Public Participation and Foreign Investment Law

From the Creation of Rights and Obligations to the Settlement of Disputes

Edited by

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CHAPTER 1

Public Participation in International Investment Law: Setting the Scene

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The concept of public participation is deeply rooted in international law. The origins of 'public participation' are found in human rights law, as an expression of the rights to elect and to be elected. A notable example of such an early, limited understanding of public participation can be found in Article 21 of the 1948 Universal Declaration on Human Rights, according to which '[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives'.[1] Similar instructions are found in other key international agreements, *inter alia*, the 1966 International Covenant on Civil and Political Rights,[2] the 1969 American Convention on Human Rights,[3] and the 1981 African Charter on Human and Peoples' Rights.[4]

The content of the concept of public participation has evolved over the years far beyond the mere rights to elect and to be elected. It has been mostly discussed in relation to sustainable development and is in that context now widely understood as allowing members of the public the opportunity to express their views and participate in decision-making processes that are related to sustainable development. Public participation is understood today as a safeguard for the attainment of a variety of ideals and objectives: from the basic freedoms of expression and speech, to democratic values (notably

* We would like to thank Margrit Trein, Rafael Ruschel, Ruth Flaherty and Sophie Ghashghaei-Pour for their invaluable help as research assistants for this project.

1 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III), art 21.

2 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 25(a).

3 American Convention on Human Rights (adopted on 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 3.

4 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art 13.

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the public's right to be involved in decisions that are affecting their lives),[5] good and effective governance, and the high quality of public decisions.[6] The 2002 International Law Association (ILA) New Delhi Declaration of Principles of International Law Relating to Sustainable Development (ILA New Delhi Declaration) summarises the role of public participation in the following words:[7]

> Public participation is essential to sustainable development and good governance in that it is a condition of responsive, transparent and accountable governments as well a condition for the active engagement of equally responsive, transparent and accountable civil society organizations, including industrial concerns and trade unions.

Allowing public participation is often supplemented with two accompanying commitments, both of which are regarded as essential for ensuring the effectiveness and the quality of public participation. The first is to facilitate the public's access to information in order to allow effective participation, traditionally referring only to information 'held by public authorities'.[8] More recent emanations of this principle however, are referring also to information held by private entities, especially where these are performing a public function.[9] The second completing commitment regards access to justice, and is designed to allow members of the public the opportunity to challenge decisions of governments.[10]

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5 See for example the preamble to the UNECE Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted on 25 June 1998) (Aarhus Convention); United Nations Sustainable Development, Agenda 21 (1992), para 23.2.

6 See for example the Preamble to the Aarhus Convention: 'Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions …'.

7 See International Law Association (ILA) New Delhi Declaration of Principles of International Law Relating to Sustainable Development, Principle 5.

8 UNGA 'Rio Declaration on Environment and Development' (1992) UN Doc A/CONF.151/26 (vol I) (Rio Declaration 1992), Principle 10.

9 See for example the Aarhus Convention, as explained in this Convention's implementation guide, UNECE, *The Aarhus Convention: An Implementation Guide* (UN 2014) 46. See also the International Law Association (ILA) New Delhi Declaration of Principles of International Law Relating to Sustainable Development, in which it is stated: 'It [public participation] also requires a right of access to appropriate, comprehensible and timely information held by governments **and commerce**'.

10 See, for example, Aarhus Convention, art 9.

The 1992 Rio Declaration on Environment and Development has placed public participation as one of the leading principles of sustainable development law,[11] cementing it as a pillar, upon which the process of development is to be construed. However, just as the content of 'public participation' has evolved, so have the legal areas that rely on (certain conceptions of) 'public participation' either explicitly or implicitly. Different forms and emanations of 'public participation' can now be found in a variety of international legal fields: from environmental law, to human rights law, economic law, and even the operation of international organisations and international courts.

1 Public Participation and Foreign Direct Investment (FDI)

There is little doubt that the promotion of foreign direct investment (FDI) is linked with states' sustainable development, for better or worse.[12] It follows that public participation as applied in the context of sustainable development must play a central role in decision-making processes that are related to FDI. This volume's main objective is to critically assess whether, if, and to what extent, the notion of public participation indeed is embedded in the regulatory environment that surrounds FDI.

The results, as presented in this book's chapters, are mixed. There is no doubt that public participation is slowly finding its way into the core of the investment law regime. For example, investment tribunals are far more accessible to non-disputing parties today than many other international courts.[13] Also in the process of investment treaties' negotiations – a space that was consistently closed to the public – some progress has been made: certain countries

11 Rio Declaration 1992, Principle 10.

12 See, for example, Viktoria Aust and others, 'How does foreign direct investment contribute to sustainable development goals? Evidence from African countries' (2020) 245 Journal of Cleaner Production; Holger Görg, 'Making investment work for productivity – enhancing, inclusive and sustainable development: what we know, and what we would still like to know' (2018) KCG Policy Paper No 3; Anthony Bonde-Nabende, *Globalisation, FDI, regional integration and sustainable development: Theory, evidence and policy* (Routledge 2002).

13 While tribunals such as the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), the European Court of Justice (ECJ) or the Wolrd Trade Organization (WTO) accept public interventions only very rarely (if at all), investment tribunals are now allowing the submission of amicus briefs almost as a matter of routine. See Eric De Brabandere, 'Amicus Curiae: Investment Arbitration' in Hélène Ruiz-Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (OUP 2019 – online edition).

are now relying on public consultations, and civil society organisations were able to find ways to access this process[14] and even affect its results.[15] At the same time, the full implementation of public participation as it is applied in other contexts is still far from being achieved. Key elements of public participation – notably access to information – are systematically rejected by states and tribunals, and in some cases a regression in the public's right to participate in relevant decision-making processes has been noted (see for example the regulation of domestic investment laws in Tanzania).[16]

Another theme that comes out of this book relates to the impact of the ever-present, notorious perception of the investment regime. Even where significant progress has been made (e.g. the conclusion of UNCITRAL Rules on Transparency),[17] the regime's image – as a closed, undemocratic, and pro-corporate legal system – remained unchanged. The ongoing political debate that surrounds the EU's proposal on the creation of an 'investment court' is telling in this respect, as references to the Investor-State Dispute Settlement (ISDS) mechanism's alleged isolation and lack of accessibility consistently re-appear.[18] The latter criticism is an important aspect of the debate, yet it also reveals a certain hypocrisy given that none of the EU's member states have ratified the Mauritius Convention (and considering the EU's own courts' restrictive approach towards non-disputing party interventions (amicus curiae) or legal standing of NGOs). But whether one is to accept this approach as double standard or not, one cannot discount the impact that this criticism is having on the reforms that the field of investment law is currently undertaking. As some of this book's authors state, it could be that this criticism is preventing a cool-headed, critical evaluation of the public participation mechanisms that states and civil society are so eager to adopt.

A third important theme that comes out of this book's chapters relates to the tension between the public and the private spheres. This tension is not new in the world of investment law, a regime protecting private interests but concerned with public goods and interests. This tension is also expressed through the implementation of public participation in investment law, as a safety

14 See chapters by Marceddu and Cotula, in this volume.

15 See chapters by Mavromati and Spottiswood and Cotula, in this volume. Developments in the world of Corporate Social Responsibility (CSR) indicate certain advancements also with respect to investment contracts, although precise data on this area is far less available. See Farah and Kunuji's chapter in this volume.

16 See Maina Peter and Mwakaje's chapter in this volume.

17 Faccio, for example, reveals the importance that tribunals are granting to the public's interest. See her chapter in this volume.

18 See El-Hosseny's chapter in this volume.

mechanism, or a counter-force against powerful private actors and interests. The authors in this book address the conflicting elements that are inherent to this tension: while repeatedly stressing the importance of increased public participation, several authors also warn against a certain backlash, and substitute risks. Notably, public participation – especially when utilised primarily by political actors or organised pressure groups – can lead to a hostile business environment and politicisation,[19] indirectly undermining the many public benefits that FDIs should or do deliver.[20] These arguments cannot be regarded as imagined alarmism: the UNCTAD Secretary-General, Mukhisa Kituyi himself, has warned against this backlash, attributing a slow-down in investment flows towards developing countries to a decline in investors' confidence, stemming from reforms in these countries' international investment agreements (IIAs).[21]

One of the book's main messages, so it seems, is that the integration of the concept of public participation into the investment regime is an ongoing, positive process, but perhaps not as simplistic and straightforward as one would expect. As such, it should be evaluated through sympathetic, yet critical eyes.

2 Setting the Scene

This book is divided into four sections. The first section of this book sets out the foundations, by discussing key processes and concepts. Yenkong Ngangjoh Hodu begins with an overview of the core principles of the investment regime. This review is provided so as to allow the reader a full understanding of the debate that follows. Public participation, he explains, 'is part and parcel of the process of evolution of the rules on the promotion and protection of foreign investment as well as the continuous effort to manage the tension between the private and public interests and rights of the different stakeholders'.[22]

19 See chapters by, inter alia, Cima, Nappert and Tuzheliak, Kent, Collins, Marceddu and more. Notable practitioners have also warned that increased public participation could be used "as a weapon, contrary to the very principle of neutral, non-political dispute resolution." See L Yves Fortier, 'Investment Protection and the Rule of Law: Change or Decline?' Lecture given by L Yves Fortier on 17 March 2009 at the British Institute of International and Comparative Law, 15 <www.arbitration-icca.org/media/0/12392785460140/0732_001.pdf> accessed 5 July 2020.

20 See Collins and Cima's chapters in this book.

21 United Nations Conference on Trade and Development (UNCTAD), 'Investors Uncertainty Looms Over Sustainable Development Goals' (10 October 2017) <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1579> accessed 5 July 2020.

22 See Hodu's chapter in this book.

Next, Lorenzo Cotula adresses the democratic deficit that is inherent in the process of international law-making, and investment treaty-making more particularly.[23] He compares the legislation of domestic legal reforms (notably the drafting of new constitutions), with the conclusion of investment treaties. Both processes, he explains, are affecting similar sensitive matters (e.g. the allocation and use of states' resources). Nevertheless, while the former is often achieved through open political dialogues and extensive public participation, the latter is conducted away from the public's eye and with very little public involvement. This state of affairs, however, is slowly changing. Civil society organisations and other public groups are increasingly able to pressure their governments and impact treaty negotiations, even where the official channels for public participation are blocked.

A similar movement, albeit far move advanced, is noticeable also in the ISDS mechanism, discussed in the chapter by Avidan Kent. Here as well, a decision-making process – investment arbitration – was traditionally conducted away from the public's eye and with very little room for public participation. The entrance of environmental actors into the field of investment arbitration has changed this state of affairs. These norm entrepreneurs have successfully advocated for the adoption of norms that were appropriate and acceptable in their original areas of activity (i.e. environmental law and policy), also in their new battle-ground – investment arbitration. The success of this process, according to Kent, was accomplished, not because of convincing legal explanations, but rather due to the norm-entrepreneurs' persuasive re-framing of the process of investment arbitration.

2.1 *The Normative Process*

The second part of this book addresses the role of public participation in the normative process. This part of the book deals with the participation of the public in the adoption or conclusion, amendment, and termination of the legal instruments related to the promotion and protection of foreign investments, keeping in mind their different nature and their different exposure to public participation and public scrutiny.

The chapters in this part address three types of normative processes: the legislation of domestic investment laws, the negotiations of investment treaties, and the conclusion of investment contracts. Chris Maina Peter and Saudin

23 Cotula, in this volume. See more on the democratic deficit and the investment regime in Barnali Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) 41 Vanderbilt Journal of Transnational Law 775.

Jacob Mwakaje present the example of Tanzania's domestic investment legislation. They assess the events that led to the enactment of this country's investment laws, and critically reflect on the decreasing role that the public's participation has played in the legislative process over the years. The most recent laws they review were enacted under a certificate of urgency, with 'no general public participation apart from the representative views from Members of the Parliament'.[24]

Maria Laura Marceddu's chapter brings this very discussion to the international level by focusing on the negotiation of free trade agreements (FTAs). As Cotula, she refers to the democratic deficit that is inherent in the process of international law making. This deficit, she explains, 'has resulted in citizens feeling anxious and suspicious of no longer being in a position democratically to influence the increasingly complex settings of the course in the present-day 'multilevel' system'.[25] Marceddu assesses different instruments that facilitated public participation in the process of FTA's negotiations, including public consultations, stakeholders meetings, public hearings and referenda. She emphasises the limits of these tools, notably the fact that these instruments do not necessarily reflect a fair representation of the public's views (as opposed to the views of organised sectorial groups), and the difficulties in assessing the real value of public participation. She calls for a refined approach that will rely on a better access to 'sensible and objective'[26] information. This, she explains, will improve the quality of public participation mechanisms, as well as the legitimacy of the process.

The role of public participation in the negotiation of investment treaties is further discussed by Chrysoula Mavromati and Sarah Spottiswood. Mavromati and Spottiswood discuss a wide range of mechanisms – official and unofficial – through which the public can participate, and possibly influence, the process of treaty negotiations. Some of these mechanisms (e.g. engagement with parliamentary committees, requests under freedom of information laws) are available only in certain states, but others – notably the use of social media – are available to all, regardless of nationality or geographic location. According to these authors, the proliferation of public participation mechanisms requires a careful examination: notably, the manner in which this growing range of views is to be 'considered, weighted, filtered and prioritised by treaty negotiators'[27] will have to be assessed.

24 Maina Peter and Mwakaje, this volume.
25 Marceddu, this volume.
26 Marceddu, this volume.
27 Mavromati and Spottiswood, this volume.

Lastly, Youseph Farah and Valentine Olusola Kunuji are evaluating the role of public participation in the conclusion of investment contracts. Farah and Kunuji point at new trends in international law concerning investors' social responsibility, notably the conclusion of the United Nations Guiding Principles on Business and Human Rights. These developments imply a greater role for human rights – including those that are related to public participation – in investment contracts. Investment contracts, however, remain a difficult tool to rely on in the context of public participation: they are hardly accessible to the general public, and their interpretation is often made in light of private contract laws, possibly 'to a lower standard […] than that which is required from states under international law'.[28] Other problems include the difficulties that third parties (e.g. affected communities) might face when trying to enforce rights in a contract to which they were not a party of. The authors call for a more careful drafting of these contracts, notably ensuring the public's legal standing and rights in such a private, legal relationship.

2.2 *Public Participation in the Lifecycle of Foreign Investment*

The third part of this book deals with the role of public participation in the application of legal instruments that relate to the promotion and protection of foreign investment law. This section examines the different forms of public participation during the entire life of foreign investments, focussing on their admission and management.

The chapters in this part address the very delicate relation between the state – as a sovereign and a regulator – and the investor, a driver of *public* goods that is accountable to *private, commercial* interests. The measures discussed in this part address states' efforts to correct a regulatory balance that, in their mind, was biased towards the private interests of the investors.

David Collins addresses the role of public participation in the pre-investment stage. His chapter focusses on Environmental Impact Assessment studies (EIA): future-facing studies that are aimed at informing regulators by predicting and assessing the impact of investments on the environment generally. The role of public participation in EIAs 'is essential to effective EIAs in terms of outcomes which are welfare maximizing both economically and socially […] an instrument of empowering formerly marginalised individuals in the sense that the outcome itself does not matter'.[29] EIAs are further useful in enabling states, and investors, to identify points of contention in advance, and

28 Farah and Kunuji, this volume.

29 Collins, this volume.

to address these before they mature into disputes. Collins discusses the experience of Canada, where a line of court decisions has ensured rigorous public participation and maintained the integrity of this process. He warns, however, that this process might also entail certain political and financial cost, potentially borne by both investors and society as a whole.

Elena Cima examines the role of parliamentary scrutiny over investment projects. She describes the erosion of states parliaments' ability to scrutinise investors' activities, notably in light of increased standards of investment protection granted by IIAs. This process, she explains, is leading to a certain backlash, whereas states are attempting to 'recapture control' and reassert parliamentary scrutiny. She evaluates new developments from Tanzania, where new laws were adopted to 'restore' states' sovereignty and address the democratic deficit. Cima warns that some of these attempts have possibly tipped 'the scale too much in the opposite direction',[30] possibly 'creating an unpredictable and unhospitable environment for foreign investors'.[31]

Lastly, Franz Zubieta Mariscal reminds the reader that the interaction between investors and their host communities does not end with adherence to domestic laws and regulations. Foreign Direct Investments are almost never friction-less, and the insensitive treatment of local communities (notably ignoring their unique preferences and traditions) could escalate into conflicts, legal disputes and even violence. Mariscal calls for a 'smart' management of the investor-community relationship: he proposes a line of recommendations that will lead to meaningful engagements with local communities and assist investors in maintaining fruitful relationships with their hosts.

2.3 *Public Participation in the Settlement of Foreign-Related Disputes*

The last section of this book considers how the public and the concerned stakeholder may participate in ISDS mechanisms, and most prominently, but not exclusively, investment arbitration. Admittedly, the association of public participation with a process such as investment arbitration is not without difficulties. To begin with, public participation was traditionally conceived as public in nature; it represents a duty on *public authorities* to allow the public's participation in *public decision-making processes*. Can investment tribunals be regarded as 'public authorities'? And can the process of investment arbitration be regarded as a 'public decision-making process'? These questions are without

30 Cima, this volume.

31 Cima, this volume.

a doubt contentious and arguments could be made on either side. A reflection on states, and tribunals' practice in this respect, offers certain answers.

To begin with, modern perceptions of the concept of public participation suggest that where private bodies are conducting public functions, they too are obliged to allow public participation. The Aarhus Convention implementation guide is explicit on this point, stating that the privatisation of public functions should not result in the obliteration of the duty to allow public participation.[32] As discussed in this volume, a similar understanding is increasingly prevailing also in investment arbitration – a process that is now framed as public in nature, even if conducted by private entities.[33] Several authors in this book[34] review the evolving practice of investment tribunals, and their increasing tendency to allow public participation. This liberal approach has been reflected in the amendment of relevant procedural rules (e.g. ICSID, NAFTA) and the adoption of new ones (e.g. UNCITRAL Rules on Transparency, and many other 'new generation' investment treaties).

An important reason for this shift towards a more liberal approach is the hope that increased public participation will enhance the public acceptance and legitimacy of ISDS.[35] The incorporation of public participation into the arbitral process however, is not without tensions. Notably, it requires a careful balance between the fairness[36] and the efficiency of the process[37] (notably in terms of cost, time, and even politicisation) on the one hand, and its accessibility and legitimacy, on the other.

Authors in this book point out that arbitrators are indeed going at great pains to ensure that the right balance is maintained. Sophie Nappert and Nataliia Tuzheliak's evaluation of decisions on amicus curiae participation reveals

32 UNECE, *The Aarhus Convention: An Implementation Guide* (UN 2014) 46.

33 See more on this process in Kent's chapter.

34 See chapters by Nappert and Tuzheliak; Faccio, and Kent.

35 Eugenia Levine, 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation' (2011) 29 Berkeley J Int'l L 200; Fernando Dias Simões, 'Myopic Amici? The Participation of Non-disputing Parties in icsid Arbitration' (2016–17) 42(3) North Carolina Journal of International Law 791.

36 Thomas Wälde stated in this respect: 'The introduction of amicus briefs by NGOs, which as a rule oppose the Claimant, impose the cost of review and attempted rebuttal. Amicus briefs can also directly or indirectly impugn the investor or the social acceptability of the investor's conduct, without supplying evidence or being subjected to cross-examination. Even if tribunals do not refer to such depreciatory comment, this does not mean that they are ineffectual ("semper aliquid haeret")'. Thomas W Wälde, ' "Equality of Arms" in Investment Arbitration: Procedural Challenges', in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (OUP 2010) 161, 178.

37 Levine (n 33) 219.

that tribunals are overall displaying a careful, and even protective, approach towards the dispute settlement process. Tribunals are therefore reluctant to extend the disputed grounds beyond those presented by the parties and are inclined to pay special attention to elements such as the amici's neutrality and independence from the parties. Several rejections of requests by the EU Commission to be allowed to make a submission in relation to intra-EU treaties, is demonstrative of this careful approach. At the same time, Sondra Faccio addresses the importance of the public's interest in investment case-law. Faccio demonstrates that, even where the 'public interest' is not mentioned by the relevant procedural rules, investment tribunals have consistently addressed this element and emphasised its importance.

There are however, some who were not satisfied by investment tribunals' efforts to balance public and private interests. For several years now, the EU has been considering the replacement of ISDS with a new public, permanent investment court. Farouk El-Hosseny evaluates the EU's proposed model and its impact on public participation in investment disputes. The EU, he explains, might take a step further, beyond the now-widely accepted amicus model: it may promote 'third-parties interventions', a concept that implies wider participatory rights ('the highest ceiling that can be achieved within the current architecture of ISDS'),[38] notably access to the case materials and arbitral hearings, and the right to make oral observations. Farouk El-Hosseny concludes with a call for the careful regulation of third-party interventions, notably in order to safeguard elements such as the efficiency of the process and equality of arms, alongside an effective public participation.

Other dispute settlement models that deviate from traditional ISDS include mediation, conciliation and fact-finding procedures. The advantages of alternative dispute resolution (ADR) are appealing, especially where the investor and the host state are hoping to prevent the escalation of the dispute and ensure future amicable relationship. Esmé Shirlow points at the role that confidentiality plays in such proceedings, 'often considered to be an inherent and necessary feature of ADR'.[39] This emphasis on confidentiality, she warns, contradicts the trend of increased transparency and public participation in ISDS, and could even undermine it. Shirlow concludes with a list of measures that could mitigate this process, including public notifications on the existence of ongoing mediations, and the opening of certain stages of the mediation process to the public's participation.

38 El-Hosseny, this volume.

39 Shirlow, this volume.

3 Public Participation and Investment Law: the Way Forward

There is little doubt that the concept of public participation will continue to play a role in the regulation of foreign direct investment. This movement is evident from the examination of wider shifts in international law, notably the increasing demands for accountability, participation and representation. This development is also clear if one is to observe the more specific evolution of states' practice: when it comes to the regulation of FDI, public participation is evolving to a new widely-accepted and expected standard.

What is far less clear, however, is the exact nature and scope of public participation, as well as the role that this concept will play as the field of investment law continues to change. Future research agenda will have to follow and evaluate these developments. Researchers will have to examine the impact of public participation on a variety of issues, including representation, efficiency, legitimacy, the *genuine* impact on the quality of decisions, and so forth. Researchers will also have to search for new models that will suit the changing face of processes, such as treaty negotiations and dispute settlement.

It is hoped that the book will contribute to the understanding of the current forms, level and impact of public participation, as well as to provide some indications of how such participation could be enhanced with a view of improving the balance and legitimacy of the legal instrument related to the promotion and protection of foreign investments.