sage publications, 2017.

<sup>132</sup> Mkutu, Kennedy, Tessa Mkutu, Martin Marani, and Augustine Lokwang Ekitela. "New Oil Developments in a Remote Area: Environmental Justice and Participation in Turkana, Kenya." *The Journal of Environment & Development* (2019): 1070496519857776.

Tullow attributes most of its production from six African countries, the Southern Sea and Asia. In Ghana, for example, the offshore Jubilee oil fields were discovered in the year 2000 with production commencing in December 2010.<sup>133</sup> This project is one of Tullow's largest discoveries. Oil and Gas companies like British Multinational Oil and Gas Company (BG Group Plc) are reluctant to continue with the drilling of exploration wells of natural gas because the recent model of production contract has a bias on the terms. There are new, breakthrough technologies that can assist in finding, developing and producing more oil and gas, which has enhanced international business with most oil and gas drilling companies.

Tullow acquired a 50% interest for the exploration of 5 licence blocks in Turkana, Baringo and Marsabit after signing agreements with Centric Energy and Africa Oil in 2010. Two years later at the Ngamia-1 well (in the South Lokichar Basin), the company made its first crude oil discovery. Tullow also started another exploration block in 2012 that covered Kisumu County. In a joint venture with Swala Energy, Tullow became the main operator and drilled over 11 wells in Turkana County since 2012. Oil and gas are some of the few resources that have recently been discovered and attracted international attention as more oil drilling companies come to seek for oil drilling contracts in Kenya.<sup>134</sup>

Moreover, the exploration has been categorical in the establishment of a number of large-scale infrastructural development projects that form part of Kenya Vision 2030 strategic plan. One of the most ambitious project in the plan is the LAPSSET project, which stands for Lamu Port – South Sudan – Ethiopia Transport Corridor project. The project will cost over \$28 billion and comprises a port in Lamu with an oil pipeline linking South Sudan, Kenya, Ethiopia and Uganda to an oil terminal in the Lamu port, a railway line, dam, international airport, resort city and oil refinery. The project will traverse northern Kenyan counties like Garissa, Isiolo, Turkana and Marsabit. Depending on the level of engagement done with marginalized communities along the route, the LAPSSET project is a potential catalyst for political and communal feud as well as, a source of transformational development.<sup>135</sup>

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<sup>133</sup> Vasquez, Patricia I. "Kenya at a crossroads: Hopes and Fears concerning the development of oil and gas reserves." *International Development Policy/ Revue internationale de politique de développement* 4, no. 4.3 (2013).

<sup>134</sup> Bos, Kyra, and Joyeeta Gupta. "Inclusive development, oil extraction and climate change: a multilevel analysis of Kenya." *International Journal of Sustainable Development & World Ecology* 23, no. 6 (2016): 482-492.

<sup>135</sup> Enns, Charis. "Infrastructure projects and rural politics in northern Kenya: the use of divergent expertise to negotiate the terms of land deals for transport infrastructure." *The Journal of Peasant Studies* 46, no. 2 (2019): 358-376.

The unprecedented drop in oil prices since late 2014 affected exploration of oil in Kenya prompting many oil companies to drastically reduce or completely halt exploration and drilling activities in the region. Most of these companies have been forced to fire staff, locally, at the county level and nationally.<sup>136</sup> Currently, Tullow is working with the Kenya government on various options that enhance the independent development of Kenyan resources including early production using infrastructure to provide valuable storage data in anticipation for full-fledged development from an export pipeline. This is part of the international business engagements that might strengthen and bond the relationship between Tullow Company and Kenya.

#### **4.2.2 FDI Payments to Major Stakeholders by Tullow Oil Company**

The London-based company has remained committed to upholding transparency on payments to its stakeholders in Kenya since it allows citizens, communities and governments to engage in a constructive debate about sustainably managing oil revenues. By the end of 2013, the company made payments (including national and county government taxes, local supplier's expenditures and discretionary investments in social-based projects) amounting to KES 6.1 Billion. When it comes to taxes, Tullow Oil also paid a total of KES 1.9 Billion to the Kenyan government.<sup>137</sup>

Tullow Kenya employs over 100 permanent employees, of which 70% are Kenyan nationals. The company also employs more than 2,000 sub-contractors locally, 87% of whom are nationals (59% of them from Turkana community) where operations are located.<sup>138</sup> Different levels of experience are required by suppliers, defined as either unskilled, skilled or semi-skilled. Pursuant to the established categories, more than 24%, 78% and 98% of the skilled, semi-skilled and unskilled workforce respectively, is comprised of the local Turkana people. To date, the company has ensured it maintains 100% of its external affairs, human resources and legal roles to locals as it seeks to develop more opportunities for experienced personnel and fresh graduates to propel localisation programmes (nationally and in relation to its area of operation).<sup>139</sup>

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<sup>136</sup> Enns, Charis, and Brock Bersaglio. "Pastoralism in the time of oil: Youth perspectives on the oil industry and the future of pastoralism in Turkana, Kenya." *The Extractive Industries and Society* 3, no. 1 (2016): 160-170.

<sup>137</sup> Alushula, Patrick. 2019. "Tullow Oil Pays State Sh49.6M Licence Fees". *Business Daily*. <https://www.businessdailyafrica.com/corporate/companies/Tullow-Oil-pays-State-Sh49-6m-licence-fees/4003102-5161166-9cqnkn/index.html>.

<sup>138</sup> Okoth, Edwin. 2019. "Tullow Oil Keeps Under Wraps All Its Trading Deals". *Business Daily*. <https://www.businessdailyafrica.com/news/Tullow-Oil-keeps-under-wraps-all-its-trading-deals/539546-5222366-1nnnd4/index.html>.

<sup>139</sup> Ibid



In 2013, Tullow Oil invested more than KES 233 million in Kenya to support Corporate Social Responsibility (CSR) projects and doubled its investment in the 2014 budget by prioritising essential areas that influence local communities and that are categorical to the long-term development of Turkana, specifically education, water, environment, health and alternative livelihoods.<sup>140</sup> One CSR project, for example, works to improve the education levels in the community through 3,000+ scholarships and bursaries for students for the last two years. Moreover, the company has provided teaching materials to over fifty secondary and primary institutions as it seeks to build the local school system capacity. More than 80 solar lamps have been given to over 40 schools to allow students to study and revise for their national examinations after sunset. In the wake of a devastating drought in Turkana County, Tullow Oil in conjunction with the Turkana County Government and the Kenya Red Cross Society contributed more than KES 20 million for the implementation of a school feeding programme in the county.<sup>141</sup>

In 2018, Tullow Oil Plc paid the Kenyan government Sh49.6 million in licence fees and infrastructure improvement payments last year, down from Sh64.6 million paid in 2017.<sup>142</sup> This is according to a disclosure in the multinational's consolidated report for the year ended December 31, 2018, which reveals pay-outs made to various governments in accordance with the UK's Reports on Payments to Governments Regulations 2014. The sum paid to Kenya is a three-year low. In 2016, it rose to Sh61.4 million with a further increase in 2017. However, the amount is expected to rise in future when commercial oil production starts.<sup>143</sup>

Tullow has been committed to local content by increasing its expenditures on Kenyan suppliers in accordance to its enhanced operational activities and because it seeks to sensitize contractors on the importance of optimizing local content. Notwithstanding the KES4.1 billion Tullow spent with local suppliers in 2013 (2012: KES2.4 billion), contractors likewise spent an upwards of KES 4.1 billion with Kenyan organizations in the same year, with organisations in Turkana getting KES 259 million.<sup>144</sup>

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<sup>140</sup> Ibid

<sup>141</sup> Ibid

<sup>142</sup> Alushula, Patrick. 2019. "Tullow Oil Pays State Sh49.6M Licence Fees". *Business Daily*. <https://www.businessdailyafrica.com/corporate/companies/Tullow-Oil-pays-State-Sh49-6m-licence-fees/4003102-5161166-9cqnkn/index.html>.

<sup>143</sup> Ibid

<sup>144</sup> Schilling, Janpeter, Thomas Weinzierl, Augustine Ekitela Lokwang, and Francis Opiyo. "For better or worse: major developments affecting resource and conflict dynamics in northwest Kenya." *Zeitschrift für Wirtschaftsgeographie* 60, no. 1-2 (2016): 57-71.

The firm had disclosed in January that it plans to invest Sh7 billion in its Kenyan operations this year as it steps up preparations for commercial production starting 2022. Its 2019 capital expenditure totalled approximately \$570 million (Sh57.5 billion), comprising. The additional capital will be spent on developing wells in Turkana where the multinational discovered an estimated 1.2 billion barrels of oil reserves. Tullow is also expected to announce investments related to the large-scale commercial exports of about 80,000 barrels per day projected in 2022 upon construction of the pipeline linking the Turkana oilfields to Lamu port. The firm is favouring a price of \$50 per barrel to make a good return even though a price of \$34 will still be a viable case for business.<sup>145</sup>

### 4.2.3 Conflict Analysis

Turkana is one of the poorest counties in Kenya, with 94.3 % of its people living beneath the poverty line.<sup>146</sup> The local people customarily depend on pastoralism for livelihood culminating in the disparity in the level of development and wealth between the area and the rest of Kenya. The land is communally owned and local communities rely on political initiative and government institutions to safeguard community resources against attacks and the degradation of customary grazing land by economic exercises like oil exploration. The Turkana people grumble about the lack of transparency, the inability to access and disclose information on signed agreements, and progressively accuse businesses and government authorities of the 'grabbing' and sale of communal land in urban areas like Lokichar and Lodwar.<sup>147</sup>

Turkana County is part of the 'Karamoja Cluster', the territory along the Kenya, South Sudan, Uganda and Ethiopian borders – home to one of the biggest pastoral populations globally.<sup>148</sup> Since the colonial period, the central government in Nairobi has largely forsaken the region and largely regarding economic advancement and provision of services. However, with changes realized by devolution, oil discovery, underground water, mineral resources and the anticipated huge scale infrastructural undertakings (like LAPSSSET), the region has received vital strategic significance. These advancements may offer ideal opportunities for Turkana

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<sup>145</sup> Okoth, Edwin. 2019. "Tullow Oil Keeps Under Wraps All Its Trading Deals". *Business Daily*. <https://www.businessdailyafrica.com/news/Tullow-Oil-keeps-under-wraps-all-its-trading-deals/539546-5222366-1nnnd4/index.html>.

<sup>146</sup> Watete, Patrick Wekondi, Wambui Kogi Makau, Jesse Theuri Njoka, Laban Adero MacOpiyo, and Oliver Vivian Wasonga. "Moving in and out of Poverty: A Case of the Somali and Turkana of Northern Kenya." *Nomadic Peoples* 20, no. 1 (2016): 123-140.

<sup>147</sup> Johannes, E. M., Zulu, L. C., & Kalipeni, E. (2015). Oil discovery in Turkana County, Kenya: a source of conflict or development?. *African Geographical Review*, 34(2), 142-164.

<sup>148</sup> Mkutu Agade, Kennedy. "'Ungoverned Space' and the Oil Find in Turkana, Kenya." *The Round Table* 103, no. 5 (2014): 497-515.

residents to appreciate the advantages of development. However, they might also present critical risks to the community's pastoral occupation, security and unique culture.<sup>149</sup>

#### **4.2.3.1 Devolution, Inter-Community Conflicts and Insecurity**

Kenya's 2013 general election denoted the progress from a centralized government system to a devolved one. The recently formed counties have been afforded noteworthy political power and budget assignments. Though the new county governments command solid prominent support, they are likewise faced with numerous issues, including constrained capacity and the absence of clear guidelines regarding jobs and levels of authority between the county and national governments.<sup>150</sup> County government's role in the provision of security, for instance, remains unclear. Besides, in conflicts areas where communities have been in feuds with neighbouring communities have, for a long time, been an essential concern for the local population. In Turkana and West Pokot, for example, politicians have regularly sought constituent support based on tough militaristic positions.<sup>151</sup>

The various tribes occupying the Karamoja Cluster (like the Turkana, Pokot, Toposa, Karamojong, Didinga and Nyangatom) have been in frequent clash over water, livestock and grazing fields. Nonetheless, in recent years, these traditional clashes have turned out to be more brutal, culminating in more deaths, damage and property destruction, as well as restricting the portability of people and livestock that is vital in typical pastoralists lifestyle. Armed robbery remains categorical in the enhancement of extreme poverty and underdevelopment in the four nations that form the Karamoja Cluster. Revenge attacks further exhaust communal resources and diminish communal strength to shocks, which creates a sad endless loop.<sup>152</sup>

The escalation in the number of arms and the advancement of archaic animal attacking practices have culminated in a rapid growth of the levels of armed robbery that occur along Kenya's north-western borders. Increased local demand and availability of small arms nourish the illicit trade. The lack of organized and professional border control and the weak administration of

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<sup>149</sup> Ibid

<sup>150</sup> Johannes, E. M., Zulu, L. C., & Kalipeni, E. (2015). Oil discovery in Turkana County, Kenya: a source of conflict or development?. *African Geographical Review*, 34(2), 142-164.

<sup>151</sup> Agade, Kennedy Mkutu. "Changes and challenges of the Kenya Police Reserve: the case of Turkana County." *African Studies Review* 58, no. 1 (2015): 199-222.

<sup>152</sup> Schilling, Janpeter, R. Locham, T. Weinzierl, J. Vivekananda, and Jürgen Scheffran. "The nexus of oil, conflict, and climate change vulnerability of pastoral communities in northwest Kenya." *Earth System Dynamics* 6, no. 2 (2015): 703-717.

government-owned weapon stockpiles in the area adds to the progression of small arms and ammo.<sup>153</sup>

At the core of conflict and insecurity in the Karamoja Cluster is a weak or even minimal state presence.<sup>154</sup> Insecurity and conflict in the Karamoja Cluster is further progressed by a frail state presence in the area. Limited security provision and the absence of dependable justice frameworks, or the presence of 'ungoverned areas', have prompted local communities to provide their own justice and security. Although the Ugandan government boosted its security presence in Karamoja, this is not the case with other countries like Kenya. In Kenya, the Kenya Police Reserve (KPR) is the fundamental provider of security in most remote regions. Although local communities view them positively, KPRs and other security groups negatively affect the general security in the area. This is because they receive almost no training, little to no compensation, and generally left without oversight and control. Moreover, they are commanded to convey and use small arms to secure local communities, against livestock theft.<sup>155</sup>

#### **4.2.3.2 Infrastructural Development and Conflict**

Within the next decade, socio-economic development will be witnessed within the Karamoja Cluster thanks to a number of infrastructural development projects and the discovery of mineral and water deposits. These include the USD 24.5 billion LAPSSET project, the GIBE III dam in Ethiopia, commercially viable oil and water deposits in Turkana and the rapid expansion of gold and other mineral mining projects in Karamoja. However, these upcoming developmental changes may bring about the potential for conflict and pose major challenges for the local communities.<sup>156</sup>

Potential conflict triggers cannot be easily evaded because of issues like land ownership and access, compensation, displacement, environmental degradation, and queries like the how revenues will be distributed and who will be the beneficiaries of the new job and business opportunities. Multiple incidents of violence and demonstrations have been witnessed in Turkana, as people compete for available job opportunities provided by the exploration

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<sup>153</sup> Agade supra note 1

<sup>154</sup> Ibid

<sup>155</sup> Ndegwa, Miriam M. "Intercultural Communication in Conflict Management: A Case Study of the Karamoja Cluster." PhD diss., United States International University-Africa, 2017.

<sup>156</sup> Schilling, Janpeter, Thomas Weinzierl, Augustine Ekitela Lokwang, and Francis Opiyo. "For better or worse: major developments affecting resource and conflict dynamics in northwest Kenya." *Zeitschrift für Wirtschaftsgeographie* 60, no. 1-2 (2016): 57-71.

companies as well as subcontractors. In May 2013, for example, local residents in Lokichar assaulted an investor and this resulted in a momentary suspension of operations by Tullow Oil in October/November 2013.<sup>157</sup> The Turkana-Pokot conflict has escalated as the communities are being displaced to pave way for the exploration and drilling of oil. Local residents, especially the Turkana are forced to move closer to the border with West Pokot where they risk more violence as well as hostility towards investors.

#### **4.2.4 Mechanisms of Community Engagement by Tullow Oil**

In a bid to tone down the possibilities of conflict, Tullow Oil has, over the years applied mechanisms in order to engage local communities. In 2010 when the company assumed operations from Africa Oil, an association (known as the Lokichar Basin Development Committee) that comprised 11 representatives from various stakeholders like Tullow, the national government and local communities was formed. Its mandate was to manage and oversee the successful implementation of the social investment relationship with all communities within the Lokichar Basin.<sup>158</sup> The District Advisory Committee (DAC) was formed with the District Commissioner in charge. The committee was also disbanded after the March 2013 elections when devolution came into effect. The current committee is headed by the area MP who is in charge of appointing members and distributing employment opportunities, turning the DAC into a politically oriented patronage mechanism.<sup>159</sup>

In Turkana North, East and South, Tullow engaged local communities using a team of 30 community liaison officers (CLOs) who covered the three exploration blocks (10BA, 10BB and 13T) respectively. However, there was widespread dislike and mistrust towards the CLOs by the local community representatives who also disliked the methods used when engaging with local communities. Some of the main issues complained about include the role of local politicians as community interlocutors. Whenever the locals expressed grievances, most of them were either not dealt with and follow-ups were limited. Some grievances include the anticipated appeasement in the form of ‘traditional’ gifts like tobacco and sugar.<sup>160</sup>

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<sup>157</sup> Agade, Kennedy Mktu. "Oil and emerging conflict dynamics in the Ateker Cluster: the case of Turkana, Kenya." *Nomadic Peoples* 21, no. 1 (2017): 34-62.

<sup>158</sup> Johannes, Eliza M., Leo C. Zulu, and Ezekiel Kalipeni. "Oil discovery in Turkana County, Kenya: a source of conflict or development?." *African Geographical Review* 34, no. 2 (2015): 142-164.

<sup>159</sup> Mktu Agade, Kennedy. "'Ungoverned Space' and the Oil Find in Turkana, Kenya." *The Round Table* 103, no. 5 (2014): 497-515.

<sup>160</sup> Ibid

Since the beginning of 2015, the community engagement approach was changed and a new, systematic strategy called the ‘field stakeholder engagement strategy’ was adopted. Some of the changes brought by the new strategy includes advanced training of officers known as Field Stakeholder Engagement Officers (FSEOs), introduction of new officers like Government and Public Affairs Officers, Village Socialization Officers (VSOs), Community Communications Officers and other members that formed a ‘social performance’ team.<sup>161</sup> Moreover, the new strategy comprised an improved mechanism to handle grievances, which utilised a proactive group to collect data and resolve grievances within 30 days. The outreach programme also focused on the collection and distribution of information as well as listening and understanding any grievances tabled by stakeholders and local communities.<sup>162</sup> Differences between the old and new approaches include the shift from a ‘transactional’ community engagement approach into one whose focus was ensuring sound relationship building with local communities and stakeholders.

### **4.3 The Lamu Coal Power Project Case Study**

#### **4.3.1 Project Description, Design and Justification**

The Kenyan Government, in 2013 proposed the construction of a 1,050-megawatt coal plant in Lamu County – the first of its kind in Kenya and the entire East Africa. This is despite the fact the country has immense current capacity and the potential to generate renewable energy that meets current demand and exceed projected electricity demands over the next decade.<sup>163</sup> The proposed project depicts the unfortunate turn by a growing economy to an outdated as well as an environmentally destructive source of energy production, which illustrates the plight of local communities, and the potential threat to their culture, land and livelihoods.<sup>164</sup>

In the beginning of 2014, the Kenya Government sought investors’ bids to build, own, and operate the proposed coal power station in Lamu. A consortium that consisted of Gulf Energy, Centum Investments, Sichuan Electric Power Design, and Consulting Company Limited was awarded the development rights in September 2014. In July 2016, Standard Bank (a South African Bank) together with the Industrial & Commercial Bank of China Ltd (ICBC) teamed

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<sup>161</sup> Orr, David W. "Renegotiating the periphery: oil discovery, devolution, and political contestation in Kenya." *The Extractive Industries and Society* 6, no. 1 (2019): 136-144.

<sup>162</sup> Ibid

<sup>163</sup> Le, Dong. "Environmental and social risks of Chinese official development finance in Africa: The case of the Lamu Port project, Kenya." *African review of economics and finance* 8, no. 1 (2016): 106-129.

<sup>164</sup> DeCOALonize, 2019. "Kenyan Government Attempting To Weaken UNESCO Recommendations For Lamu Old Town, Politicising The Decision In Baku". 2019. *Medium*. <https://medium.com/@deCOALonize/breaking-kenyan-government-attempting-to-weaken-unesco-recommendations-for-lamu-old-town-2df94046e86>.

up to fund the project backed by Centum Investment to a tune of USD Two Hundred Billion (USD 200 billion).<sup>165</sup> The project financing also received substantial backing from a number of local firms, which led to the formation of the Amu Power Company. In Aug 2016, an environmental impact report on the project was rejected by the Lamu County Assembly. The assembly demanded that a comprehensive resettlement plan be put in place to compensate local residents who were bound to lose their land to the project.<sup>166</sup>

In Feb 2017, the project was approved by the Energy Regulatory Commission (ERC) despite objections by community-based organisations. In July 2017, a petition was filed in court asking the court to determine whether or not an Electricity Generation Licence had been granted to Amu Power Company Limited by the Energy Regulatory Commission for the proposed project. The petition also sought a full disclosure of the Power Purchase Agreement (PPA) entered into by stakeholders.<sup>167</sup> In a meeting in September 2017, Standard Bank denied its involvement in the project and a month later backed out from funding the project.

In June 2019, the license granted to Amu Power was cancelled by the National Environment Tribunal (NET) of Kenya citing amongst other reasons, the lack of effective public participation and social and environmental risks. In July 2019, the Kenyan government was called upon by UNESCO to reassess the project's impact on the heritage and natural environment of Lamu Island.<sup>168</sup> Kenya is required to submit a report with the committee by February 2020 considering Lamu (a world heritage island) is at risk. The decision from UNESCO shortly follows the NET's decision to halt the plans to build the coal plant, and also comes in the wake of demonstrations and sentiments from environmental activists who accused Kenyan officials of attempting to undermine Lamu's heritage site status.<sup>169</sup> Proposed

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<sup>165</sup> Juma, Victor. 2016. "Standard Bank to Finance Centum's Sh200bn Coal Plant". *Business Daily*. <https://www.businessdailyafrica.com/Corporate-News/Standard-Bank-to-finance-Centum-s-Sh2bn-coal-plant/-/539550/3298816/-/yssjfk/-/index.html>.

<sup>166</sup> Ibid

<sup>167</sup> Juma, Victor. 2017. "ERC Approves Lamu Coal Plant". *Daily Nation*. <https://www.nation.co.ke/business/Coal-fired-plant-gets-greenlight-from-ERC/996-3830384-kuoyo5/index.html>.

<sup>168</sup> Dahir, Abdi. 2019. "China's Plan To Help Build Kenya's First Coal Plant Has Been Stopped—For Now". *Quartz Africa*. <https://qz.com/africa/1653947/kenya-court-stops-china-backed-lamu-coal-plant-project/>.

<sup>169</sup> DeCOALonize, 2019. "Lamu Coal Plant ESIA Appeal Case Concluded; Submission Highlights". 2019. *Decoalozize.Org*. <http://www.decoalonize.org/lamu-coal-plant-esia-appeal-case-concluded-submission-highlights/>.

amendments to a draft document on UNESCO's website included the removal of considerations of the project's impact on the island.<sup>170</sup>

### **4.3.2 Impacts of the Lamu Coal Project**

#### **4.3.2.1 Environment**

The lives, livelihoods and culture of the Swahili and other peoples of Lamu are interwoven with their environment. It is impossible to discuss the impacts of coal combustion on the environment without also talking about the impacts on the community. Community members are concerned about how the plant will affect their lives and if there are any ways their environment, health and livelihoods could be protected if Amu Power goes ahead with the plant. The coal plant is bound to have a major impact on the Lamu environment and this will begin during construction. Chapter 5 of the Constitution states that land and the environment must be managed in a sustainable manner and provides for sound protection of ecologically sensitive areas such as mangroves.<sup>171</sup>

During the project's construction phase, the sediment build-up would disrupt stability and lead to a potential collapse of the marine ecosystem. The death of mangroves and associated ecosystems would further lead to a release of 1000t CO<sub>2</sub> per hectare of mangrove lost; from both above and below ground components.<sup>172</sup> The mangroves make up the largest mangrove forest in Kenya, and are very important as they protect sea grasses and coral reefs from various destructions such as pollution. As regards human welfare, they act as a barrier from strong monsoon winds and currents as well as a sink for diseases which may emanate from the ocean. The mangroves and the bay are also home to a variety of fish and migratory birds, sea turtles and the dugong; a vulnerable species. Each of these species will be affected by the increased temperature of the water as well as the release of metals and other compounds into the ecosystem.

The beaches adjacent to the mangroves are an important nesting site for sea turtles, also considered vulnerable by the International Union for Conservation of Nature (IUCN). The region also houses endangered species such as the triton shell, sea horse and shiny lobster.

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<sup>170</sup> Dahir, Abdi. 2019. "UNESCO Wants Kenya To Review Plans To Build Its First Coal Plant On A World Heritage Site". *Quartz Africa*. <https://qz.com/africa/1662956/unesco-calls-on-kenya-to-review-plans-for-lamu-coal-plant/>.

<sup>171</sup> Jacob, Thabit. "Competing energy narratives in Tanzania: Towards the political economy of coal." *African Affairs* 116, no. 463 (2017): 341-353.

<sup>172</sup> DeCOALonize, 2017. "The Pursuit of Coal In Kenya". 2019. *Medium*. <https://medium.com/@deCOAL/extractive-infrastructure-projects-in-lamu-6552e149731>.



Thus, any destruction of the mangroves, beaches, or water systems would have irreparable impacts on their habitat and threaten their existence. Furthermore, within marine ecosystems, the aquatic life is adapted to specific ranges of water temperature. When the temperature changes, it affects rates of reproduction and interspecies interaction, including the potential extinction of species that others rely on for food, thereby disrupting the entire ecosystem. For endangered species, the survival of some animals may depend on whether their offspring can safely migrate from protected breeding areas to other areas where they are safe from fishing and capture.<sup>173</sup>

During the operation of the coal plant, the emissions will cause acid rain, which contaminates water systems, destroys crops, plants, trees, and affect the wildlife and aquatic life. There are two national parks and numerous critical land and marine habitats in the zones identified as most affected by emissions from the plant. Total acid deposition on land is projected at 8,000 tonnes SO<sub>2</sub> equivalent, of which 24 per cent or 2,000 tonnes into critical and legally protected areas.<sup>174</sup> This contravenes the Land Act of 2012 - the legal regime that regulates and governs inter alia, the management and administration of public and private land; land agreements like leases, charges, easements and related rights and manages under the National Land Commission (NLC).<sup>175</sup> The coal power plant project is to be constructed on land with a community land tenure, which the County Government of Lamu holds in trust. The Kenyan Ministry of Energy and Petroleum (MoEP) is mandated to provide the land for the proposed project free of encumbrances to the project developer. The MoEP should ensure that land acquired for the project is done according to the provisions of the Land Act, which includes fair and just compensation for project affected persons (PAPs).

#### **4.3.2.2 Livelihood and Culture**

Destruction of the environment directly impacts the local economy and the economic sustainability of the Swahili people. Nitrogen in the acid rain for example will cause the death of many fish and shellfish thereby disrupting the region's fishing industry currently valued at Kshs 1.5 billion. The fishermen who fish near the proposed plant use artisanal vessels and

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<sup>173</sup> DeCOALonize, 2017. "The Impacts on the Community of the Proposed Coal Plant in Lamu: Who, if Anyone, Benefits from Burning Fossil Fuels?" *Perspective*. Issue No. 31. Institute of Policy Analysis and Research, 2017.

<sup>174</sup> Ndungu, Alphaxard Gitau. "A Kenyan Youth Perspective on Climate Change." *Development* 59, no. 3-4 (2016): 266-269.

<sup>175</sup> Republic of Kenya, The Land Act, 1978, long title.

equipment; the traditional fishing practices and boats are best suited to these sheltered and restricted areas.

In assessing the project's impact on the local fishermen and fishing industry, the Department of Fisheries Livestock and Cooperative Development found that the approximately 5,500 fishermen near the plant site would face the greatest impact. The marine water pollution from the plant will lead to the loss of fishing ground, nursery and feeding grounds, and the disappearance of priority species, "resulting in loss of livelihoods". This contravenes the Fisheries Act, which is applicable to the proposed project and regulates the fisheries activities in Kenya including the Manda Bay. Within Manda Bay, there are several fishing areas including some which may be near the circulating water intake and outfall of the power plant; these would be regulated by the Director of Fisheries within the definitions of the Act.

Acid rain will also affect the agricultural sector of the region by altering PH and reducing the nutrient content of the soil. In Kwasasi, the same area as the proposed coal plant, farmers grow cashews, coconut, millet and sesame. Their health, land and livelihoods will be most impacted by the emissions and they have raised concerns about the plant because they are yet to be compensated for their land. Initially, compensation was set at Kshs. 800,000 per acre (USD 8,000) with a cap of Ksh 800 million. However, more than 600 farmers at Kwasasi village, Lamu West are worried since they are yet to receive the long-awaited compensation. This contravenes the Physical Planning Act (PPA), which is the principal legislation in Kenya dealing with the formal approval of development planning permissions. The principal statute delegates authority for physical planning at the County level to the County Governments. Subsequently, the PPA will be applicable as the development planning process stipulated in the Act will be followed in order to get development planning permission for the coal fired power plant.

#### **4.3.2.3 Health**

Releases from coal combustion plants in the form of gases, liquids and solids have been proven to damage human health. In the case of the Lamu Coal Plant, air emission limits applied to the project are alarmingly weak in international comparison. For example, the plant would be allowed to emit 5-10 times more air pollutants as a new coal plants in the EU and China. Approximately 460,000 people live in areas where air quality would be notably affected, while

approximately 1,000 people live in the areas of highest impact.<sup>176</sup> The particulates in air emissions are known to cause cancer, asthma, cardiac disease and, bronchitis.

The designated ash yard at Manda Bay will be constructed over a freshwater source, thereby posing major health risks to its users. In addition, Coal ash contains toxic elements and heavy metals like mercury, arsenic, lead, cadmium, lead and other naturally occurring radioactive materials that cause cardiovascular, reproductive, neurological, and respiratory problems. As pollution controls are added to smokestacks to reduce air emissions, the compounds that are collected end up in the ash making it increasingly toxic.<sup>177</sup>

In February 2019, the Katiba Institute on behalf of Save Lamu went to court to challenge the Environmental and Social Impact Assessment (ESIA) License issued to Amu Power Company Limited by NEMA. According to the sentiments tabled before court, NEMA was accused of having erred when it approved the project because of the negative impact it posed on in the region and country as a whole. Moreover, the project was inconsistent with, and undermined Kenya's low carbon emission commitments.<sup>178</sup> As expressed by Rose Birgen, the Natural Justice's Senior Programme Officer, revoking the Lamu coal plant licence re-affirms the significance that public participation commands when it comes to environmental decision-making.<sup>179</sup>

#### **4.4 Conclusion**

This chapter delved into the Tullow Oil Case Study and the Lamu Coal Power Plant Case Study. The presence of Tullow Oil Company in Turkana County offers immediate benefits of the exploration work in the form of job creation and opportunities for the local population to supply good and services. The fruits of such benefits have already been realized, and the more exploration activities that take place is a pointer to future mining undertakings associated with employment and wealth creation. Tullow Oil is seen taking steps to establish a community engagement strategy to encourage participatory engagement through the utilisation of numerous methods to engage neighbouring communities in their core operations and future activities. These steps are however taken after the fact. It is evident that in the case of Tullow

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<sup>176</sup> Mueni, Jemimah. 2019. "Environment Tribunal Stops Lamu Coal Project". *Capital News*. <https://www.capitalfm.co.ke/news/2019/06/environment-tribunal-stops-lamu-coal-project/>.

<sup>177</sup> Ibid

<sup>178</sup> Onyach, Abiud. 2019. "Lamu Coal Plant ESIA Appeal Case Concluded: Submission Highlights". *Natural Justice*. <https://naturaljustice.org/lamu-coal-plant-esia-appeal-case-concluded-submission-highlights/>.

<sup>179</sup> Birgen, Rose. 2019. "Reflections Of The Lamu Coal Plant Case". *Natural Justice*. <https://naturaljustice.org/reflections-of-the-lamu-coal-plant-case/>.

Oil, engagements with the local community and their participation came into focus way after the drilling had commenced. Can it be termed as participation of the people if the project has already commenced? Would engagement after the fact still amount to allowing public participation prior to making a decision that will affect the public?

According to research and findings, the Lamu Coal project would cause damage that is irreversible to the natural environment in Lamu County. No convincing argument proves that there is need for the plant because of the abundance of renewable energy resources in Kenya. Many stakeholders, including the judiciary constantly question why the project was allowed to move forward given the impact it will have on the lives of local people. The political class and adjudicating bodies like NEMA have constitutional obligations that require national interests of the present and future generations to be considered and put before personal interests.<sup>180</sup>

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<sup>180</sup> Dolan, Gabriel. 2019. "Ludicrous Lamu Coal Deal Is As Dirty As The Energy It Will Generate: The Standard". *The Standard*. <https://www.standardmedia.co.ke/article/2001331023/ludicrous-lamu-coal-deal-is-as-dirty-as-the-energy-it-will-generate>.

## **CHAPTER FIVE**

### **5.0 CONCLUSION AND PROPOSALS FOR REFORMS**

#### **5.1 Introduction**

This chapter summarises the study and gives conclusions and proposals. The conclusions are drawn from each chapter in relation to public participation and the legal framework of foreign direct investments (FDI) projects in Kenya as well as the approaches for reforms.

#### **5.2 Summary of the Study**

This study discussed the lengths that the Kenyan government legally addresses issues regarding public participation as the country continues to attract large FDI flows for proposed projects. The concept of public participation in Kenya was also analysed by exploring the various obligations that the government and the citizens owe each other. This helped to demonstrate the extent to which public participation helps in exercising and fulfilling a number of objectives outlined in the Constitution of Kenya. The legal framework on FDI, which is found in a number of legislations was also appraised in this study. The list of such legislations included the Constitution and various Acts of Parliament. The researcher presented in-depth discussions and comprehensive reviews of two major FDI related case studies: the Tullow Oil Case and the Lamu Coal Power Plant Case. The case study strategy was used because it helped the study to focus on specific foreign investment projects and interrogate the extent public participation was allowed.

The first objective investigated the legislative framework on public participation in foreign direct investment projects in Kenya. The Constitution is the backbone of the legal framework on public participation and provides a unique way of enhancing the role of citizens in FDI projects. To capitalise on this opportunity, citizens must put both the national and county governments to task in defining public participation comprehensively, and the drafting of relevant laws to enhance rather than undermine Constitutional mandates.

The second objective examined lessons learnt from cases that Kenya has been involved in following a decision on foreign direct investment. The researcher selected the Tullow Oil Case and the Lamu Coal Power Plant Case. According to findings from the Tullow Oil Case, public participation practices exist but a balance must be created. On one hand, local people continue to enjoy the immediate benefits of the exploration work through employment and the opportunity to supply good and services. However, the government needs to implement,

intensify, and monitor multi-stakeholder dialogue to ensure that all stakeholders are informed. According to findings from the Lamu Coal Power Plant Case, the study found out that the project would cause irreparable damage to the natural environment in Lamu County as well as to the livelihoods and health of local people and it is unclear why the project was granted certain approvals in the first place. Its rejection by the Lamu County Assembly was the first sign that public participation was not factored in prior to making the decision to approve the project.

The third objective examined whether public participation of the local population is essential before the government makes an informed final decision on FDI. Evidently, the researcher found out that public participation is one of the important undertakings essential for the implementation of FDI projects. This is because public participation allows the local residents who could be affected by FDI projects to exercise their right take part in the decision-making process. It is important to engage all stakeholders who are involved in overseeing and promoting the legal framework on FDI through a more effective approach. Therefore, the process of public participation of the local population is essential because it manages resistance because of the feeling of ownership and facilitates smooth implementation.

### **5.3 Proposals for Reforms**

#### **5.3.1 Proposals for Public Participation Reforms**

Citizens are the main pillars of the public participation and have to actively be involved in its implementation including being actively engaged in monitoring, evaluation and learning. They have a duty to attend public participation meetings and to contribute effectively. Being the overall consumers of public participation, citizens are expected to exercise their sovereignty by holding duty bearers and all other agencies to account. The National Capacity Building Framework (NCBF) and the relevant capacity building institutions like the Kenya School of Government and Centre for Parliamentary Studies have established programmes, and facilitated the training of government officials, including civil servants, the Members of Parliament and County Assemblies on public participation. The NCBF, adopted in 2013 provides a mechanism for facilitating and coordinating county capacity building initiatives based on government policies and priorities. One of its core objectives is to empower citizens in the counties to hold county governments accountable through sensitizing them on efficient policy instruments for functioning of county governments

Nevertheless, the past and current public engagement programmes and processes have been fraught with diverse challenges. In particular, inadequate funding to public participation has

affected the establishment of the relevant mechanisms for coordination and management of the processes and their effectiveness in developing appropriate capacity strengthening programmes; planning for public participation and managing the processes and; coordinating public participation and civic education programmes.<sup>181</sup> In addition, there are gaps in complaints management and redress mechanisms, coordination, monitoring, evaluation, learning and feedback mechanisms of public participation in the country. Such stumbling blocks negatively affects the implementation of public participation initiatives. Therefore, to effectively engage in public participation, citizens must be fully aware of their roles and responsibilities, which can be fostered through capacity building.

The role of non-state actors is also vital because they collaborate with Government to mobilize citizens and resources, disseminate the policy and participate in capacity building for both citizens and duty bearers.<sup>182</sup> They will also collaborate with the government in public participation processes including civic education and mobilizing the citizens to participate in diverse aspects of public governance. Therefore, the policy should be implemented through an integrated, coordinated and consultative process by various non-state actors both at the national and county levels, while at the same time respecting the principles of separation of powers and devolution. Within each arm of government at both levels, public participation will be conducted in a collaborative manner and in collaboration with Non State Actors (NSAs).

Civic education is also an important prerequisite for effective public participation by the citizens. Civic education informs the public, creates awareness and empowers them to make informed decisions. It ensures that a critical mass of citizens, are endowed with knowledge and skills that embody the values, norms and behaviour that accord with the principles of democracy.

The Public Participation Bill states that it shall be guided by among others, the principle that the public, communities and organizations to be affected by a decision shall have a right to be consulted and involved in the decision making process. The Bill goes on to provide general public participation guidelines that cover opportunities for public participation, public awareness, factors to be considered before conducting public participation, the timeframe for participation and processing of responses and the requirement of publication of annual reports

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<sup>181</sup> Mugambi, Keziah Wangui, and F. S. Theuri. "The challenges encountered by county governments in Kenya during budget preparation." *IOSR Journal of Business and Management* 16, no. 2 (2014): 128-134.

<sup>182</sup> Mung'ou, Cherotich. "The Role of Non-State Actors in Enhancing Peacebuilding Among Women in Mount Elgon Region, Kenya." *Journal of African Conflicts and Peace Studies* 4, no. 1 (2018): 1.

containing a description of the activities and outcomes of public participation. Curiously, the Bill does not contain any provision on the right for review where a responsible authority has failed to comply with the provisions of the Act and it does not also make it compulsory to engage the public prior to certain decisions being made. It is unclear from the Bill what decisions can only be taken after the public is engaged and what decisions can be taken without a public consultative exercise being undertaken.

The Bill, once passed will provide a basic general framework to guide public participation. The development of specific public participation guidelines is left to each responsible authority. This essentially means that matters like levels of public participation will differ depending on the responsible authority that developed the specific guidelines. The general guidelines under this Bill should be cited as compulsory minimum requirements for all public participation guidelines developed. This would even, after the enactment of the Bill, all public participation guidelines, including those currently developed by County Governments will mirror the provisions of this Bill.

In the meantime, since the Bill is yet to be enacted into law, a public participation policy should be adopted by Kenya's Ministry of Industry, Trade and Co-operatives. The policy should be couched in specific terms that address sector specific issues in matters related to foreign direct investments and should make it compulsory to consult the community or group that will be affected depending on the intensity of the impact of the decision relating to an FDI project on that community or group.

## **Conclusion**

The study concludes that the Kenyan government is committed to providing a framework for the participation of the public as is evident from the Public Participation Bill. However, the GoK is undergoing immense pressure locally, regionally, and internationally to accelerate decision-making processes associated with FDI projects, for example, in the Lamu Coal Power Project. In order to attract and accommodate foreign investors, the government must create an enabling investment environment first before marketing a number of investment opportunities. Therefore, attaining this objective starts with enforcing the rule of law, applying rigorous macroeconomic policies, improving infrastructure, and eliminating policy reversals risks. In addition, international and regional agreements puts pressure on the Kenyan government to take steps to improve transparency, participation, and accountability.



The impact of Foreign Direct Investment remains relatively weak due to the laxity to revise and introduce various legislation affecting the entire investment network. Generally, Kenya lacks a robust system of legislation advocating for public participation in FDI and the interests of local population are pushed at the periphery. There is a dire need to examine the role of public participation in FDI projects coupled with an in-depth assessment of emerging best-practice policies in attracting FDI.

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