

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

**SPECIAL ECONOMIC ZONES AS GATEWAY FOR SUSTAINABLE FOREIGN
DIRECT INVESTMENTS IN KENYA: TOWARDS A SPECIAL REGIME IN LABOUR
REGULATION**

**A mini-thesis prepared in partial fulfilment of the requirement for award of the
degree of Master of Laws (LLM) in International Trade, Investment and Business**

Law

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DECLARATION

I, NYAKAGWA CALEB OSORO, do hereby declare that the mini-thesis entitled *Special Economic Zones as Gateway for Sustainable Foreign Direct Investments in Kenya: Towards a Special Regime in Labour Regulation* is my own work and has not been submitted for any degree or examination in any other university, and that all the sources and materials I have used or quoted have been indicated and acknowledged as complete references.

Nyakagwa Caleb Osoro



Prof Kitty Malherbe



Supervisor



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DEDICATION

I dedicate this work to all Special Economic Zones stakeholders in Kenya who wish to see Special Economic Zones work for both sustainable and inclusive development.



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ACKNOWLEDGMENTS

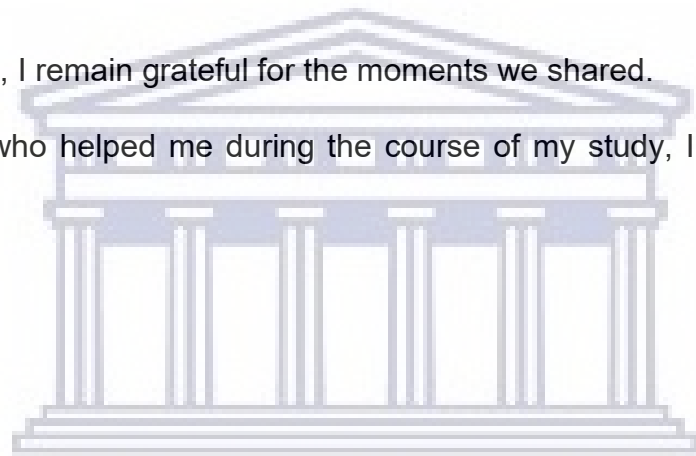
I am grateful to Almighty God for giving me life and grace throughout this mini-thesis.

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KEYWORDS

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Inclusive development

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Kenya

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Special Economic Zones

Special labour regime

Sustainable investments



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ABSTRACT

The role of Special Economic Zones (SEZs) in promoting foreign direct investment (FDI) cannot be gainsaid. In particular, developing and least developed countries have been keen on attracting FDIs through SEZs as a way of ensuring economic growth and development. In recent years, Kenya has received an increased flow of FDIs into its SEZs. Such an influx of FDIs into SEZs has, among other benefits, contributed to job creation and stimulated skill transfers.

In Kenya, SEZs enjoy a liberal administration. The national legislation governing investment, tax and labour, among other matters, is often excluded from application in the SEZs. For instance, Kenya's labour legislation provides for labour rights which apply even in the SEZs. However, the government has continuously allowed a flexible legal framework for labour regulation for companies setting up in the SEZs, such as the provision of cheap labour. Such flexibility goes against not only the tenets of the current national labour legislation but also the interests of the workers. The failure to enforce the application of the national labour legislation in the SEZs provides a flexible legal framework for labour regulation, which has allowed SEZs' companies to compromise labour rights in order to remain competitive and attract FDIs.

On this premise and related to labour legislation, the mini-thesis focuses on the unlimited application of Kenya's labour legislation in the SEZs – the inclusionary approach. Also, the mini-thesis analyses the implications of the inclusionary approach for the flow of FDIs into SEZs. Furthermore, the mini-thesis assesses the impact of the failure to either ensure application of the national labour legislation in the SEZs or to provide for labour rights in the SEZ Act. The mini-thesis then recommends that in order to attract and retain the flow of FDIs into SEZs whilst also ensuring sustainable investment and inclusive development, a special regime is suitable in which the SEZs Act provides for special labour rights.

ACRONYMS AND ABBREVIATIONS

ADR	Alternative dispute resolution
AEZO	African Economic Zones Organization
AfCFTA	African Continental Free Trade Area
CEACR	Committee of Experts on Application of Conventions and Recommendations
CIIP	Competitive Industries and Innovation Programme
COTU (K)	Central Organisation of Trade Unions Kenya
CS	Cabinet Secretary
CSR	Corporate social responsibility
CSI	Corporate social investment
EAC	East African Community
EIC	Ethiopian Investment Commission
ELIDZ	East London Industrial Development Zone
ELRC	Employment and Labour Relations Court
EOI	Export oriented industry
EPZ	Export Processing Zone
ESG	Environmental, social and governance
FDI	Foreign direct investment
FTA	Free trade agreement
FTZ	Free trade zone
FZ	Free zone
GDP	Gross domestic product

GTP	Growth and Transformation Plan
GVC	Global value chain
HIPSTER	Hawassa Industrial Park Sourcing and Training of Employees in the Region
ICESR	International Convention on Economic and Social Rights
ICSID	Convention on Settlement of Investment Disputes between States and Nationals
ICT	Information and communication technology
ILO	International Labour Organization
IMF	International Monetary Fund
IP	Industrial park
IPDC	Ethiopian Industrial Parks Development Corporation
IZDC	Ethiopian Industrial Zones Development Corporation
KHRC	Kenya Human Rights Commission
MNC	Multinational corporation
MNE	Multinational enterprise
PPP	Public-private partnership
REI	Regional economic integration
SDGs	Sustainable Development Goals
SEZ	Special Economic Zone
SEZA	Special Economic Zones Authority
SFZ	Special Factory Zones
SPZ	Special Purpose Zones

UDHR	Universal Declaration of Human Rights
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre on Transnational Corporations
VAT	Value-added tax
WBG	World Bank Group
WIR	World Investment Report
WRC	Worker Rights Consortium



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CHAPTER ONE

INTRODUCTION

1.1. BACKGROUND TO THE STUDY

The Kenyan economy is one of the largest and most diversified in Eastern Africa.¹ The country boasts a higher economic growth rate and gross domestic product (GDP) than the other countries in the region.² Notwithstanding Kenya's economic growth rate, its foreign direct investment (FDI) inflows still fall short of those received by its neighbouring countries. In 2021, Kenya received FDI inflows amounting to \$448.1 million, lagging behind Ethiopia, Uganda and Tanzania, which received \$4,259.4 million, \$1,142.2 million and \$921.8 million, respectively.³

Keen to resuscitate the country as a key FDI destination in the region, the Kenyan government has been undertaking legal reforms aimed at promoting and retaining FDI inflows.⁴ In 1990, it established Export Processing Zones (EPZs) through enactment of the EPZs Act by the legislature.⁵ However, by 2006 the productive capacity of the EPZs had declined due to, among other reasons, lack of diversification.⁶

The inability of the EPZs programme to attract and sustain significant FDIs and ensure economic growth as intended prompted the government of Kenya to change its development strategy. In 2012, it adopted the Special Economic Zones (SEZs) policy.⁷ In 2015, the Kenyan legislature enacted the SEZs Act in order to actualise the SEZs programme.⁸ The SEZs programme is a vital tool intended to spur economic growth in

¹ International Finance Corporation 'Kenya's Growth? Three Promising Areas' (2019) https://www.ifc.org/wps/wcm/connect/news_ext_content/ifc_external_corporate_site/news+and+events/news/insights/kenya-prospects?CID=IFC_TT_IFC_EN_EXTP (accessed 26 September 2022).

² World Bank Group *Kenya Economic Update – Aiming High: Securing Education to Sustain the Recovery* (2022) 3.

³ United Nations Conference on Trade and Development (UNCTAD) *World Investment Report 2022-International Tax Reforms and Sustainable* (2022) 211.

⁴ UNCTAD *Investment Policy Review: Kenya* (2005) 85.

⁵ Export Processing Zones Act No. 517 of 1990.

⁶ UNCTAD (2005) 90.

⁷ Government of Kenya *Sessional Paper Number 10 of 2012 on Kenya Vision 2030* (2012).

⁸ Special Economic Zones Act No. 16 of 2015.

Kenya through, inter alia, attracting FDIs and creating jobs.⁹ Therefore, SEZs play a significant role in ensuring that the FDI inflows are not only sustainable but also promote inclusive development in Kenya.

In this mini-thesis, 'sustainable FDI' is broadly defined to include sustainable development. 'Sustainable development' has been defined as development that meets the needs of the present generation without compromising the ability of the future generations to meet their own needs.¹⁰ The United Nations Economic and Social Commission for Asia and Pacific defines sustainable FDI as FDIs that contribute to a country's sustainable development and achieve social, economic and environmental objectives.¹¹

There is no agreed-upon definition of 'inclusive development'. Hickey, Sen and Bukenya define it as 'a process that occurs when social and material benefits are equitably distributed across divides within societies, across income groups, gender groups, ethnicities, regions, religious groups, and others'.¹² Musahara observes that inclusive development brings into play dimensions of well-being beyond income, while inclusiveness focuses on the distribution of well-being.¹³ As used in this mini-thesis, inclusive development encompasses the well-being (long-term dynamic benefits) made available to SEZs workers as a result of investments within SEZs.¹⁴

⁹ Gitau F *How and Why Special Economic Zones Matter for Fostering Competitiveness and Facilitating Linkages in Kenya* (2022) UN Conference on Trade and Development Presentation Paper 4.

¹⁰ UN *Report of the World Commission on Environment and Development: Our Common Future* (1987) 11.

¹¹ UN Economic and Social Commission for Asia and Pacific *Sustainable FDI: Attracting FDI in Support of SDGs* (2016) 2.

¹² Hickey S, Sen K & Bukenya B *The Politics of Inclusive Development: Interrogating the Evidence* (2015) 5. Also, Gupta J, Pouw NR & Ros-Tonen M in 'Towards an Elaborated Theory of Inclusive Development' (2015) 27 *European Journal of Development Research* 542 define inclusive development as development that includes marginalised people, sectors and countries in social, political and economic processes for increased human well-being, social and environmental sustainability, and empowerment.

¹³ Musahara H *Inclusive Growth and Development Issues in Eastern and Southern Africa* (2016) 71.

¹⁴ UNCTAD *World Investment Report 2019: Special Economic Zones* (2019) 178.

1.2. PROBLEM STATEMENT

The SEZs Act contains distinctive legal provisions that depart from those in the national territory.¹⁵ One of the salient features in this Act is that it does not restrict the application of the Kenya national labour legislation, the Employment Act of 2007, in the SEZs.¹⁶ However, even though the Employment Act applies in the SEZs, some of its provisions have often not been applied or enforced.¹⁷

The SEZs Act is specialised, sector-specific legislation. The Kenyan SEZ by design and application is outside of the local customs territory.¹⁸ As such, the SEZs Act ought to protect the rights and interests of all of the stakeholders involved in the operation of the SEZs, such as the government, investors and workers. However, the SEZs Act does not contain labour rights provisions. This omission in the Act raises significant questions regarding the nature, norms and impact of FDIs in the SEZs in view of labour rights. In addition, the normative value of the FDIs, compared with their impact on inclusive development, questions their sustainability.

In accordance with article 2(6) of the Constitution, Kenya has ratified some International Labour Organisation (ILO) conventions.¹⁹ Despite Kenya's ratification of the ILO Declaration on Decent Work and Rights at Work,²⁰ the government has failed to enforce the Employment Act in the SEZs or secure SEZs workers' rights as required in the Declaration. The failure to implement the fundamental principles and labour rights, either through incorporating them in the SEZs Act or enforcing them as envisaged in the Employment Act, raises pertinent labour concerns such as whether the government deliberately allows SEZs to compromise labour rights in order to remain competitive and

¹⁵ Baissac C 'Brief History of SEZs and Overview of Policy Debates' in Farole T *Special Economic Zones in Africa: Comparing Performance and Learning from Global Experience* (2011) 23.

¹⁶ Special Economic Zones Act No. 16 of 2015 s 3.

¹⁷ Cotula L & Mouan L 'Labour Rights in Special Economic Zones: Between Unilateralism and Transnational Law Diffusion' (2021) 24 *Journal of International Economic Law* 358.

¹⁸ Farole T *Special Economic Zones in Africa: Comparing Performance and Learning from Global Experience* (2011) 23.

¹⁹ International Labour Organisation (ILO) 'Ratifications for Kenya' https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103315 (accessed 29 September 2022).

²⁰ ILO *Declaration on Fundamental Principles and Rights at Work and its Follow-up* (June 18 1998).

attract investors. The SEZs Act is also yet to address how it intends to safeguard such rights.²¹ The research problem that this mini-thesis investigates is the lack of labour rights provisions in the SEZs Act and the failure of Kenya's government to enforce the Employment Act, fundamental principles and labour rights within SEZs.

1.3. SIGNIFICANCE OF THE PROBLEM

The adoption of the SEZs programme has significantly boosted the quality of FDI inflows, diversified exports and improved the investment climate in Kenya.²² In spite of the SEZs' performance, SEZs investments have often raised labour concerns. The Constitution of Kenya provides for fair labour practices, fair remuneration and reasonable working conditions.²³ The Employment Act, among other legislation, provides for key working conditions and labour relations terms.²⁴ Also, the ILO core conventions stipulates basic workers' rights including safe working conditions. Despite these legal provisions, labour concerns, including harsh working conditions, low wages, and lack of union representation in SEZs, have been raised.²⁵ The foregoing labour issues elucidate the fact that workers' rights within the SEZs are yet to be fully enforced or applied.

1.4. RESEARCH QUESTIONS

Based on the problem statement above, the mini-thesis discusses the role of labour rights in SEZs in ensuring sustainable FDI inflows and inclusive development in Kenya. In addressing the foregoing central question, the mini-thesis considers the following sub-questions:

1. What is the role of Special Economic Zones in attracting sustainable FDI in Kenya?
2. What is the role of international labour standards and labour best practices in transitioning towards sustainable FDI in Kenya's SEZs?
3. Are there lessons Kenya can draw from Ethiopia's SEZs regulation?

²¹ Mulama J 'Export Processing Zones Still a Bone of Contention' *Global Policy Reform* 2007 <https://archive.globalpolicy.org/nations/epz/2007/0430epz.htm> (accessed 28 September 2022).

²² UNCTAD *World Investment Report 2019: Special Economic Zones* (2019) 37.

²³ Constitution of Kenya 2010 art 41(1) and 41(2).

²⁴ Employment Act No. 11 of 2007 s 26.

²⁵ Laryea E, Ndonga D & Nyamori B 'Kenya's Experience with SEZs: Legal and Policy Imperatives' (2020) *African Journal of International and Comparative Law* 12.

4. What would be an effective labour-rights approach to be adopted, to ensure sustainable FDI and inclusive development in Kenya's SEZs?

1.5. LITERATURE REVIEW

The UNCTAD *World Investment Report of 2019 on Special Economic Zones* identifies SEZs as a seminal policy tool for attracting investments.²⁶ The report observes that SEZ schemes are among the more widely employed programmes aimed at promoting, attracting and facilitating investments. The report identifies major challenges facing SEZs, such as rapidly revolving digital technology which affects the majority of industries. Also, the report appreciates the integral role played by the UN Sustainable Development Goals (SDGs) in aiding the formulation of the SEZs policies and operations. The report highlights the advantages accruing to companies adopting the highest environmental, social and governance (ESG) standards in the SEZs. In conclusion, the report makes a case for new generation of SEZs which are premised on their ability to harness the lessons learnt and to develop strategies to overcome existing challenges such as sustainable development principles.

Despite such a detailed analysis on the nexus between SEZs and FDIs, on the one hand, and the concept of sustainability and ESG, on the other, the report fails to enunciate in detail how inclusive development for SEZs workers can be achieved. Accordingly, the mini-thesis seeks to fill this gap by propounding a special labour-rights approach in SEZs to ensure sustainable investment and inclusive development.

Thomas Farole, in a World Bank publication entitled *Special Economic Zones in Africa: Comparing Performance and Learning from Global Experience*,²⁷ provides a comprehensive overview of the evolution of SEZs and their scope of application. The book provides an in-depth analysis of Africa's experience with SEZs, drawing lessons from case studies and surveys. Farole identifies the determinant factors for SEZs' success by drawing comparisons between well-performing African and global SEZs. While acknowledging the bottlenecks facing African countries in increasing their global

²⁶ UNCTAD (2019) 127–202.

²⁷ Farole T (2011) 23–248.

value chains, he identifies SEZs as a policy tool that can help solve this conundrum. Notably, Farole conducts a study confined to manufacturing-oriented zones in Africa, leaving out other equally essential zones.

Farole's studies found that, while SEZs have contributed to economic growth and job creation, they have failed to meet certain socio-economic needs. He observes that most of the African SEZs are yet to realise inclusive development because, for instance, they have failed to provide quality employment and a living wage to workers. Even though the study provides valuable insights on SEZs' performance in Africa, it fails to address the critical aspect of sustainable investments. Farole's studies also fail to comprehensively establish the relationship between successful SEZs and sustainable investments, which are key to attracting FDIs and ensuring inclusive development. This mini-thesis supplements Farole's research by establishing the role of labour rights in ensuring SEZs' success and promoting sustainable FDI and inclusive development.

In the light of the foregoing, the mini-thesis discusses the linkage between labour rights and SEZs in attracting sustainable FDI and ensuring inclusive development, something which is not discussed in detail in the existing literature. Essentially, the mini-thesis constitutes significant research because it propounds a labour-rights approach to be followed by the Kenyan government to ensure the attraction of sustainable FDI and inclusive development.

1.6. RESEARCH METHODOLOGY

The mini-thesis adopts the doctrinal research method. The doctrinal approach entails a qualitative desktop research and analysis of relevant primary and secondary sources. Primary sources include the Constitution of Kenya, the SEZs Act and the Employment Act, while secondary sources include books, peer-reviewed articles, working papers and reports. Furthermore, the mini-thesis makes reference to relevant international labour standards and labour best practices. It discusses how international labour standards and labour best practices address the 'race to bottom' in SEZs' labour regulation. The aim of the discussion is to establish the relationship between labour rights, SEZs, sustainable FDI and inclusive development.

The mini-thesis also considers Ethiopia as a case study, in order to draw lessons for Kenya. Ethiopia is an ideal case study because of its labour force, its status as the top recipient of FDIs in the Eastern Africa region, and the fact that it has some of the most effective SEZs in the region. As such, the mini-thesis discusses the legal framework governing Ethiopia's Industrial Parks (IPs), and labour regulation within the IPs, in order to draw lesson for Kenya.

The mini-thesis then adopts prescriptive and descriptive methods, respectively, to come up with recommendations and an effective labour-rights approach in Kenya's SEZs.

1.7. CHAPTER OUTLINE

Apart from this chapter, the mini-thesis is organised into four other chapters as follows:

Chapter 2 – Chapter 2 discusses the significance of SEZs and FDIs for the Kenyan economy. As such, it outlines the evolution of SEZs in Kenya, their scope and their contribution to economic development. The discussion proceeds to ascertain the performance of SEZs in the light of the economic dynamics in the country. The chapter goes on to examine the status of FDI inflows in Kenya and their contribution to economic development. Thereafter, it establishes the nexus between SEZs and FDIs in Kenya. In conclusion, an assessment of the extent to which FDIs in Kenya's SEZs are sustainable is undertaken.

Chapter 3 – The chapter focuses on Kenya's labour law regime and the regulation of labour activities in the SEZs. The discussion aims at identifying an effective labour-law approach to the regulation of labour activities within the SEZs in order to promote sustainable FDI and ensure inclusive development in Kenya. The chapter is divided into three parts. Part 1 discusses the relevant labour rights provisions in Kenya's labour legislation and their scope of application in the SEZs. Part 2 discusses the relationship between labour law and SEZs, and evaluates the prevailing labour concerns. Part 3 establishes Kenya's labour-law approach in its SEZs. In conclusion, there is a discussion of the impact of the established labour-law approach in ensuring inclusive development.

Chapter 4 – The chapter outlines the international labour standards and labour best practices applicable to SEZs. The international labour standards and labour best

practices are discussed after the domestic legal framework for labour regulation, because the chapter aims at evaluating the role that these standards and practices can play in the reforms proposed in chapter 3. The discussion is crucial at this point because it also seeks to fill the gaps in Kenya's SEZs labour regulations identified in chapter three. Also, the discussion evaluates the role that international labour standards and labour best practices can play in shaping Kenya's SEZs' labour legislation, discussed in chapter 3, in order to ensure sustainable and inclusive development. In particular, the chapter explores relevant ILO conventions and draws on best practices applicable to Kenya's SEZs. In conclusion, the chapter undertakes a case study of Ethiopia's export-oriented IPs. Ethiopian IPs' legal framework is discussed with the aim of drawing lessons for Kenya's SEZs on how to attract sustainable FDI and ensure inclusive development.

Chapter 5 – Chapter 5 provides a summary of the major findings, draws the conclusion of the mini-thesis, and makes recommendations. The recommendations are based on the discussion of Kenya's labour and SEZs legislation, international labour standards and labour best practices, and lessons learnt from Ethiopia.



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CHAPTER TWO

THE ROLE OF SPECIAL ECONOMIC ZONES IN ATTRACTING SUSTAINABLE FOREIGN DIRECT INVESTMENTS IN KENYA

2.1. INTRODUCTION

The impact of SEZs' FDIs on the Kenyan economy is examined in this chapter. The chapter begins by outlining the definition, types and features of SEZs. It then discusses the history and evolution of SEZs, and their scope, performance and contribution to economic development in Kenya. The chapter proceeds to examine the status of FDI inflows into Kenya, and establishes the nexus between SEZs and FDIs' inflows. In conclusion, it examines the extent to which FDIs in Kenya's SEZs are sustainable.

2.2. EVOLUTION OF SPECIAL ECONOMIC ZONES IN KENYA

2.2.1. Definition of a special economic zone

The term 'special economic zone' has yet to find a succinct definition. The evolution of SEZs over the years has resulted in the conceptualisation of different SEZ definitions in different jurisdictions.²⁸ Farole presents a broad and widely used definition of SEZs as

demarcated geographic areas contained within a country's national boundaries where the rules of business are different from those that prevail in the national territory. These differential rules primarily apply to investment conditions, international trade and customs, taxation, and the regulatory environment and whereby the zone is given a business environment that is intended to be more liberal from a policy perspective and more effective from an administrative perspective than that of the national territory.²⁹

Similarly, the SEZ Act defines an SEZ as

[a] designated geographical area where business enabling policies, integrated land uses and sector appropriate on-site and off-site infrastructure and utilities are

²⁸ Competitive Industries and Innovation Programme (CIIP) *Special Economic Zones: An Operational Review of their Impact* (2017) 11.

²⁹ Farole T (2011) 23.

provided, or which has the potential to be developed either on a public, private or public-private partnership basis, where any goods introduced and specified services provided are regarded, in so far as import duties and taxes are concerned, as being outside the customs territory.³⁰

Farole and the SEZ Act's definitions bear close similarity in terms of scope of application, incentives and purpose for establishment. Also, both definitions are limited by the fact that an SEZ is linked to a geographic area, whilst in some instances an SEZ can be purely a legal designation.³¹

2.2.2. Types and features of special economic zones

Basically, SEZs are defined by their location and the primary economic activity carried therein. The main types of SEZs³² are the Export Processing Zones (EPZs),³³ Special Purpose Zones (SPZs)/Specialised Zones (SZs),³⁴ Free Zones (FZs),³⁵ Freeports³⁶ and Special Factory Zones (SFZs)³⁷. The Kenyan SEZ Act also refers to other types of SEZs, such as livestock zones and industrial parks, which fall within either the SPZs or EPZs.³⁸

The prominent feature of an SEZ is that it is a geographically delineated area that is exclusive of the national customs territory. Also, companies operating within the SEZ benefit from a legal framework that offers distinct incentives for investment separate from those available in the national legal framework.³⁹ Generally, SEZs schemes are tailored

³⁰ Special Economic Zones Act No. 16 of 2015 s 4(4).

³¹ Baissac C 'Brief History of SEZs and Overview of Policy Debates' in Farole T (2011) 23.

³² As described in Foreign Investment Advisory Service (FIAS) *Special Economic Zones: Performance, Lessons Learned, and Implications for Zone Development* (2008) 11.

³³ An EPZ is a geographically delimited area that is often set up as an industrial enclave offering special incentives for the manufacturing of merchandise mainly for export.

³⁴ An SPZ or SZ is a geographically delineated area which is established primarily to attract investment in and promote development of a specific type of manufacturing or service industry.

³⁵ An FZ is a geographically delineated area which is typically located adjacent to ports of entry with the objective of supporting export trade through processing of operations and logistics.

³⁶ A Freeport is a geographically delimited area, traditionally located near ports and major trade routes, with the objective of encouraging diversified economic growth.

³⁷ A SFZ is a processing or manufacturing zone that can be located throughout the country but is limited to a specific plant site or sites. Its objective is to promote growth in a particular industry, mainly to take advantage of a country's comparative advantage.

³⁸ Special Economic Zones Act No. 16 of 2015 s 4(6).

³⁹ Baissac C 'Brief History of SEZs and Overview of Policy Debates' in Farole T (2011) 23.

for attracting FDIs by offering companies production incentives to gain competitive advantage in global markets.⁴⁰ The host states benefit from the SEZ schemes through transfer of technology, employment creation, and capital inflow.⁴¹

2.3. SPECIAL ECONOMIC ZONES IN KENYA: A HISTORICAL PERSPECTIVE

The growth of international trade has made SEZs an integral tool for Kenya's economy. The need to increase and diversify exports, attract foreign investments and improve international supply chains has justified the creation of SEZs.⁴² In Kenya, successive governments have enacted different development policies aimed at transforming the country from a centrally planned economy to a market-oriented economy.

2.3.1. Import substitution policy between the 1960s and 1980s

The import substitution policy was one of the policies introduced by the independent Kenyan government to spur economic growth, achieve economic autonomy and attain self-reliance.⁴³ The import substitution policy meant that all consumer goods that were initially imported were to be produced locally henceforth.⁴⁴ In order to protect the local producers, measures such as protective tariffs and import restrictions were aimed at protecting local companies from external competition.⁴⁵ However, by the 1980s, the import substitution policy had failed to yield the intended outcome.⁴⁶ The failure of this policy was largely due to the market liberalisation wave of the 1970s that advocated for free markets and export promotion.⁴⁷

⁴⁰ Laryea E, Ndonga D & Nyamori B (2020) 3.

⁴¹ Shihata F *Legal Treatment of Foreign Investment* (1993) 9.

⁴² Pavlov P & Vetkina 'A Special Economic Zones As Key to Sustainable Economic Development of Russia' (2019) *Future Academy* 1.

⁴³ Republic of Kenya *Development Plan for the Period 1964–1970* (1964).

⁴⁴ Meilink H 'The Effects of Import-Substitution: The case of Kenya's Manufacturing Sector' (1982) 276 *Institute for Development Studies* 3.

⁴⁵ Republic of Kenya *Development Plan for the Period 1970–1974* (1970)12.

⁴⁶ Republic of Kenya *Development Plan for the Period 1984–1988* (1984) xx.

⁴⁷ Republic of Kenya 'Budget Speech Delivered to the National Assembly on 12 June 1974' (1974) 473.

2.3.2. Structural adjustment policies 1980–2000

The market-liberalisation push prompted the Kenyan government to adopt the neoliberal ideology in the 1980s. This ideology advocated for, among other things, open markets and increased foreign investment. Economic liberalisation and restricted government market intervention were viewed as seminal to economic development.⁴⁸ Eventually, the Kenyan government shifted its policies from protectionism to market liberalism, focusing on free markets, the attraction of foreign investors, and export promotion.⁴⁹ In 1990, the Kenyan legislature enacted the EPZs Act that led to the creation of the EPZs. Arguably, the EPZs are the precursor of the current SEZs. Essentially, the change of tack from protectionism to market liberalisation provided a basis for the SEZs programme.

2.3.3. The SEZs era post 2000

The current SEZs programme derives its legitimacy from the 2008 national economic blueprint, Vision 2030. Through Vision 2030, the Kenyan government aims to transform its economy through industrialisation and the diversification of its exports, with SEZs viewed as one of the enabling tools.⁵⁰ In 2012, the government adopted an SEZs programme.⁵¹ In 2015, the Kenyan legislature enacted the Special Economic Zones Act. The SEZs Act governs the establishment and operationalisation of SEZs. It aims at improving the investment climate in Kenya.⁵²

2.4. THE SPECIAL ECONOMIC ZONES PROGRAMME IN KENYA

2.4.1. Special economic zones policy environment

The Kenyan SEZs programme is a development strategy aimed at transforming the country into an export-oriented market economy, creating jobs, and accelerating

⁴⁸ Coase R 'The Problem of Social Cost' (1960) 3 *The Journal of Law and Economics* 27.

⁴⁹ Republic of Kenya *Development Plan for the Period 1984–1988* (1984) 154.

⁵⁰ Chege J, Ngui D & Kimuyu P 'Scoping Paper on Kenya Manufacturing' (2014) *World Institute for Development Economics Research* 6.

⁵¹ Government of Kenya, Office of the Prime Minister Ministry of State for Planning, National Development and Vision 2030 *Sessional Paper Number 10 of 2012 on Kenya Vision 2030* (2012).

⁵² Special Economic Zones Act No. 16 of 2015, preamble.

economic growth.⁵³ Pursuant to section 4 of the SEZs Act, an SEZ is established through a declaration by the Cabinet Secretary (CS) responsible for trade and investment on the recommendation of the Special Economic Zones Authority (SEZA) and in consultation with the CS in charge of finance.⁵⁴ The declaration is made through a Gazette Notice which defines the nature and limits of the zone.⁵⁵

The SEZs Act provisions are implemented by the SEZA in accordance with the government development agenda.⁵⁶ The functions of the SEZA have been spelled out in section 11(2) of the Act. They include implementation of the government policies and programmes relating to the SEZs.⁵⁷ In terms of section 27 of the SEZs Act, the SEZA has been given the mandate of issuing or renewing licences to SEZ developers, operators, or enterprises. As such, the SEZA regulates the activities of the SEZs developers, operators and enterprises. The SEZs Act enumerates investment incentives which SEZs companies are entitled to in order to attract FDIs.⁵⁸

2.4.2 Planning, scope and distribution of special economic zones in Kenya

SEZs planning is the framework which the Kenyan government follows in the implementation of the SEZs programme. The Chinese Shenzhen SEZ has been recognised as a success story.⁵⁹ The gradual expansion, growth and hosting of modern technological economic activities and services qualified the Shenzhen SEZ as model of a successful development policy.⁶⁰ At its inception, the Kenyan SEZ programme was designed to emulate the success of the Shenzhen SEZ in order to transform Kenya into a globally competitive market economy.⁶¹

⁵³ Government of Kenya, Office of the Prime Minister Ministry of State for Planning, National Development and Vision 2030 *Sessional Paper Number 10 of 2012 on Kenya Vision 2030* (2012).

⁵⁴ Special Economic Zones Act No. 16 of 2015, s 4(1).

⁵⁵ Special Economic Zones Act No. 16 of 2015, s 4(2).

⁵⁶ Special Economic Zones Act No. 16 of 2015, s 10.

⁵⁷ Special Economic Zones Act No. 16 of 2015, s 11(2).

⁵⁸ The investment incentives are discussed below at 2.7.2.

⁵⁹ Cheng X & Medici T 'The "Instant City" Coming of Age: Production of Spaces in China's Shenzhen Special Economic Zone in Thirty Years' (2010) 31(8) *Urban Geography* 10.

⁶⁰ Wong K 'China's Special Economic Zone Experiment: An Appraisal' (1987) 69(1) *Geografiska Annaler* 27.

⁶¹ Antonio N & Ma S 'China's Special Economic Zone in Africa: Context, Motivations and Progress' (2015) 25 (44) *Euro Asia Journal of Management* 94.

Currently, there are different forms of SEZs in Kenya. The SEZs Act stipulates that an SEZ may be designated as a single- or multiple-sector zone.⁶² Pursuant to section 4(6) of the SEZs Act, single- or multiple-sector SEZs may include FTZs,⁶³ IPs,⁶⁴ Freeport zones,⁶⁵ information communication technology (ICT) parks,⁶⁶ and agricultural zones.⁶⁷ For instance, the Athi River EPZ encompasses a wide range of industrial activities such as those undertaken in FTZs and IPs; hence, it is a multiple sector SEZ.⁶⁸

The Kenyan government has issued licences to SEZs developers under the Vision 2030 flagship projects. Some of the SEZs that have been licensed to operate include Dongo Kundu SEZ, Konza Technopolis, Naivasha SEZ, Tatu City, African Economic Zone (AEZ), Compact Free Trade Zone, and Northlands City.⁶⁹

2.5. THE ROLE OF SPECIAL ECONOMIC ZONES IN KENYA'S ECONOMIC DEVELOPMENT

2.5.1. The profile of the Kenyan economy

The Kenyan economy is one of the largest in Eastern and Central Africa. The economy has vibrant sectors, such as financial services and agribusiness, that distinguish it in the region.⁷⁰ Kenya was ranked 56th globally in the Ease of Doing Business Report of 2020, with an impressive doing-business (DB) score of 73.2, up from 71.0 in 2019.⁷¹ Despite the Covid-19 pandemic, the Kenyan economy has remained resilient, and in 2021 it

⁶² Special Economic Zones Act No. 16 of 2015, s 4(6).

⁶³ An FTZ is a special economic zone customs-controlled area where goods are off-loaded for transshipment or storage, and may include bulk breaking, repacking, sorting, mixing, trading or other forms of handling, excluding manufacturing and processing.

⁶⁴ An IP is a special economic zone with integrated infrastructure to facilitate the needs of manufacturing and processing industries.

⁶⁵ See part 2.2.1 above.

⁶⁶ An ICT park is a special economic zone established to facilitate the information communication technology sector, its services and associated activities.

⁶⁷ An agricultural zone is a special economic zone established to facilitate the agricultural sector, its services and associated activities.

⁶⁸ UNCTAD (2019) 45.

⁶⁹ UNCTAD (2022) 9.

⁷⁰ World Bank Group *Country Private Sector Diagnostic (CPSD) for Kenya – Creating Markets in Kenya: Unleashing Private Sector Dynamism to Achieve Full Potential* (2019) 36.

⁷¹ World Bank Group *Economy Profile Kenya: Ease of Doing Business 2020* (2020) 4.

boasted a dominant real GDP of 7.5 per cent in the East Africa region.⁷² In the same year, the country's economy grew by 6.7 per cent, compared to 6.4 per cent in 2020.⁷³ The continued economic growth has been supported by macroeconomic stability, public and private investments and modernised public infrastructure.⁷⁴ Notwithstanding its impressive economic growth, the country is yet to improve its FDI inflows and boost export diversification.⁷⁵ Therefore, the SEZs programme is seen as a policy tool to increase FDI inflows and export diversification.

2.5.2. Significance of special economic zones to Kenya's economic development

Kenya's Vision 2030 sets out national development goals. Some of the envisaged goals are industrialisation, job creation, and improving the living standards of Kenyans.⁷⁶ The role of the SEZs in accelerating Kenya's development goals is key to this development agenda.⁷⁷ The subsequent implementation of Kenya's SEZs programme has boosted FDI inflow significantly, enhanced trade, and created jobs.⁷⁸ As of 2018, there were seven SEZs, three ongoing projects and 95 companies operating in them.⁷⁹ An investment of \$160 million, accounting for 10 per cent of Kenya's total FDIs, was made into the SEZs.⁸⁰ FDI inflows into SEZs were made in key sectors such as manufacturing and chemicals, in which the SEZs specialise.

In addition, in the financial year 2017–2018 there was a total of \$369 million SEZs exports.⁸¹ By the end of 2018, the SEZs were able to generate about 44,000 employment opportunities.⁸² In the light of the foregoing, SEZs have made a significant contribution to

⁷² World Bank Group *Kenya Economic Update – Aiming High: Securing Education to Sustain the Recovery* (2022) 3.

⁷³ African Development Bank 'Kenya Economic Outlook' (2022) <https://www.afdb.org/en/countries-east-africa-kenya/kenya-economic-outlook> (accessed 27 March 2022).

⁷⁴ The National Treasury and Planning *The Kenyan Economy, Quarterly Economic and Budgetary Review* (2022) 3.

⁷⁵ UNCTAD *World Investment Report 2022 – International Tax Reforms and Sustainable* (2022) 211.

⁷⁶ The Republic of Kenya 'Kenya Vision 2030' (2007) 10.

⁷⁷ The Republic of Kenya (2007) 16.

⁷⁸ UNCTAD (2019) 37.

⁷⁹ African Economic Zones Organization (AEZO) *African Economic Zones Outlook* (2018) 3.

⁸⁰ AEZO (2018) 9.

⁸¹ AEZO *African Economic Zones Outlook* (2021) 14.

⁸² AEZO (2021) 14.

the growth of the Kenyan economy and realisation of the Vision 2030 development agenda.

2.6. FOREIGN DIRECT INVESTMENT IN KENYA

2.6.1. Definition of foreign direct investment

There are different definitions of FDIs. According to Sornarajah, foreign investment involves the transfer of tangible or intangible assets from one country into another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets.⁸³ Such investment can be operated directly as foreign direct investment or indirectly as portfolio investment. For that reason, FDI involves the control and long-term interest of the investor in the host nation (investment recipient country), while portfolio investment involves movement of money for the purpose of buying shares, bonds or other instruments in a company formed or functioning in another country.⁸⁴

The International Monetary Fund (IMF) defines FDI as an investment made to acquire a lasting interest in an enterprise operating in an economy other than that of an investor, the investor's purpose being to have effective choice in the management of the enterprise.⁸⁵ In this regard, the investor should exercise substantial control in the management and have more than 10 per cent of the voting power in the foreign enterprise for it to qualify as FDI.⁸⁶

The definition by Sornarajah is adopted in this mini-thesis, as it seeks to examine the impact of the transfer of tangible and intangible assets from other countries on both Kenya's SEZs and economy.

⁸³ Sornarajah M *Resistance and Change in the International Law on Foreign Investment* (2015) 8.

⁸⁴ Boghean C & Mihaela S 'The Relation Between Foreign Direct Investments (FDI) and Labour Productivity in the European Union Countries' (2015) 32 *Procedia Economics and Finance* 279.

⁸⁵ International Monetary Fund (IMF) *Balance of Payments and International Investment Position Manual* 6 (1980) 101.

⁸⁶ IMF (1980) 101.

2.6.2. Foreign direct investment theories

The nexus between FDIs and their impact on the country's economy is explained by three economic theories, namely the classic theory, the dependency theory, and the middle path theory.⁸⁷

According to the classic theory, foreign investment is wholly beneficial to the host state.⁸⁸ The theory is based on the notion that a foreign investor brings foreign capital and new technology, creates employment, and builds infrastructure that benefits the host state.⁸⁹ However, although foreign investment has some rewards for developing countries, it also has deleterious effects such as environmental degradation.⁹⁰ Related to the classical theory is the neoclassical theory. The latter is based on the theory that capital flows from developed countries to developing and least developed countries (LDCs) through multinational corporations (MNCs).⁹¹ The theory argues that with this continued flow of capital, developing countries and LDCs will be able to reach the development levels of the developed countries.⁹²

The dependency theory is premised on the finding that foreign investment hardly contributes to the economic development of the host state.⁹³ It states that most investment in the host state is made by MNCs that serve the interests of their parent companies in their countries of origin. Host states therefore benefit only negligibly from such investments because the MNCs largely repatriate the realised profits.⁹⁴ Also, within the host state, foreign investors often form alliances with political elites who provide favourable conditions to the operations of the MNCs, for example by enacting favourable legislation.⁹⁵ Foreign capital in this case ends up benefiting the elite. According to the

⁸⁷ Toone JE 'Mirage in the Gulf? Examining the Upsurge in FDI in the GCC and its Legal and Economic Implications for the MENA Region' (2012) 26 *Emory International Law Review* 713.

⁸⁸ Sornarajah M *The International Law on Foreign Investments* (2010) 48.

⁸⁹ Todaro MP & Smith SC *Economic Development* (2003) 128.

⁹⁰ Sornarajah M (2010) 51.

⁹¹ Udo EA & Obiora IK 'Determinants of Foreign Direct Investment and Economic Growth in the West African Monetary Zone: A System Equations approach' (2006) *University of Ibadan Press* 6.

⁹² Udo EA & Obiora IK (2006) 7.

⁹³ Sornarajah M (2010) 53.

⁹⁴ ONeal JR & ONeal FH 'Hegemony, Imperialism, and the Profitability of Foreign Investments' (1988) *International Organisation* 42.

⁹⁵ Sornarajah M (2010) 53.

proponents of dependency theory, MNCs end up controlling the economy of the host state due to their influence, and as a result such economies become untenable.⁹⁶ Essentially, dependency theorists see economic development not in terms of flow of resources to the host state but as involving the meaningful distribution of wealth to the people of the state.⁹⁷ In terms of this view, there cannot be development unless the people are freed from poverty and exploitation. The dependency theory will be key in this mini-thesis in assessing the impact of FDIs on the inclusive development of SEZs workers.

The final theory is the middle path theory. In terms of this theory, foreign investments may deliver both benefits and harm to the economic development of the host state.⁹⁸ It merges the ideas of both the classic and the dependency theories, and propounds that even though foreign investments contribute to the economic development of the host state, they are also associated with adverse effects.⁹⁹ It thus adopts the position that foreign investment should be harnessed with the objective of economic development and must be carefully regulated to achieve this.¹⁰⁰ In this regard, government interventions through regulations and openness are desirable.¹⁰¹ In the mini-thesis, the middle path theory will help demonstrate both the significance of SEZs in Kenya and the role of labour rights in attracting sustainable FDI.

2.6.3. Determinants of foreign direct investment

According to Dunning and Lundan, there are four major types of FDI, namely efficiency-seeking FDI, natural-resources-seeking FDI, market-seeking FDI, and strategic-asset-seeking FDI.¹⁰² The authors explain that FDI is determined by three sets of advantages, namely location, ownership-specific advantages, and internationalisation advantages.¹⁰³ The location advantage is associated with the offers such as labour, incentives and

⁹⁶ Udo EA & Obiora IK (2006) 11.

⁹⁷ Asongu S et al 'Determinants of Foreign Direct Investment in Fast-Growing Economies: Evidence From the BRICS and MINT Countries' (2018) *Financial Innovation* 4.

⁹⁸ Sornarajah M (2010) 56.

⁹⁹ Sornarajah M (2010) 56.

¹⁰⁰ Toone JE 715.

¹⁰¹ Sornarajah M (2010) 56.

¹⁰² Dunning JH & Lundan MS *Multinational Enterprises and the Global Economy* 2 ed (2008) 67.

¹⁰³ Dunning JH & Lundan MS (2008) 131.

market size that host states provide to investors.¹⁰⁴ The location advantage is key in influencing MNCs to relocate from the countries of origin to host states. It will be crucial in this mini-thesis when assessing whether FDIs are attracted to Kenya's SEZs due to the nature of the legal framework for labour regulation. Ownership-specific advantage is associated with the dominant advantages such as capital and technology that the MNC has over other companies.¹⁰⁵ The internationalisation advantage is based on how MNCs are involved in FDI activities in order to gain control in the global markets.¹⁰⁶

Based on these advantages, the determinant factors that influence the location of efficiency-seeking FDI include the cost of production, cost and quality of labour, and infrastructure in the host state.¹⁰⁷ In case of natural-resource-seeking FDI, the cost and quality of the natural resources informs relocation to the host state.¹⁰⁸ The size of the market, cost of labour, infrastructure and the macroeconomic policy inform the location of market-seeking FDI.¹⁰⁹ The location of strategic asset-seeking FDI is influenced by the type of technology and management skills that are available.¹¹⁰

The foregoing FDI categorisation by Dunning and Lundan has faced criticism due to its inability to provide a theoretical justification for the influencing factors.¹¹¹ However, the concept of efficiency-seeking FDI will be informative in this mini-thesis in its examination of the nexus between SEZs FDIs and labour rights in Kenya.

¹⁰⁴ Amal M, Raboch H & Tomio BT 'Strategies and Determinants of Foreign Direct Investment (FDI) from Developing Countries: Case Study of Latin America' (2009) 10 *Latin American Business Review* 78.

¹⁰⁵ Dunning JH & Lundan MS (2008) 131.

¹⁰⁶ Dunning JH & Lundan MS (2008) 140.

¹⁰⁷ Kok R & Ersoy AB 'Analyses of FDI Determinants in Developing Countries' (2009) 36 *International Journal of Social Economics* 106.

¹⁰⁸ Masipa TS 'The Relationship between Foreign Direct Investment and Economic Growth in South Africa: Vector Error Correction Analysis' (2018) 18 *Acta Commercii Journal* 3.

¹⁰⁹ Kok R & Ersoy BA (2009) 106.

¹¹⁰ Masipa TS (2018) 3.

¹¹¹ Singh H & Jun KW *Some New Evidence on Determinants of Foreign Direct Investment in Developing Countries* (1995) 1531 World Bank Policy Research Working Paper 3.

At the country-level, the inflow of FDIs is influenced by a variety of factors such as macroeconomic stability, trade barriers, ease of doing business, labour costs, and tax rates.¹¹²

2.6.4. Relationship between FDI and economic growth

Given a conducive investment climate, there is a positive correlation between FDI and economic growth. Although there is no general consensus on the impact of this correlation, proponents of the growth theory identifies factors such as technological advancement and efficiency in production as key drivers of economic growth.¹¹³ In this regard, FDI contributes to the economic growth of a given country by, for instance, acting as a conduit for technology transfer from developed to developing countries through contagion effects.

The contagion effect, as propounded by Findlay and often referred to 'knowledge diffusion or spill-over efficiency', usually impacts on the host country's economy.¹¹⁴ For instance, a domestic company can improve its efficiency in production by adopting an advanced technology employed by a foreign company or MNC affiliate in its country.¹¹⁵ Also, spill-over can happen when, due to the competition foreign companies bring into the domestic market, local companies are forced to improve their production by using their existing technology and resources more efficiently.¹¹⁶

Lall has identified 'linkages' between foreign companies and local suppliers and consumers as another substantial form of spill-over.¹¹⁷ He identified certain forms of relationships between foreign companies, local suppliers and consumers that can bolster the efficiency and productivity of local companies. For instance, supporting local suppliers

¹¹² De Mello R 'Foreign Direct Investment in Developing Countries and Growth: A Selective Survey' (1997) 34 *The Journal of Development Studies* 5.

¹¹³ Lim EG *Determinants of, and the Relation Between, Foreign Direct Investment and Growth: A Summary of the Recent Literature* (2001) IMF Working Paper 3.

¹¹⁴ Findlay R 'Relative Backwardness, Direct Foreign Investment, and the Transfer of Technology: A Simple Dynamic Model' (1978) 92 *Quarterly Journal of Economics* 8.

¹¹⁵ Lim EG (2001) 3.

¹¹⁶ Lim EG (2001) 3.

¹¹⁷ Lall S 'Vertical Inter-firm Linkages in LDCs: An Empirical Study' (1980) 42 *Oxford Bulletin of Economics and Statistics* 206.

to set up production facilities through technical assistance would help them improve their production efficiency.¹¹⁸ In view of the foregoing, the mini-thesis seeks to examine FDIs' impact on SEZs' workers in Kenya and the issue of whether such investments are sustainable.

2.7. LEGAL FRAMEWORK REGULATING FDI IN SEZs IN KENYA

Kenya's foreign investments legal regime has evolved and undergone reforms since independence. The country has enacted legislation aimed at streamlining, promoting and retaining foreign investments within its SEZs. The mini-thesis, under specific thematic areas, discusses relevant legal provisions relating to the scope of study.

2.7.1. Entry rules for foreign investors

The legal framework regulating investment in Kenya does not subject foreign investors to a mandatory screening prior to their investment. However, sector-specific legislation aims to protect public interests and facilitate local ownership in foreign companies. For a foreign investor's company to operate in Kenya, it must be registered and operate in accordance with the Companies Act (CA).¹¹⁹ The CA is the principal legislation governing the incorporation, registration, operation and regulation of companies in Kenya.¹²⁰ Section 975 of the CA sets out the criteria for registration of a foreign company, which include lodging an application for registration with the Registrar. To encourage foreign investments, in 2016 the Kenyan legislature, through the Finance Act, amended section 975(2)(b) of the CA that required 30 per cent local ownership of foreign companies' share capital, thus allowing such companies to be 100 per cent foreign-owned.¹²¹

In addition, in 2004, the Kenyan legislature enacted the Investment Promotion Act (IPA), with the objective of promoting and facilitating investment by stipulating licensing criteria and providing investment incentives.¹²² The IPA stipulates that an investment certificate will only be issued to a foreign investor who commits at least \$100,000 as the investment

¹¹⁸ Lall S (1980) 215.

¹¹⁹ Companies Act No. 17 of 2015, s 974.

¹²⁰ Companies Act No. 17 of 2015, s 2.

¹²¹ Finance Act No. 38 of 2016, s 85.

¹²² Investment Promotion Act No. 6 of 2004, s 4(3).

amount and that such investment should be lawful and beneficial to Kenya.¹²³ In determining whether the investment is beneficial to Kenya, the investment must, along with other requirements, contribute to the creation of employment, the transfer of skills or technology to Kenyans, or the generation of revenue for the government.¹²⁴ With regard to property ownership, article 65 of the Constitution of Kenya provides that non-citizens may hold leasehold interests over land only for a period of up to 99 years.¹²⁵

In the communication sector, the Information and Communication Technology (ICT) Policy guidelines provide that foreign companies must have at least 30 per cent of local ownership for them to be licensed to operate ICT services.¹²⁶

In addition to the above sector-specific regulations, the National Construction Authority (NCA) Act imposes local-content requirements on foreign investors.¹²⁷ The NCA Regulations define a foreign contractor as a company incorporated outside of Kenya or with 51 per cent ownership by non-Kenyan citizens.¹²⁸ For such a foreign company to operate in Kenya, it must enter into sub-contracts or joint ventures so that 30 per cent of the contract work is done by local companies, and skills must be transferred to locals.¹²⁹ In the insurance sector, foreign capital investment in the insurance companies is limited to two-thirds,¹³⁰ with no individual shareholder owning more than 25 per cent of the share capital.¹³¹

2.7.2. Investment incentives

The Kenyan legislature enacted the Foreign Investment Protection Act (FIPA) in order to protect the interests of approved foreign investments.¹³² In this regard, a foreign investor intending to invest in Kenya is required to make an application to the cabinet secretary

¹²³ Investment Promotion Act No. 6 of 2004, s 4(1).

¹²⁴ Investment Promotion Act No. 6 of 2004, s 4(2).

¹²⁵ Constitution of Kenya 2010, art 65(1).

¹²⁶ The National Information and Communication Technology Policy Guidelines of 2020, guideline 6.2.4.

¹²⁷ National Construction Authority Act No. 41 of 2011 s 18(5).

¹²⁸ National Construction Authority Regulations of 2014, reg 2.

¹²⁹ National Construction Authority Regulations of 2014, reg 16(1).

¹³⁰ Insurance Act No. 11 of 2014, s 22(b).

¹³¹ Insurance Act No. 11 of 2014, s 23(4A)(a).

¹³² Foreign Investment Protection Act No. 35 of 1964, s 3.

responsible for the finance ministry for a certificate of approval to operate an enterprise.¹³³ Pursuant to section 5 of the Stamp Duty Act, a stamp duty is required to be levied on such instruments of application.¹³⁴ However, in accordance with section 62 of the Finance Act, foreign investors applying for licences to invest in the SEZs are exempt from the payment of stamp duty when executing instruments relating to SEZ business activities, including registration.¹³⁵

Section 15 of the IPA also establishes the Kenya Investment Authority (KenInvest), with the primary objective of promoting and facilitating investments in Kenya. The IPA stipulates that KenInvest shall promote and facilitate investment through, in particular, the issuance of investment certificates.¹³⁶ The investment certificate issued in terms of the IPA accords an investor a number of benefits, such as assistance in obtaining entry permits for expatriates.¹³⁷ Furthermore, section 26 of the IPA establishes the National Investment Council (NIC). The NIC has been tasked to advise the government and its agencies on ways of increasing investment and economic growth in the country. This includes proposing investment incentives.¹³⁸

The Income Tax Act requires companies operating in Kenya to pay a corporation tax on the profits earned from their businesses that are deemed to have accrued in or been derived from Kenya.¹³⁹ The corporation tax is capped at 30 per cent of the profits earned by resident companies and 37.5 per cent of the profits earned by foreign companies.¹⁴⁰ However, companies setting up in the SEZs are required to pay a corporation tax of 10 per cent of their earned profits only during the first 10 years of operation.¹⁴¹ Thereafter, SEZs companies are required to pay 15 per cent and 30 per cent of profits earned as corporation tax for the following 10 and 15 years, respectively.¹⁴²

¹³³ Foreign Investment Protection Act No. 35 of 1964, s 3(1).

¹³⁴ Stamp Duty Act No. 31 of 1958, s 5.

¹³⁵ Finance Act No. 10 of 2018, s 62.

¹³⁶ Investment Promotion Act No. 6 of 2004, s 15(2).

¹³⁷ Investment Promotion Act No. 6 of 2004, s 12.

¹³⁸ Investment Promotion Act No. 6 of 2004, s 27(2)(a).

¹³⁹ Income Tax Act No. 16 of 1973 (cap 470), s 4.

¹⁴⁰ Income Tax Act No. 16 of 1973 (cap 470), Third Schedule, head B, para 2.

¹⁴¹ Income Tax Act No. 16 of 1973 (cap 470), Third Schedule, head B, para 2.

¹⁴² Income Tax Act No. 16 of 1973 (cap 470). Third Schedule, head B, para 2(h).

In accordance with the Value Added Tax Act, value-added tax (VAT) is chargeable on the importation of taxable goods and the supply of imported taxable services in Kenya.¹⁴³ Pursuant to the SEZs Act, such goods and services are considered as having been imported and exported into Kenya when brought into or out of SEZs, and hence qualify for VAT.¹⁴⁴ However, in terms of the VAT Act, such goods and supplies are zero-rated for VAT purposes.¹⁴⁵

2.7.3. Rights of foreign investors

The FIPA guarantees foreign investors in Kenya the right to capital and profit repatriation.¹⁴⁶ In particular, foreign investors within SEZs enjoy the right to fully repatriate all their capital and profits without foreign exchange impediments.¹⁴⁷ Such provision for repatriation of capital and profits boosts investment inflow into Kenya.

In addition, the Constitution of Kenya provides for the protection of the right to property. In terms of its article 40, every person has a right to acquire and own property and shall not be arbitrarily deprived of such right.¹⁴⁸ Subsequently, approved investment enterprises are guaranteed this right in accordance with section 7 of the FIPA, while the SEZs Act specifically entitles SEZs investors full protection of their property rights.¹⁴⁹

Furthermore, the SEZs Act guarantees SEZs investors the right to protection of their industrial and intellectual property rights. In particular, the SEZs Act provides for the protection of patents, copyrights, industrial designs and trademarks.¹⁵⁰

2.7.4. Public-private partnerships

The Public Private Partnerships Act (PPP) was enacted primarily to facilitate the involvement of the private sector in the delivery of public projects.¹⁵¹ The participation of

¹⁴³ Value Added Tax Act No. 35 of 2013, s 5(1).

¹⁴⁴ Special Economic Zones Act No. 16 of 2015, s 6.

¹⁴⁵ Value Added Tax Act No. 35 of 2013, Second Schedule, part A, para 12.

¹⁴⁶ Foreign Investment Protection Act No. 35 of 1964, s 7.

¹⁴⁷ Special Economic Zones Act No. 16 of 2015, s 34(b).

¹⁴⁸ Constitution of Kenya 2010, art 40.

¹⁴⁹ Special Economic Zones Act No. 16 of 2015, s 34(a).

¹⁵⁰ Special Economic Zones Act No. 16 of 2015, s 34(c).

¹⁵¹ Public Private Partnerships Act No. 14 of 2021 s 3.

the private sector in PPPs is through financing, construction, development, operation or maintenance of infrastructure or development projects.¹⁵² A private party, in terms of the PPP Act, includes both domestic and foreign investors.¹⁵³ The PPP Act, in accordance with section 6, establishes the Public Private Partnership Committee. The committee is responsible for, among other functions, formulation of policies on public-private partnerships, overseeing implementation of public-private partnership contracts, and approving privately initiated projects.¹⁵⁴ As a result of the PPP framework, some SEZs such as the Pearl River SEZ have been developed through a joint venture of the Kenyan government with African Economic Zones Ltd.¹⁵⁵

To secure investor confidence, the PPP Act makes provision for government support measures for a PPP. Some of these support measures include a binding undertaking, a letter of support, a letter of credit, and a credit guarantee, whether partial or full.¹⁵⁶ Various projects have been undertaken under this model in Kenya, including the 35MW Menengai Phase I and the Lamu seaport.¹⁵⁷

2.7.5. Labour regulation

The Employment Act (EA) is the principal legislation regulating labour rights in Kenya, and it applies to all sectors subject to the enshrined exceptions.¹⁵⁸ There is no specific definition of labour rights or definitive list of labour rights.¹⁵⁹ However, as used in this mini-thesis, there are two categories of labour rights, namely collective labour rights and individual labour rights.¹⁶⁰ Collective labour rights are legal rights that govern the

¹⁵² Public Private Partnerships Act No. 14 of 2021 s 3(a).

¹⁵³ Public Private Partnerships Act No. 14 of 2021 s 2.

¹⁵⁴ Public Private Partnerships Act No. 14 of 2021 s 8(1).

¹⁵⁵ UNCTAD (2019) 155.

¹⁵⁶ Public Private Partnerships Act No. 14 of 2021 s 28(1).

¹⁵⁷ Republic of Kenya, Public Private Partnership Unit <http://portal.pppunit.go.ke> (accessed 19 December 2022).

¹⁵⁸ Employment Act No. 11 of 2007, s 3.

¹⁵⁹ United States of America Department of Labor 'What are Workers' Rights?' (2023) <https://www.dol.gov/agencies/ilab/our-work/workers-rights> (accessed 20 July 2023). Also, the ILO *Declaration on Fundamental Principles and Rights at Work and Its Follow-up* (1992) art 2, identifies fundamental principles and rights at work that all ILO member states are required to respect and promote. The fundamental principles and rights form part of labour rights to be discussed herein.

¹⁶⁰ Clarke S 'Individual and Collective Regulation of Labour Relations' (2004) *Centre for Comparative Labour Studies, University of Warwick* 1.

relationship between trade unions and employers' associations, while individual labour rights are legal rights that govern the relationship between employees at work and their employers as established in their employment contract.¹⁶¹

The EA does not restrict application of either collective or individual labour rights in the SEZs.¹⁶² However, even though the EA does not restrict application of either collective or individual labour rights in the SEZs, the mini-thesis seeks to examine the extent to which such rights are enforced within Kenya's SEZs. In addition, since the SEZs Act is sector-specific legislation, the Act does not provide for labour rights in the SEZs. Although Kenya's draft Supplementary Special Economic Zones Regulations seek to solidify the relationship between SEZs and labour rights in the country, the Regulations are yet to come into force.¹⁶³ The missing link between SEZs investments and labour regulation will be discussed further in the next chapter to ascertain the sustainability of the SEZs' FDIs in Kenya and the impact on workers.

2.7.6. Dispute resolution

The Constitution of Kenya establishes an independent judiciary pursuant to article 160, with the mandate to exercise judicial authority in accordance with the Constitution.¹⁶⁴ In terms of article 165(3)(a) of the Constitution, the High Court of Kenya has unlimited original jurisdiction to hear and determine civil matters, including economic and commercial disputes. Parties to an investment dispute can seek redress before the High Court, and they have an option to appeal where dissatisfied.¹⁶⁵

In addition to the court system, Kenya is a member of the International Centre for Settlement of Investment Disputes (ICSID) Convention¹⁶⁶ and the New York Convention

¹⁶¹ Cabrelli D *Employment Law: A Very Short Introduction* (2022) 98. Also, Novitz T 'Collective Labour Rights for Working People: The Legal Framework Established by the International Labour Organisation' in Paul S, McCrystal S & McGaughey E *The Cambridge Handbook of Labor in Competition Law* (2022) 12.

¹⁶² Employment Act No. 11 of 2007, s 3.

¹⁶³ Draft Supplemental Special Economic Zones Regulations of 2019, reg 26.

¹⁶⁴ Constitution of Kenya 2010, art 160(1).

¹⁶⁵ Constitution of Kenya 2010, art 165(3)(a).

¹⁶⁶ ICSID *List of Contracting States and Other Signatories of the Convention*, 2022 (ICSID/3).

on the Enforcement of Foreign Arbitral Awards.¹⁶⁷ The ICSID is an international arbitration institution established to hear and determine investment disputes between international investors and states.¹⁶⁸ The New York Convention applies to the recognition and enforcement of foreign arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought.¹⁶⁹ In this regard, aggrieved foreign investors may opt to use the internationally recognised dispute resolution mechanism at the ICSID, and seek recognition and enforcement of issued arbitral awards through the New York Convention. In *WalAm Energy LLC v The Republic of Kenya*, Kenya prevailed in an ICSID international arbitration matter, where the dispute involved the cancellation of a geothermal exploration licence issued to a US-Canadian geothermal company.¹⁷⁰

The Kenyan legislature enacted the Foreign Judgments (Reciprocal Enforcement) Act to give effect to enforcement of arbitral awards issued in countries outside Kenya. The Act also accords reciprocal treatment to judgments given in Kenya.¹⁷¹ Also, where disputes involve an SEZ developer, operator, or enterprise and an authority of the government, the SEZs Act provides that such a dispute be settled through negotiations and mutual agreement within 30 days.¹⁷² In case of failure to settle the foregoing dispute, parties can resort to arbitration in accordance with either the arbitration rules set forth by the United Nations Commission on International Trade Law (UNCITRAL), the International Chamber of Commerce in Paris, or the ICSID resolution mechanisms.¹⁷³ The alternative dispute resolution mechanisms provide fast-track avenues for dispute

¹⁶⁷ New York Arbitration Convention 'Contracting States' <https://www.newyorkconvention.org/countries> (accessed 5 May 2023)

¹⁶⁸ Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965, art 1(2).

¹⁶⁹ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, art 1 (1).

¹⁷⁰ *WalAm Energy LLC v The Republic of Kenya* ICSID Case No. ARB/15/7.

¹⁷¹ Foreign Judgments (Reciprocal Enforcement) Act No. 4 of 1984, s 3(1)(f).

¹⁷² Special Economic Zones Act No. 16 of 2015 s 37(1).

¹⁷³ Special Economic Zones Act No. 16 of 2015 s 37(2)(a).

resolution to investors, as compared to the Kenyan judicial system, which often faces challenges such as a backlog of cases that delay dispute resolution processes.¹⁷⁴

2.8. EVOLUTION OF FDI IN KENYA

2.8.1. Backdrop of the Kenyan FDI performance

Since independence, successive Kenyan governments have been keen on enacting socio-economic reforms aimed at growing the economy and attracting FDI. In the 1970s, Kenya was a prime investment destination in the East African region, with average FDI inflows amounting to \$10 million a year before topping \$80 million in 1980.¹⁷⁵ However, due to the convoluted policies and structural reforms of the 1980s, FDI inflows to Kenya declined to an average of \$22 million a year.¹⁷⁶

During the period 1990–2003, Kenya's FDI inflows averaged \$31.1 million, while those of Uganda and Tanzania surged to \$108.6 million and \$241.6 million, respectively.¹⁷⁷ The slump in FDI inflows to Kenya was attributed to weak institutional framework, the cost of doing business, low domestic investment, and corruption.¹⁷⁸

In an endeavour to boost FDI inflows, the Kenyan legislature undertook a number of legal reforms after 2004. As discussed above,¹⁷⁹ the legislature enacted investment legislation aimed at providing a favourable investment regime to investors in Kenya. Consequently, FDI inflows into Kenya in the period 2013–2021 averaged \$1,211.2 million,¹⁸⁰ lagging behind only Ethiopia, which was the then top FDI destination in the East Africa region.

The table below summarizes the foregoing findings.

¹⁷⁴ Mbote PK & Akech M 'Kenya Justice Sector and the Rule of the Law' (2011) *Open Society Foundations* 156.

¹⁷⁵ UNCTAD (2005) 4.

¹⁷⁶ UNCTAD (2005) 4.

¹⁷⁷ UNCTAD *World Investment Report 2022- International Tax Reforms and Sustainable* (2022) 211.

¹⁷⁸ Ateng' AB 'Constraints to Foreign Direct Investment Inflows to Kenya: Stakeholders' (2017) 5 *Perspective International Journal of Education and Research* 6.

¹⁷⁹ In part 2.7.

¹⁸⁰ UNCTAD (2022) 211.

Table 1: Total FDI inflows to the Eastern Africa region, 2013–2021 (\$ million)

Economy	2013	2014	2015	2016	2017	2018	2019	2020	2021	Average
Kenya	1978.4	1513.9	1463.7	1138.6	1403.6	1139.4	1098.4	716.8	448.1	1211.2
Tanzania	2087.3	1416.1	1560.8	864.0	937.7	971.6	1217.2	684.9	921.8	1184.6
Uganda	1096.0	1058.6	737.7	625.7	802.7	1055.4	1273.6	873.9	1142.2	962.9
Rwanda	257.6	458.9	379.8	342.3	356.4	381.9	353.8	274.1	211.9	335.2
Ethiopia	1343.9	1855.1	2626.5	4142.9	4017.1	3310.3	2548.8	2381.0	4259.4	2942.8

Source: UNCTAD, World Investment Report 2022

Against this backdrop, the government of Kenya has committed to diversifying its FDI inflows. One of the diversification strategies has been the enactment of the SEZs Act to enhance the investment climate in Kenya.

2.8.2. Significance of FDI in Kenya

FDI has contributed to capital accumulation and investment. In developing countries, it is regarded as a mechanism to accelerate development. In Kenya, FDI has often been considered a crucial factor to spur economic growth, due to the country's low domestic investment and budgetary deficits. The low domestic investments and budgetary deficits provide a platform upon which FDI can play a significant role as an extra source of capital and investment for the country.

FDI has contributed significantly to Kenya's capital and investment. Some notable contributions have taken place in the energy sector, which received foreign investments between 2010 and 2022 in initiatives such as the geothermal development projects at Ol Karia and Menengai Phase 1.¹⁸¹ Such forms of investment have improved Kenya's capital accumulation and supported financing its budget, thus enabling the government, to some extent, to meet critical needs such as health and infrastructure.¹⁸²

¹⁸¹ Republic of Kenya, Ministry of Industrialisation, Trade and Enterprise Development 'Nairobi Grabs Top Spot in FDI Destinations in Africa' (2016) <https://www.industrialization.go.ke/index.php/media-center/blog/375-nairobi-grabs-top-slot-in-fdi-destinations-in-africa> (accessed 20 December 2022).

¹⁸² Ocharo KN et al 'Private Capital Inflows and Economic Growth in Kenya' (2014) 3 *International Journal of Development and Sustainability* 824.

In addition to the above economic impact, FDI has also contributed to technology transfer from the foreign companies' countries of origin to host states. Often, the operations of foreign enterprises are accompanied by the use of sophisticated technology and efficient managerial skills and processes. For instance, Homegrown – currently known as Flamingo Horticulture Ltd¹⁸³ – introduced wireless data communication linking its production, cooling and packing facilities in Kenya with its European clients' specifications.¹⁸⁴ Relationships formed between foreign enterprises and local companies through technology contracts have facilitated technology transfer in Kenya.¹⁸⁵ Technology transfer has not only enhanced Kenya's industrialisation agenda, but also contributed to its overall economic growth.

2.9. THE RELATIONSHIP BETWEEN SEZs, FDIs AND KENYA'S INVESTMENT CLIMATE

The success of the SEZs programme can be determined by different factors. Apart from the investment climate, incentive framework and the quality of SEZ design, Farole notes that other factors, including macroeconomic policies, market size, wages and productivity, affect SEZs' FDI performance.¹⁸⁶ The investment climate is usually described by the ease of operating a business in a given place. The ease of doing business is further determined by risks, opportunities, transaction costs, and the interaction of legislation and its enforcement.¹⁸⁷ Thus, the nature of the investment climate informs investment decisions by investors. Also, the investment climate determines export outcomes, either through their impact on the local companies or by the way they influence FDI inflows into the country.¹⁸⁸ In an export-oriented market economy like Kenya's, FDI plays a seminal role in accelerating export activities, thus establishing a strong, interdependent relationship between the investment climate, FDI and SEZs.

¹⁸³ A foreign enterprise which is Kenya's leading producer of flowers and vegetables.

¹⁸⁴ Africa Outlook 'Flamingo Horticulture' <https://www.africaoutlookmag.com/company-profiles/800-flamingo-horticulture> (accessed 20 December 2022).

¹⁸⁵ UNCTAD *Africa's Technology Gap* (2003) 23.

¹⁸⁶ Farole T (2011) 111.

¹⁸⁷ Farole T (2011) 113.

¹⁸⁸ Farole T (2011) 113.

2.9.1. Significance of SEZs' FDI to economic development in Kenya

Kenya's SEZs have significantly boosted FDI inflow, enhanced trade and created jobs, thus contributing to economic development.¹⁸⁹ By the end of 2019, UNCTAD data indicated that a capital investment of \$160 million had been made into Kenya's SEZs.¹⁹⁰ The received amount accounted for 10 per cent of total FDIs and 16.2 per cent of Kenya's GDP.¹⁹¹ The capital investment targeted diverse sectors, including manufacturing, petrochemicals and real estate within the SEZs.¹⁹²

In 2019–2020, there were a total of \$650 million diversified SEZs exports, which accounted for 10 per cent of the total exports from Kenya.¹⁹³ The increased investments in diverse sectors in Kenya contributed to export diversification, which is one of the objectives for the establishment of SEZs.

In addition, by the end of 2019, the SEZs created about 60,000 jobs, accounting for 4 per cent of national industrial employment.¹⁹⁴ One of the objectives of setting up SEZs is to create jobs in order to help in reducing the high unemployment rate in the country.¹⁹⁵

2.10. SUSTAINABILITY OF KENYA'S SEZs INVESTMENTS

SEZs' contribution to sustainable development in Kenya is determined by their economic, social and environmental impact.¹⁹⁶ The combined economic impact of Kenya's SEZs, measured against their impact on the environment and the dynamic benefits to workers, local communities and country at large, paints a picture of the sustainability of the SEZs. In this regard, the sustainable dimension of SEZs investments is determined by economic and socio-economic factors. Economic sustainability involves the commercial and financial viability of the SEZs, while socio-economic factors relate to inclusive

¹⁸⁹ AEZO (2018) 3.

¹⁹⁰ AEZO (2018) 9.

¹⁹¹ UNCTAD (2019) 182.

¹⁹² AEZO (2018) 9.

¹⁹³ UNCTAD (2019) 146; 150.

¹⁹⁴ United Nations Conference on Trade and Development *Handbook on Special Economic Zones in Africa* (2021) 45.

¹⁹⁵ See part 2.4.1 above.

¹⁹⁶ UNCTAD (2019) 178.

development.¹⁹⁷ Therefore, Kenya's SEZs should both promote sustainable investments and ensure inclusive development.¹⁹⁸

In the light of the foregoing, labour conditions in the SEZs have faced severe criticism both locally and internationally. An ILO report of 2017 pointed to labour rights violations within SEZs.¹⁹⁹ In particular, the report highlighted the prevalence of unsafe working conditions, low wages, and exploitation of women within SEZs in some countries.²⁰⁰

In Kenya, labour concerns have been predominant in SEZs. SEZs workers, civil society, activists and non-governmental organizations have complained about the harsh working conditions, low wages, lack of union representation, and harassment in the zones.²⁰¹ Even though the Constitution of Kenya grants SEZs workers the right to freedom of association and collective bargaining,²⁰² some SEZs workers have been barred from collective bargaining activities and even joining trade unions.²⁰³ In addition, some SEZs companies have been unable to provide basic health services to their workers.²⁰⁴

The foregoing instances, as further demonstrated herein,²⁰⁵ raise the question of whether Kenya allows a flexible legal framework in labour regulation as a locational advantage in order to attract FDIs in accordance with the middle path theory. In this regard, despite the SEZs' economic contribution in Kenya, they are yet to yield the more dynamic benefits expected by workers, local communities and the country as a whole.²⁰⁶ Therefore, Kenya's SEZs investment experience may elucidate the gap between economic significance and inclusive development.

¹⁹⁷ UNCTAD (2021) 202.

¹⁹⁸ UNCTAD (2021) 203.

¹⁹⁹ ILO *Promoting Decent Work and Protecting Fundamental Principles and Rights at Work in Export Processing Zones* (2017) 19.

²⁰⁰ ILO (2017) 24.

²⁰¹ Cotula L & Mouan L (2021) 356.

²⁰² Constitution of Kenya 2010, art 41(2) and 41(5).

²⁰³ Cotula L & Mouan L (2021) 356.

²⁰⁴ UNCTAD (2021) 186.

²⁰⁵ See part 3.6 below.

²⁰⁶ Laryea E, Ndonga D & Nyamori B (2020) 16.

2.11. CONCLUSION

In this chapter, it has been noted that SEZs have contributed to economic growth in Kenya by, in addition to other benefits, attracting FDIs, creating employment opportunities and diversifying the country's exports. Also, although the SEZs programme is yet to exploit its full productive capacity, it has boosted Kenya's investment climate significantly and contributed to the country's market-orientation strategy.

In addition, the chapter has noted that an effective legal framework is a critical element for FDI and SEZ development. Kenya has an elaborate legal infrastructure that not only governs and regulates investments but also codifies the SEZ programme. The chapter notes that, even though Kenya has an enabling investment and SEZ legal framework, it does not address key issues such as compliance with labour standards in the SEZs. Also, the legal framework does not provide for labour regulation, and nor are there specific regulations to deal with labour issues in the SEZs.

SEZs' FDIs have contributed to Kenya's economic growth by promoting capital investment, creating jobs, diversifying exports, and establishing linkages with the domestic economy. The chapter notes that, even though Kenya's SEZs programme has contributed to FDI attraction in the country, it faces criticism as to its sustainability. Although this will be discussed further in the next chapter, this chapter has highlighted how SEZs investments are yet to yield the expected dynamic benefits for workers. The question of inclusive development sets the stage for the next chapter, in which the place of labour rights in SEZs in ensuring sustainable FDI inflows and inclusive economic development in Kenya is examined.

CHAPTER THREE

THE ROLE OF LABOUR RIGHTS WITHIN SPECIAL ECONOMIC ZONES IN PROMOTING INCLUSIVE DEVELOPMENT IN KENYA

3.1. INTRODUCTION

The significance of SEZs in attracting sustainable FDI in Kenya was discussed in chapter two. This chapter turns to examine the role of labour rights in SEZs in promoting sustainable FDI inflows and inclusive development in Kenya. As such, the chapter begins by assessing the applicable labour law regimes in SEZs. It then analyses the legal framework governing labour rights in Kenya. A discussion of the relationship between labour regulation in Kenya's SEZs and the prevailing labour concerns then follows. The chapter ends by discussing the special regime in labour regulation in Kenya's SEZs. The ensuing discussion is fundamental in contributing not only to literature on the appropriate labour law regime in Kenya's SEZs, but also in evaluating the significance of labour rights in SEZs in ensuring sustainable and inclusive development in Kenya.

3.2. EVOLUTION OF LABOUR REGULATION IN KENYA

The evolution of labour law in Kenya is categorised into three phases: namely, the colonial, post-colonial, and post-2010 constitutional dispensation period. These phases are discussed below.

Kenya was colonised by Great Britain between 1901 and 1960. During that period, all English law became part of Kenyan law.²⁰⁷ Effectively, England's Employment and Workmen's Act of 1875 became the primary legislation regulating the terms and conditions of employment in Kenya.²⁰⁸ To ensure an adequate supply of cheap labour to British settlers in Kenya, the Master and Servant Ordinance was enacted in 1906.²⁰⁹ In terms of the 1906 ordinance, servants were given little protection when compared to

²⁰⁷ In terms of the East African Order in Council 1897.

²⁰⁸ Kenya Human Rights Commission (KHRC) *Labour Rights Legal Framework in Kenya* (2019) 2.

²⁰⁹ Anderson MD 'Master and Servant Ordinance in Colonial Kenya 1895–1939' (2000) 41 *The Journal of African History* 461.

masters, whose rights were fully enforced.²¹⁰ Due to deteriorating labour conditions for the African workers, in 1925 workers were forced to organise and agitate for their rights. Such organisation led to the formation of the Labour Trade Union of Kenya in 1935.²¹¹

Although the colonial government stifled the formation of trade unions, the continued agitation and the ILO Declaration of Philadelphia²¹² concerning the purpose of trade unions and the necessity of the freedom of association bolstered the spirit of such unions.²¹³ As a result, the Industrial Relations Charter was signed in 1962 between the government of Kenya, the Federation of Kenya Employers, and the Kenya Federation of Labour.²¹⁴ The Industrial Relations Charter spelt out the responsibilities of the employer associations and trade unions in the field of industrial relations.²¹⁵ Furthermore, in 1964, the Industrial Court was established, *vide* enactment of the Trade Dispute Act, to resolve labour-related disputes.²¹⁶ During this period, the protection of African workers' rights was not prominent in the country.

During the post-colonial period, legislation aimed at protecting the welfare of workers and regulating the labour market was enacted. Labour legislation, including the Employment Act (cap.226), the Regulation of Wages and Conditions of Employment Act (cap.229) and Trade Unions Act (233), was enacted. However, according to the Kenya Human Rights Commission (KHRC), this legislation had a colonial heritage, having borrowed heavily from English legislation, and was unsuitable for the Kenyan labour sector.²¹⁷ Also, the legislation did not regulate the informal economy, and there was duplication and overlap with other legislation.²¹⁸

²¹⁰ Anderson MD (2000) 462.

²¹¹ Patel Z *Unquiet: The Life and Times of Makhan Singh* (2006) 58–59.

²¹² Declaration Concerning the aims and purposes of the International Labour Organisation, 1944.

²¹³ Home R 'Colonial Township Law and Urban Governance in Kenya' (2012) 56 *Journal of African Law* 179.

²¹⁴ Chepkuto P, Kipsang S & Chemirmir M 'Labour Law and Regulatory Practices in Kenya: An Analysis of the Trends and Dynamics' (2015) *International Journal of Management Business* 2.

²¹⁵ The Industrial Relations Charter of Kenya (1962) art 1.

²¹⁶ Trade Disputes Act No. 9 of 1964 (repealed).

²¹⁷ Kenya Human Rights Commission (KHRC) *Labour Rights Legal Framework in Kenya* (2019) 3.

²¹⁸ KHRC (2019) 3.

Consequently, these deficiencies in the post-colonial labour law, coupled with other labour issues including unsafe working conditions, led to the formation of a taskforce to review labour law in 2001.²¹⁹ The taskforce came up with five pieces of draft legislation aimed at repealing the old labour legislation. The drafts were for the Employment Act, Labour Institutions Act, Labour Relations Act, Work Injury Benefits Act, and the Occupational Safety and Health Act.²²⁰ All of this legislation was enacted by 2007, and collectively redefined the labour regulation regime in Kenya through protecting workers' rights in four ways.

First, the legislation forbade all forms of discrimination in the labour market by ensuring that workers were entitled to basic rights in their employment relationships.²²¹ Secondly, the government was given latitude in regulating employment relationships to prevent the exploitation of workers by their employers.²²² Thirdly, trade unions were empowered to represent workers collectively and to protect specific union interests during negotiations with employers.²²³ Finally, the legislation made provision for social insurance against loss of income due to old age, disability, sickness, and the breadwinner's death.²²⁴ These labour law reforms demonstrate the need for government intervention in the labour market in order to protect workers' rights.²²⁵

The Constitution of Kenya of 2010 augmented the labour regulation regime in the country. As this chapter shows, the Constitution of Kenya provides for fair labour practices, fair remuneration and reasonable working conditions.²²⁶ In effect, the continued agitation for labour reforms by different stakeholders, including SEZs workers, led to the enactment of this legislation.²²⁷

²¹⁹ Ochieng JO & Waithaka KL 'Evolution of Labour Law in Kenya: Historical and Emerging Issues' (2019) 4(1) *International Journal of Law and Policy* 6.

²²⁰ ILO 'National Labour Profile: Kenya' https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158910/lang--en/index.htm (accessed 14 January 2023).

²²¹ Employment Act No.11 of 2007, s 5.

²²² Employment Act No.11 of 2007, part v.

²²³ Labour Relations Act No. 14 of 2007, s 8.

²²⁴ Employment Act No.11 of 2007, part III.

²²⁵ Botero JC et al 'The Regulation of Labour' (2004) *The Quarterly Journal of Economics* 1342.

²²⁶ Constitution of Kenya 2010 art 41(1) and (2).

²²⁷ KHRC (2019) 3.

3.3. LEGAL FRAMEWORK GOVERNING LABOUR RIGHTS IN KENYA

The legal framework regulating labour activities in Kenya applies to both the public and private sectors, as discussed below.

3.3.1. Constitution of Kenya

The Constitution of Kenya is the foundational law from which all other law emanates.²²⁸ The Constitution enshrines the rights and freedoms of workers, employers and trade unions.²²⁹ In this regard, it provides for labour rights that have enabled amplification of the legal framework for labour regulation in the country.

In accordance with article 30 of the Constitution, all acts of slavery, servitude and forced labour have been prohibited. The Constitution goes a step further to guarantee that these rights cannot be limited.²³⁰ Such protection is important for workers, especially those within the SEZs, in ensuring that, regardless of the government incentives offered to investors, workers must not be subjected to forced labour, or any act of slavery or servitude in their workplaces.

Article 27 of the Constitution provides for the right to equality and freedom from discrimination. It states that every person has a right to equal treatment, including the right to equal opportunities in economic and social spheres.²³¹ Also, the state is obligated not to discriminate either directly or indirectly against any person on any ground including race, sex, ethnic or social origin and colour.²³² The constitutional provisions on the right to equality and freedom from discrimination are integral to workplaces, especially SEZs, in ensuring that men and women are treated both equally and equitably.

Article 36 of the Constitution guarantees freedom of association, including the right to form, join or participate in the activities of an association of any kind. Freedom of

²²⁸ Constitution of Kenya 2010 art 2(1).

²²⁹ Constitution of Kenya 2010 art 41.

²³⁰ Constitution of Kenya 2010 art 25(b).

²³¹ Constitution of Kenya 2010 art 27(3).

²³² Constitution of Kenya 2010 art 27(4).

association is augmented by the provision on the right to assemble, to demonstrate, to picket, and to present petitions to public authorities, provided that this is done peaceably.²³³ Such freedom is crucial to workers, especially those working within SEZs, in ensuring that they can hold their employers accountable for their actions when the government seems not to, and that they can advocate for their rights where appropriate.

Article 41(1) of the Constitution provides for the right to fair labour practices.²³⁴ In terms of article 41(2), every worker has the right to fair remuneration and reasonable working conditions, to join or participate in the activities and programmes of a union, and to go on strike.²³⁵ Article 41(5) entitles every trade union, employers' organisation and employer the right to engage in collective bargaining. The Constitution further provides for the right to fair administrative action to be pursued in case of infringement of the aforementioned rights.²³⁶ These provisions establish the legal basis for ensuring decent employment conditions (good working conditions, wages, and equal treatment of women) and fair labour relations (freedom of association and collective bargaining) within SEZs.

To promote, protect and enhance labour rights in Kenya, the Constitution, in terms of article 162(2)(a), establishes the Employment and Labour Relations Court (ELRC). The ELRC is a specialised court mandated to hear and determine disputes arising out of employment and labour relations.²³⁷ The court provides an opportunity for SEZs workers to seek legal redress when their rights have been denied by their employers.²³⁸ The constitutional provisions on labour rights guarantee, protect and enhance the dignity of Kenyan workers. Such protection is crucial, especially to SEZs' workers, whose rights may be compromised by the Kenya government in order to attract FDIs.²³⁹

²³³ Constitution of Kenya 2010 art 37.

²³⁴ Constitution of Kenya 2010 art 41(1).

²³⁵ Constitution of Kenya 2010 art 41(2).

²³⁶ Constitution of Kenya 2010 art 43(1)(e).

²³⁷ Constitution of Kenya 2010 art 162(2)(a).

²³⁸ See part 3.6 below.

²³⁹ Discussed in part 3.6 below.

3.3.2. Employment Act

The aim of the Employment Act (EA) is to establish and regulate the relationship between employers and employees.²⁴⁰ The employer-employee relationship exists where an employer has work to be done and an employee has labour to offer for a wage.²⁴¹ The EA regulates this relationship by guaranteeing substantive rights, freedoms and applicable terms and conditions to ensure legal protection of the involved parties.²⁴² The EA has enshrined some basic general principles of employment, as discussed below.

3.3.2.1 Prohibition against forced labour

The EA defines forced labour as 'any work or service which is extracted from any person under the threat of any penalty, including the threat of a loss of rights or privileges, which is not offered voluntarily by the person doing the work or performing the service'.²⁴³ In terms of section 4, every person is prohibited from using, or assisting another person in recruiting, trafficking or using, forced labour. However, the EA provides exceptions where forced labour can be used, such as in work or service exacted by virtue of compulsory military service or for work of a purely military character.²⁴⁴ SEZs do not fall among the exemptions. As such, forced labour is prohibited within the zones. Thus, all work, including overtime work, in the SEZs should be undertaken in accordance with the aforementioned EA provisions in order to protect workers against exploitation.

3.3.2.2 Non-discrimination

In terms of section 5(1) of the EA, the CS responsible for labour matters, the labour officers and the ELRC are mandated to promote equality of opportunity in employment in order to eliminate discrimination. Section 5(2) of the EA also obligates an employer to eliminate all forms of discrimination in his or her employment policy and practice, and to strive to promote equal opportunity. In particular, the EA prohibits discrimination, either

²⁴⁰ Employment Act No. 11 of 2007 s 3.

²⁴¹ KHRC (2019) 6.

²⁴² Employment Act No.11 of 2007 part v.

²⁴³ Employment Act No. 11 of 2007 s 2.

²⁴⁴ Employment Act No. 11 of 2007 s 4(2)(a).

directly or indirectly, against an employee or prospective employee on, inter alia, grounds of race, colour, sex, and mental status or HIV status.²⁴⁵ This requirement applies to recruitment, training, promotion, terms and conditions of employment, termination of employment, or other matters arising out of the employment.²⁴⁶

However, the EA distinguishes discrimination from affirmative action, as well as from preferences inherent to a given job.²⁴⁷ Also, the EA obliges employers to pay their employees equal remuneration for work of equal value.²⁴⁸ SEZs companies are not exempt from the foregoing provisions. It is therefore worth investigating whether SEZs' workers are subjected to equal treatment in the course of their work.²⁴⁹

3.3.2.3 Prohibition of sexual harassment

In terms of section 6 of the EA, all acts of sexual harassment are prohibited. An employee is held to have been sexually harassed if his or her employer, or a representative of the employer or a co-worker, directly or indirectly requests the employee for sexual intercourse, sexual contact or any other forms of sexual activity that contain an implied or express promise of preferential treatment in employment, or threat of detrimental treatment in employment, or threat about the present or future employment status of the employee.²⁵⁰

In addition, the EA requires every employer who employs 20 or more employees to, after consulting with the employees or their representatives, issue a policy statement on sexual harassment.²⁵¹ The policy statement is required to contain a definition of sexual harassment in accordance with section 6(1) of the EA, a statement that every employee is entitled to employment that is free of sexual harassment, and a statement that the employer shall take steps to ensure that no employee is subjected to sexual

²⁴⁵ Employment Act No. 11 of 2007 s 5(3)(a).

²⁴⁶ Employment Act No.11 of 2007 s 5(3)(b).

²⁴⁷ Employment Act No. 11 of 2007 s 5(4).

²⁴⁸ Employment Act No.11 of 2007 s 5(5).

²⁴⁹ Discussed in part 3.6.5 below.

²⁵⁰ Employment Act No.11 of 2007 s 6(1)(a)(i).

²⁵¹ Employment Act No. 11 of 2007 s 6(2).

harassment.²⁵² In this regard, SEZs companies are supposed to prohibit any form of sexual harassment in the workplaces and to issue the requisite policy statement where there are more than 20 employees.

The principles above are crucial, not only in assessing the role of labour rights within Kenya's SEZs in the light of the emerging labour concerns, but also in evaluating the impact the rights have on inclusive development.

The EA provides for basic rights and duties in employment. Pursuant to section 27, an employer is mandated to regulate the working hours of each employee in accordance with the provisions of the EA and any other written law. At the minimum, an employee is entitled to one day's rest within a period of seven days.²⁵³ These provisions on hours of work are in conformity with the Regulations of Wages (General) Order enacted by the Kenyan legislature in 1982 to regulate the basic minimum wage rates and conditions of employment in different sectors.²⁵⁴

The provisions of paragraph 5 of the Regulations entitle workers to 52 normal hours of work spread over six days a week, and not more than 60 hours for a person employed in night work.²⁵⁵ Beyond the 52 hours, the Regulations entitle workers to overtime payment for the extra hours of work.²⁵⁶ Except where expressly exempted, these provisions apply even in the SEZs. As such, this mini-thesis seeks to examine whether SEZs workers benefit from the foregoing statutory protection.²⁵⁷

In terms of section 28(1)(a) of the EA, an employee is entitled to 21 working days of annual leave during the year of service, with full pay and exclusive of public holidays. Also, section 29 of the EA entitles every female employee to three months' maternity leave with full pay and option of extension with employer consent. The EA entitles employees to sick leave of seven days of full pay after two months of consecutive service.

²⁵² Employment Act No. 11 of 2007 s 6(3).

²⁵³ Employment Act 2007 s 27(2).

²⁵⁴ Regulations of Wages (General) Order 1982 reg 2(2).

²⁵⁵ Regulations of Wages (General) Order 1982 reg 5.

²⁵⁶ Regulations of Wages (General) Order 1982 reg 6.

²⁵⁷ Discussed below in part 3.6.3.

Thereafter, an employee will be entitled to seven days of sick leave with half pay.²⁵⁸ These provisions on statutory leave apply in the SEZs, and therefore it is worth investigating whether SEZ workers are benefiting from the foregoing EA entitlements.²⁵⁹

The EA mandates every employer to ensure sufficient supply of water at the workplace.²⁶⁰ In addition, section 34(1) of the EA obliges an employer to ensure sufficient provision of 'proper medicine' for employees during illness and if possible, provide medical assistance to the ailing employees. Although these provisions on water and medical attention apply in the SEZs, the mini-thesis seeks to examine whether SEZs workers are actually benefiting from the foregoing EA entitlements.²⁶¹

The EA prohibits employers from terminating the services of their employees without following legal procedures of termination.²⁶² The EA stipulates different types of termination, including termination by notice, summary dismissal and termination on account of redundancy. Where termination is by notice, either the employer or the employee is required to give notice of termination of employment contract within a given period.²⁶³ Where the employer issues the notice of termination, the employee will be entitled to payment in lieu of notice.²⁶⁴ Summary dismissal happens where an employer-employee relationship is terminated without notice or with a shorter notice, mostly in cases of gross misconduct or where there is fundamental breach of the conditions of the employment contract.²⁶⁵ Where termination is on account of redundancy, the employer is supposed to meet the requisite conditions, provided in terms of section 40(1) of the EA including notifying a union if the employee is a member. The notification should be made not less than a month prior to the date of the intended date of termination.²⁶⁶ The EA prohibits unfair termination, such as when the employer fails to prove that the reason for

²⁵⁸ Employment Act 2007 s 30(1).

²⁵⁹ Discussed below in part 3.6.

²⁶⁰ Employment Act 2007 s 32.

²⁶¹ Discussed below in part 3.6.2.

²⁶² Employment Act 2007 s 43.

²⁶³ Employment Act 2007 s 35(1).

²⁶⁴ Employment Act 2007 s 36.

²⁶⁵ Employment Act 2007 s 44.

²⁶⁶ Employment Act 2007 s 40(1).

termination is valid.²⁶⁷ These provisions of the EA are crucial as they provide basic terms of employment and working relations. In this regard, the mini-thesis seeks to investigate whether SEZs workers indeed benefit from the aforementioned terms of employment and working relations.²⁶⁸

3.3.3. Labour Relations Act

The aim of the Labour Relations Act (LRA) is to consolidate the law relating to trade unions and trade disputes.²⁶⁹ The LRA provides for the registration, regulation, management and democratisation of trade unions and employers' organisations or federations.²⁷⁰ It safeguards freedom of association and promotes effective collective bargaining and orderly and expeditious dispute settlement, while ensuring social justice and economic development.²⁷¹

The LRA provisions on the right to fair labour practices and freedom of association are derived from articles 36 and 41 of the Constitution, respectively. The LRA establishes and governs collective labour relations between employees and employers, including the SEZs companies and their workers, in order to protect and balance the interests of both parties. Therefore, it is worth investigating whether SEZs' workers benefit from the foregoing statutory protection.

3.3.4. Occupational Safety and Health Act

The objective of the Occupational Safety and Health Act (OSHA) is to secure the safety, health and welfare of persons at work, as well as other persons present at the workplace, against risks to safety and health arising out of the activities of the persons at work.²⁷² The obligation to secure the safety, health and welfare of persons at work emanates from Kenya's international commitments in terms of article 23 of the Universal Declaration of

²⁶⁷ Employment Act 2007 s 45.

²⁶⁸ Discussed below in part 3.6.4.

²⁶⁹ Labour Relations Act 2007 preamble.

²⁷⁰ Labour Relations Act 2007 s 12.

²⁷¹ Labour Relations Act 2007 preamble.

²⁷² Occupational Safety and Health Act 2007 s 3(2).

Human Rights (UDHR) and the International Convention on Economic and Social Rights (ICESR).²⁷³

The OSHA establishes general principles applicable to employees and employers. One of the fundamental principles is the duty of care.²⁷⁴ The OSHA does not define the term duty of care, but according to Murphy, the duty of care requires that in all circumstances, everything 'reasonably practicable' is to be done to protect the health and safety of others at the workplace.²⁷⁵ In terms of section 6(1) of the OSHA, every occupier²⁷⁶ is required to ensure the safety, health and welfare of persons at work. Every employee is also obligated while at the workplace to ensure his or her own safety and health as well as that of other persons who may be affected by his or her acts or omissions at the workplace.²⁷⁷

The OSHA establishes institutions aimed at securing the safety, health and welfare of persons at work. Some of these institutions are the Directorate of Occupational Health and Safety Services (DOHSS) and the National Council for Occupational Safety and Health (NCOSH). The DOHSS is established in terms of section 23, and it is mandated to conduct research either by itself or with the assistance of other persons or bodies on occupational health, and to formulate safety and health policies for workplace use.²⁷⁸ The NCOSH is established in accordance with section 27, and is mandated to advise the minister of the relevant ministry on the formulation and development of the policy framework and legislative proposals on occupational health and safety.

The OSHA also provides for the general welfare of persons at the workplace. For instance, in terms of section 91(1) an occupier is required to provide and maintain an adequate supply of drinking water at suitable points accessible to all employees. The aforementioned provisions on health and safety of persons at work or those present at

²⁷³ Discussed below in part 4.3.6.

²⁷⁴ Occupational Safety and Health Act 2007 s 2.

²⁷⁵ Murphy *J Street on Torts 4* (2007) 201.

²⁷⁶ Pursuant to section 2 of the OSHA, an 'occupier' is defined as the person or persons in actual occupation of a workplace, whether as the owner or not, and includes an employer.

²⁷⁷ Occupational Safety and Health Act 2007 s 13(1)(a).

²⁷⁸ Occupational Safety and Health Act 2007 s 24.

workplaces apply to SEZs. Therefore, it is worth examining whether SEZs workers actually benefit from the foregoing entitlements.²⁷⁹

3.3.5. Work Injury Benefits Act

The Work Injury Benefits Act (WIBA) provides for compensation to employees for work-related injuries and diseases contracted in the course of their employment.²⁸⁰ An employee involved in an accident resulting in disablement or death is subject to the provisions of the WIBA and entitled to the benefits provided therein.²⁸¹ In such instance, the employer will be obligated to compensate the employee for the injuries in accordance with the WIBA.²⁸² In terms of section 7(1) and (2), every employer is required to obtain and maintain an insurance policy with an approved insurer or provide security in respect of any liability that the employer may incur in accordance with the Act to any of his or her employees. However, some SEZs companies may not be applying the foregoing provisions, as the mini-thesis seeks to demonstrate below.²⁸³

3.3.6. Labour Institutions Act

The Labour Institutions Act (LIA) provides a framework for establishing government institutions with the mandate of administering labour law, and also stipulates their functions, duties and powers.²⁸⁴ The LIA applies to the entire workforce except the armed forces or reserve, the National Youth Service, and any other exclusions that may be recommended to the minister responsible for labour matters by the National Labour Board (NLB).²⁸⁵ The LIA provides the institutional framework for the implementation of the rights, duties and obligations enshrined in the legislation noted above.

Some of the established institutions are the NLB and the Wages Council. The NLB is established in accordance with section 5 of the LIA. In terms of section 7(1) of the LIA,

²⁷⁹ Discussed below in part 3.6.

²⁸⁰ Work Injury Benefits Act 2007 preamble.

²⁸¹ Work Injury Benefits Act 2007 s 10(1).

²⁸² Work Injury Benefits Act 2007 s 10(2).

²⁸³ In part 3.6.2 below.

²⁸⁴ Labour Institutions Act 2007 preamble.

²⁸⁵ Labour Institutions Act 2007 s 4(1).

the NLB is mandated to advise the minister responsible for labour matters on matters concerning employment and labour, legislation affecting employment and labour and matters relating to labour relations and trade unions.

As for the Wages Council, it comprises the General Wages Council, the Agricultural Wages Council, the Export Processing Zones Wages Council and other Sectoral Wages Councils that the minister upon consultation may deem fit.²⁸⁶ The Wages Council is mandated to investigate the remuneration and conditions of employment in any sector, and it can invite and consider written and oral representations, in the prescribed manner, from interested parties.²⁸⁷

Despite the foregoing provisions requiring establishment of specific Wages Council, the EPZs Wages Council is yet to be constituted and operationalised. In addition, an amendment is yet to be made to the LIA in order to provide for an SEZs Wages Council which will, in particular, stipulate and regulate SEZs workers' wages. These institutions provide a framework for enforcing labour standards and ensuring compliance, especially within SEZs. Therefore, this mini-thesis seeks to examine whether SEZs workers' rights have been enforced and complied with.²⁸⁸

The legal framework for labour regulation sets out the substantive rights, duties and obligations of the employers, employees and the government. The framework is fundamental in this chapter not only for establishing the relationship between labour rights and SEZs, but also for providing a basis for analysing the appropriate labour-law approach applicable to Kenya's SEZs.

3.4. LABOUR LAW REGIME IN KENYA'S SPECIAL ECONOMIC ZONES

The Kenya Special Economic Zones programme is integrated into the national economic and development strategies.²⁸⁹ Although SEZs benefit from separate governing legal and

²⁸⁶ Labour Institutions Act 2007 s 43.

²⁸⁷ Labour Institutions Act 2007 s 44.

²⁸⁸ In part 3.6.

²⁸⁹ UNCTAD (2021) 48.

institutional frameworks, national law is not entirely excluded from applying to them.²⁹⁰ In this regard, Punj conducted an inter-country comparison and discerned three labour law regimes in SEZs, as discussed below.²⁹¹

3.4.1. Inclusionary regime

The inclusionary regime is a system where the national labour law fully applies within the SEZs as well.²⁹² Ethiopia and Kenya are classic examples where this model is applied. For instance, Kenya's SEZs incentive framework, among others, generally offers regulatory latitude in tax matters. However, neither does the EA exempt its application in the SEZs, nor does the SEZs Act restrict the EA and other labour law from applying in the zones. The Ethiopian Industrial Parks Proclamation explicitly states that the national labour law applies in the IPs.²⁹³

Even though the application of labour rights is not excluded in the SEZs, Punj observes that this does not translate to a concrete regime of labour rights in the SEZs.²⁹⁴ She notes that enjoyment of rights in SEZs is often dependent on two factors. First, the type of rights, and the degree to which these rights are recognised in the national regime in compliance with international standards, both play a significant role in the enjoyment of rights in the SEZs. Secondly, the extent to which labour rights are enforced in the SEZs is equally important in so far as the enjoyment of rights is concerned.²⁹⁵ The latter observation by Punj applies to Kenya's SEZs labour regulation where, even though the EA fully applies to the entire workforce, enforcement of the Act within the SEZs has yet to be fully actualised.²⁹⁶ As a result, SEZs workers do not necessarily benefit from the entitlement of labour rights.²⁹⁷

²⁹⁰ Cotula L & Mouan L (2021) 350.

²⁹¹ Punj A 'Special Economic Zones: Operational Adjustment of Labour Law' (2018) 5(1) *Journal of the National Law University of Delhi* 79.

²⁹² Punj A (2018) 79.

²⁹³ Industrial Parks Proclamation No. 886 of 2015 art 28(1).

²⁹⁴ Punj A (2018) 80.

²⁹⁵ Punj A (2018) 80.

²⁹⁶ Discussed below in part 3.6.

²⁹⁷ Discussed below in part 3.6.

3.4.2. Exclusionary regime

The exclusionary regime is one in which either national labour law or certain provisions are completely and expressly excluded from application in the SEZs. Punj observes that under this regime, either labour rights do not exist in the SEZs or there is just a mere impression of such rights without actual enforcement in the SEZs.²⁹⁸ However, as Punj notes, due to labour struggles and mounting international pressure, most countries have moved from exclusionary to inclusionary or special, or altered, models.²⁹⁹

3.4.3. Special/altered regime

Punj observes that under the special regime, a separate labour law regime is enacted to govern labour relations in the SEZs. Alternatively, changes can be made to the existing national labour legislation, where the altered legislation governs labour relations in SEZs.³⁰⁰ The special/altered regime can be a combination of inclusionary and exclusionary regimes, where application of certain provisions of the national labour law in the SEZs are either allowed or restricted. In the alternative, it can apply where certain employment terms and conditions in the SEZs are altered, not by amending the law, but by taking advantage of lacunae in the national legal framework for labour regulation in substance or procedure.³⁰¹

An example of this model is found in Bangladesh, where the Bangladesh Export Processing Zone Act (BEZA) makes provision allowing the government to exclude or modify the application of any other legislation in the zones and in case of conflict with other legislation, the BEZA prevails.³⁰² In addition, in 2019, the parliament of Bangladesh enacted the EPZ Labour Act, with a special legal and institutional framework to specifically govern employment conditions and labour relations in the EPZs.³⁰³ The EPZ Labour Act provides for a special set of substantive labour rights applicable to the EPZs

²⁹⁸ Punj A (2018) 81.

²⁹⁹ Punj A (2018) 79–80.

³⁰⁰ Punj A (2018) 80.

³⁰¹ Punj A (2018) 79–80.

³⁰² Bangladesh Economic Zones Act No. 42 of 2010 s 3 and 13.

³⁰³ Bangladesh EPZ Labour Act No. 02 of 2019.

and their enforcement mechanisms.³⁰⁴ Therefore, under this regime, either modifications are made to the national labour to suit the SEZs operations, or special legislation is enacted to govern labour rights within SEZs.

The applicability of the labour regimes above is dependent on multiple factors. As Punj notes, different countries apply different models depending on their unique socio-political factors and other inter-related factors such as the need to attract investments.³⁰⁵ The protection of SEZs workers' rights under the inclusionary regime depends on the nature of the guaranteed rights and the extent of enforcement of such rights within the SEZs, while under the special/altered regime, it is dependent on the stipulated enforcement mechanisms.

In the light of the above discussion, and in consideration of the enclave nature of SEZs, labour regulation in the zones is crucial in attaining inclusive development in Kenya. In this regard, the mini-thesis discusses issues related to labour rights in Kenya's SEZs in the light of inclusive development.³⁰⁶

3.5. THE INTERFACE BETWEEN LABOUR REGULATION AND SPECIAL ECONOMIC ZONES' FOREIGN DIRECT INVESTMENTS

As discussed in chapter two, the Kenyan SEZs programme is premised on enhancing economic growth by reinvigorating the country's market orientation to boost FDI inflows and diversify exports. Integral to this programme is the need to create jobs to curb the high unemployment rate in the country, and improve the living standards of the people of Kenya. To achieve these objectives, labour regulation in the SEZs is crucial. However, SEZs labour regulation is often complex. Such complexity is attributable to the intertwining relationship between regulation of labour activities in the SEZs and constitutional rights, national regulation and international norms.³⁰⁷ This complexity is exacerbated by the fact that SEZs are based on legal frameworks which, mostly, are not

³⁰⁴ Bangladesh EPZ Labour Act No. 02 of 2019.

³⁰⁵ Punj A (2018) 79.

³⁰⁶ Discussed below in part 3.6.

³⁰⁷ Bessette A 'Special Economic Zones in Africa: An Overview of Policies and Regulatory Regimes' (2022) *Trade Law Centre* 7.

aligned with national law. Some zones incorporate international labour conventions in their operations, while others compromise labour rights in order to remain competitive and attract investors.³⁰⁸

A flexible labour framework within SEZs in some jurisdictions serve as an incentive aimed at boosting FDI inflows. For example, in Asia, the Export Oriented Industries (EOI) in the garment and textile industries within the economic zones depend largely on the guaranteed cheap labour in the region in order to remain competitive.³⁰⁹ In particular, China's flexible legal framework for labour regulation in the region is now considered as a mechanism to accelerate economic growth through attracting FDIs.³¹⁰ Initially, the low wages paid to Chinese workers as compared to other Asian countries contributed to China's being a key FDI destination in the region.³¹¹

A flexible labour framework within SEZs has often led to exploitation of workers. This has been observed under the exclusionary labour regime. For instance, in Mauritius, whereas the Labour Act applies nationally, the Industrial Expansion Act exempts its application in the EPZs.³¹² Consequently there have been reports of labour issues such as compulsory overwork without pay within the zones.³¹³

The above-mentioned labour compromises are often motivated by a country's determination to gain competitive advantage in FDI attraction in relation to other countries – a 'race to the bottom'. As a result, there have been widespread instances of labour

³⁰⁸ Bessette A (2022) 8.

³⁰⁹ Rondinelli DA 'Export Processing Zones and Economic Development in Asia: A Review and Reassessment of a Means of Promoting Growth and Jobs' (1987) 46 *The American Journal of Economics and Sociology* 95.

³¹⁰ Sankaran K *Labour law in South Asia: The need for an inclusive approach* (2007) 11.

³¹¹ Ellyne & Yu 'China's Success Attracting FDI and Lessons for South Africa' (2017) *Biennial Conference of the Economic Society of South Africa August 29 – 1 September 2017 Rhodes University, Grahamstown* 13–14.

³¹² Industrial Expansion Act No. 11 of 1993 s 3.

³¹³ Cirera X & Lakshman D.R 'The Impact of Export Processing Zones on Employment, Wages and Labour Conditions in Developing Countries: Systematic Review (2017) 9 *Journal of Development Effectiveness* 353.

rights infringement within SEZs – the impact of this on inclusive development in Kenya is examined later in this mini-thesis.³¹⁴

3.5.1. Draft Special Economic Zones Regulations: Supplementary Regulations

Kenya's draft Supplementary Special Economic Zones Regulations seek to solidify the relationship between SEZs and labour rights in the country.³¹⁵ Regulation 24 provides that the SEZA shall be responsible for facilitating the enforcement of all applicable law related to labour within the SEZs. The Regulations stipulate that SEZs labour rights shall co-exist in application with all ratified international instruments including the ILO Declaration on Fundamental Principles and Rights.³¹⁶ The Regulations further stipulate that the SEZA and all SEZs employers are responsible for providing SEZ workers with a safe and respectful work environment.³¹⁷

The Regulations require SEZs to comply with international agreements that provide for international labour standards to which Kenya is a party.³¹⁸ Pertinently, the Regulations seek to further protect SEZs workers' rights by stipulating specific inalienable rights, such as freedom of association and protection from forced or compulsory labour.³¹⁹ The Regulations also establish compliance and enforcement mechanisms, including monitoring and investigations, to be applied within SEZs to ensure protection of workers' rights.³²⁰ However, although the Regulations are yet to be assented to, they need to be amended to expand the scope of the SEZs workers' rights, because, apart from the inalienable rights provided therein, SEZs workers are also entitled to all other collective and individual labour rights that workers within the national customs territory enjoy. In addition, due to the fact that the Regulations provide for compliance and enforcement

³¹⁴ Discussed below in part 3.6.

³¹⁵ Draft Supplemental Special Economic Zones Regulations of 2019.

³¹⁶ Draft Supplemental Special Economic Zones Regulations of 2019 reg. 26(2).

³¹⁷ Draft Supplemental Special Economic Zones Regulations of 2019 reg. 26(4).

³¹⁸ Draft Supplemental Special Economic Zones Regulations of 2019 reg. 26(5).

³¹⁹ Draft Supplemental Special Economic Zones Regulations of 2019 reg. 26(1).

³²⁰ Draft Supplemental Special Economic Zones Regulations of 2019 reg. 26(3).

mechanisms, inclusion of the aforementioned rights in the Regulations will ensure their adequate protection.

3.6. EMPLOYMENT CONDITIONS AND LABOUR RELATIONS IN KENYA'S SPECIAL ECONOMIC ZONES

The SEZs programme has seen progressive implementation in Kenya. While much of the focus has been on its contribution to economic growth, there has been contestation over working conditions and general labour rights. The prevailing contestation has been largely attributed to existing lacunae in the legal framework establishing and operationalising SEZs; the weak enforcement of national labour legislation in SEZs, which defeats compliance; and the exemption of SEZs from certain legislation.³²¹ Therefore, irrespective of the SEZs' economic impact in Kenya, their role in ensuring inclusive development is often questionable.

In the Global South, SEZs have been criticised for their stance on labour rights.³²² In Kenya, some of the concerns relate to employment conditions, such as working conditions, and labour relations.³²³ Several of these concerns are discussed below.

3.6.1. Collective labour rights

Collective labour rights have been well-entrenched in terms of Kenyan law. Some of the guaranteed collective labour rights include freedom of association, the right to collective bargaining and the right to strike.³²⁴

Despite the existence of the above-mentioned legal provisions guaranteeing collective labour rights, emerging trends demonstrate that SEZs workers have often been denied these rights. Some instances indicate that SEZs workers have been barred from joining trade unions and other organisations to undertake collective bargaining activities in the

³²¹ Cotula L & Mouan L (2021) 342.

³²² See part 3.5 above.

³²³ ILO *Report for discussion at the Meeting of Experts to Promote Decent Work and Protection of Fundamental Principles and Rights at Work for Workers in Export Processing Zones* (2017) 33.

³²⁴ See part 3.3.1 above.

country.³²⁵ According to the report by the KHRC, workers in the labour-intensive garment, textile and agricultural sectors within SEZs have reportedly been barred from joining trade unions.³²⁶ Workers who persist in forming or joining these unions are often subjected to threats of dismissal, intimidation or harassment.³²⁷

The report by the Worker Rights Consortium (WRC) also alleges that Sinolink³²⁸ barred its workers from joining the Tailors and Textile Workers Union, and even refused to recognise the union.³²⁹ The company is also alleged to have colluded with the police to suppress the exercise of freedom of association by its workers, and to have coerced those who had joined the trade union to resign.³³⁰ These instances amount to a violation of the collective labour rights, including freedom of association and collective bargaining, to which SEZs workers are entitled. Such violation demonstrates the government's failure to protect and enforce SEZs workers' rights. As a result of this failure, there has been a deterioration of working conditions and labour relations in the SEZs.³³¹

3.6.2. Right to safe and health working conditions

As discussed above,³³² the Constitution guarantees the right to reasonable working conditions.³³³ Also, the OSHA secures the safety, health and welfare of persons at work.³³⁴ Furthermore, the right to safe and health working conditions is entrenched pursuant to article 23(1) of the UDHR and article 7(b) of the ICESCR.

Despite the above-mentioned legal provisions, there have been incidences of unsafe and unhealthy working conditions in companies operating within SEZs. Workers within some

³²⁵ Cotula L & Mouan L (2021) 357.

³²⁶ KHRC *Manufacture of Poverty: The Untold Story of EPZs in Kenya* (2004) 32.

³²⁷ International Confederation of Free Trade Unions (ICFTU) *Behind Brand Names: Working Conditions and Labour Rights in Export Processing Zones* (2004) 8.

³²⁸ Sinolink is a foreign owned company within Kingorani EPZ in Kenya.

³²⁹ WRC *Assessment re Sinolink Garment Manufacturing (Kenya): Findings, Recommendations and Status Report* (2006) 7.

³³⁰ WRC (2006) 8.

³³¹ Cotula L & Mouan L (2021) 356.

³³² In part 3.3.1.

³³³ Constitution of Kenya 2010 art 41(2).

³³⁴ Occupational Safety and Health Act 2007 s 3(2).

SEZs companies have been subjected to hazardous working environments.³³⁵ For instance, in some garment factories within Athi River SEZ, workers, due to poor ventilation, have experienced severe discomfort as a result of the excessive heat generated by machines while working.³³⁶ In addition, workers in such factories work for not only 12 hours standing, but are also locked inside workplaces during the night shifts.³³⁷ In other factories, pregnant women have been reported to have collapsed or fallen ill after the long hours of work.³³⁸ Furthermore, such factories fail to provide transportation services for workers working late.³³⁹ In other factories, workers who do not meet their daily targets are detained in the industries until the following day.³⁴⁰ These incidents demonstrate a blatant violation of the right to safe working conditions within SEZs and the government's failure to enforce the EA within the SEZs.

In addition to these circumstances, some companies such as Sinolink provided insufficient medical facilities and protective equipment for handling chemicals and other corrosive substances to their workers.³⁴¹ Furthermore, an Athi River EPZ worker cut his hand while on duty and was told by the supervisor to look for his own doctor.³⁴² Such an incident demonstrates that the company did not have medical facilities including medical personnel, or provide a medical insurance policy to its workers, as statutorily required.³⁴³

The restrooms of some companies operating within the SEZs are often in an unhygienic state, lacking sanitary facilities, and some are poorly maintained.³⁴⁴ Such conditions not only place SEZs workers at risk of contracting diseases, but also pose regulatory

³³⁵ Laryea E, Ndonga D & Nyamori B (2020) 16.

³³⁶ Wathuti GT *An Analysis of the Legislative Framework Governing Special Economic Zones in Kenya* (published LLM thesis, University of Nairobi, 2019).

³³⁷ The New Humanitarian 'Focus on Working Conditions in EPZ Companies' (2004) <https://www.thenewhumanitarian.org/report/48975/kenya-focus-working-conditions-epz-companies> (accessed 18 January 2023).

³³⁸ Wathuti GT (2019) 16.

³³⁹ The New Humanitarian 'Focus on Working Conditions in EPZ Companies' (2004).

³⁴⁰ Wathuti GT (2019) 74.

³⁴¹ WRC (2006) 14.

³⁴² Taylor D 'In a Situation like this, Who Cares for Human Rights?' (2005) *Inter Press Service* <https://archive.globalpolicy.org/social-and-economic-policy/labor-rights-and-labor-movements/43449-qin-a-situation-like-this-who-cares-about-human-rightsq.html> (accessed 18 January 2023).

³⁴³ See part 3.3.5 above.

³⁴⁴ Laryea E, Ndonga D & Nyamori B (2020) 16.

questions on how these companies were able to get operation approvals, including health permits, from relevant bodies.

3.6.3. Working hours and wages

As discussed above, the Constitution and the EA, in terms of article 41(2) and section 27, respectively, guarantee that every employee is entitled to reasonable working conditions. Reasonable working conditions holistically entail reasonable working hours and conditions.

In spite of these legal obligations, Kenya's SEZs workers have often been subjected to long working hours without overtime pay. According to the WRC report, workers within SEZs regularly work beyond the stipulated maximum working hours. Even though overtime work is legally provided for, the report indicates that some SEZs workers were not compensated for it.³⁴⁵ Maximum working hours in the companies are often disregarded by employers who cite workloads and tight delivery timelines set by their clients.³⁴⁶ The unpaid overtime work within these companies qualifies to be termed forced labour,³⁴⁷ which is expressly prohibited in terms of article 30(2) of the Constitution and section 4 of the EA.

In addition, the KHRC report indicates that some companies did not provide for statutory sick leave and maternity leave for their workers. Such workers could also not take their statutory sick or maternity leave for fear of dismissal.³⁴⁸

Regardless of the amount of work SEZs workers perform, they have often been subjected to low wages by their employers.³⁴⁹ The ILO reports that workers in some SEZs companies are paid lower wages than those of workers working outside the zones.³⁵⁰ Also, companies have often been sued either due to paying low salaries to their workers

³⁴⁵ WRC (2006) 20.

³⁴⁶ ICFTU *Export Processing Zones Symbols of Exploitation and a Development Dead End* (2023) 12.

³⁴⁷ Forced Labour Convention, 1930 (C029) art 2.

³⁴⁸ KHRC (2004) 32.

³⁴⁹ Cotula L & Mouan L (2021) 356.

³⁵⁰ ILO (2017) 33.

or the lack of implementation of collective bargaining agreements. For instance, in 2018 the ELRC, in the case of *Tailors and Textile Workers Union v Global Apparels (EPZ) Limited*, ordered a general wage increment of 5 per cent to EPZ workers, which was to become effective upon signing of a collective bargaining agreement (CBA) within 30 days. In default, the increment was to take effect within 30 days of the judgment.³⁵¹

Low wages and lack of compensation for overtime work, as has been the case in some SEZs companies, demonstrate violation of the right to reasonable working conditions. As a result, some SEZs workers have been subjected to exploitation at the expense of the SEZs' growth and of FDI attraction.

3.6.4. Freedom from unlawful dismissal

The right to fair labour practices is protected by the Constitution and EA.³⁵² Despite the establishment of the SEZA that administers SEZs, and the NLB that advises on labour matters including labour relations,³⁵³ emerging issues from companies operating within SEZs point to violations of such constitutional and statutory provisions. For instance, the WRC indicates that Rising Sun Kenya EPZ³⁵⁴ dismissed 1,270 of its workers, claiming they had participated in a trade union protest. Apparently, these workers were agitated by, among other factors, unsafe working conditions in the companies.³⁵⁵ Instead of resolving the issues raised by workers, the companies resorted to termination of their employment and even failed to pay their legally mandated benefits.³⁵⁶ The Rising Sun Kenya EPZ actions were a flagrant violation of constitutional and statutory entrenched labour rights.

Some companies also kept workers on casual employment terms for substantially longer periods than the legally provided period of three months.³⁵⁷ Subsequently, these

³⁵¹ *Tailors and Textile Workers Union v Global Apparels (EPZ) Limited* Civil Cause No. 168 of 2018 eKLR.

³⁵² In part 3.3 above.

³⁵³ As discussed in part 3.3. above.

³⁵⁴ Rising Sun Kenya EPZ is a foreign company located within the Athi River EPZ.

³⁵⁵ WRC *Preliminary Report: Worker Rights Consortium Inquiry Into Alleged Labour Rights Violation at Rising Sun Kenya EPZ* (2006) 2.

³⁵⁶ WRC (2006) 6.

³⁵⁷ The New Humanitarian 'Focus on Working Conditions in EPZ Companies' (2004).

companies proceeded to terminate those workers' employment without compensation.³⁵⁸ These instances demonstrate the persistent failure of the government to enforce SEZs workers' rights. As a result, there has not only been infringement of SEZs workers' basic constitutional and statutory rights, but also exploitation of workers, thus impairing inclusive development.



³⁵⁸ Worker Rights Consortium *Assessment re Sinolink Garment Manufacturing (Kenya): Findings, Recommendations and Status Report* (2006) 18.

3.6.5. Freedom from discrimination and harassment

Discrimination and harassment of any nature at the workplace is expressly prohibited in terms of the Constitution of Kenya and EA.³⁵⁹ The essence of the foregoing provisions is to promote equality and protection of the right to dignity at workplace.

However, there have been incidences of discrimination in SEZs companies where employers prefer employing women instead of men. In such instances, the employers state that women are easier to work with and are keen and careful in their work, unlike men, who are allegedly aggressive and intolerant.³⁶⁰ Such discriminatory action has led to almost 70 per cent of the SEZs workers being women.³⁶¹

Some women workers in the SEZs companies also face instances of mistreatment, especially sexual harassment.³⁶² The economic conditions in the country, especially inadequate job opportunities, have made women SEZs workers vulnerable, and some yield to sexual harassment in their workplaces.³⁶³

The reported exploitative working conditions and labour rights subversion within SEZs demonstrate the failure of both the SEZs Act to protect SEZs workers and the failure of the government to exclusively enforce labour law within the SEZs. Due to economic conditions in Kenya, with its high unemployment and poverty, SEZs workers have been made to endure and give in to the unsafe and exploitative SEZs working conditions.³⁶⁴ The fear of losing employment in the light of the socio-economic conditions in the country, and the government's failure to protect SEZs workers, have obliged SEZs workers to persevere in order to avoid all forms of agitation for reform.³⁶⁵ Consequently, workers are trapped in unsafe working conditions and exposed to constant violation of their rights, a situation inhibiting inclusive development.

³⁵⁹ See parts 3.3.1 and 3.3.2 above.

³⁶⁰ KHRC (2004) 8.

³⁶¹ KHRC (2004) 38.

³⁶² Taylor D 'In a Situation Like This, Who Cares for Human Rights?' (2005).

³⁶³ Laryea E, Ndonga D & Nyamori B (2020) 12.

³⁶⁴ Laryea E, Ndonga D & Nyamori B (2020) 13.

³⁶⁵ Laryea E, Ndonga D & Nyamori B (2020) 13.

3.7. SIGNIFICANCE OF THE SPECIAL REGIME IN LABOUR REGULATION WITHIN SEZs IN PROMOTING INCLUSIVE DEVELOPMENT IN KENYA

The discussion in the section above has demonstrated that Kenya's SEZs programme is yet to promote inclusive development. Juxtaposing the foregoing incidences with the general economic gains that SEZs have brought to the country, inclusive development remains low. The growth of an economy due to SEZs' impact is supposed to translate to inclusive development. As Oloruntubo observes, to ensure inclusive development, economic policies should be backed up with adequate social intervention programmes.³⁶⁶ However, as has been demonstrated above,³⁶⁷ SEZs' FDIs are yet to yield inclusive development for their workers, thus inhibiting sustainability. A special regime for labour regulation that provides for substantive labour rights, enforcement and compliance mechanisms is essential to Kenya's SEZs. Enactment of SEZ labour legislation would provide for workers' rights and establish institutions with the jurisdiction to protect and monitor SEZs workers' rights.

The inclusion of 'good social policies' as part of the special regime for labour regulation within SEZs also enhances inclusive development. In such instances, SEZs can deliver substantive economic benefits both to the SEZs companies and workers.³⁶⁸ For instance, the East London Industrial Development Zone (ELIDZ), located in East London in the Eastern Cape Province in South Africa, has incorporated good social policies in its operations.³⁶⁹ As part of its policies, ELIDZ Human Capital Strategy aims to protect the diversity and well-being of its workers and ensure compliance with labour standards. Integral to this strategy is the incorporation of the Employment Equity Plan as required in terms of section 2 of the Employment Equity Act.³⁷⁰ ELIDZ's Employment Equity Plan

³⁶⁶ Oloruntobo OS 'Inclusive Development in Nigeria' in Gumedi S *Inclusive Development in Africa: Transformation of Global Relations* (2018) 171.

³⁶⁷ In part 3.6.

³⁶⁸ UNCTAD (2021) 137.

³⁶⁹ UNCTAD (2021) 137.

³⁷⁰ Employment Equity Act No. 55 of 1998 s 2.

aims at ensuring fair remuneration and promoting workers' training, welfare and satisfaction in a region considered one of the poorest in South Africa.³⁷¹

The ELIDZ has incorporated a corporate social investment (CSI) programme that seeks to transform the surrounding community through education, social and community development, enterprise development and youth and sport development.³⁷² Currently, the CSI programme has to some extent improved workers' satisfaction, training and development, and promoted educational programmes and other development programmes within the local communities.³⁷³ The benefits arising out of the social policies of ELIDZ promote inclusive development. Therefore, good social policies establish long-term benefits out of zonal investments, ensuring the sustainability of investment and inclusive development.

Gender-inclusive policies within SEZs are also fundamental in promoting inclusive development. In Africa, SEZ corporations typically employ a higher share of women than the national average.³⁷⁴ Nevertheless, women workers face many challenges, including low education levels and lack of awareness and health facilities in the workplaces. Such challenges inhibit women workers' capacity to advance both in and beyond the workplace.³⁷⁵ In Africa, some zones have developed programmes aimed at remedying these challenges. For instance, in 2009 some corporations within Ismailia FZ in Egypt launched the Herproject. The Herproject provided peer-based learning to women on health topics and were encouraged to spread the lessons learnt to fellow women workers.³⁷⁶ Upon completion, the Herproject created benefits such health awareness and knowledge on family planning and pre- and postnatal care. Consequently, there was a low staff turnover in the corporations.³⁷⁷ As a result, workers were able to derive

³⁷¹ UNCTAD (2021) 137.

³⁷² ELIDZ *Annual Report 2019/2020* (2020) 61.

³⁷³ UNCTAD (2021) 137.

³⁷⁴ UNCTAD (2021) 138.

³⁷⁵ World Bank *Fostering Women's Economic Empowerment Through Special Economic Zones* (2011) 33–34.

³⁷⁶ World Bank (2011) 141.

³⁷⁷ Business for Social Responsibility *HERproject: Health Enables Returns, Cairo* (2011) 9.

substantive and innovative benefits that impacted positively on their long-term development.

The examples from the ELIDZ and Ismailia FZ demonstrate the substantial contribution that social policies in SEZs can make in promoting inclusive development. Implementing labour rights provisions, ESG standards, upholding best labour standards and practices, and incorporating gender-inclusive practices within the SEZs not only generate economic gains for the SEZs and the country at large, but also promote inclusive development.

Kenya's SEZs are yet to adopt social principles in their operations. Apart from economic gains-oriented policies, Kenya's SEZs companies are yet to formulate policies and strategies geared to ensuring sustainable employment and inclusive development, as the examples above demonstrate. This gap has contributed to both the prevalence of worker exploitation within the SEZs and the continued absence of inclusive development.

3.8. CONCLUSION

In this chapter, it has been observed that Kenya's legal framework for labour regulation provides for labour rights to which all workers are entitled. Although Kenya has employed an inclusionary labour law regime in its SEZs, the enforcement of these provisions in the zones has been ineffective. For Kenya to obtain sustainable SEZ investment and inclusive development, labour rights should be enforced within the SEZs irrespective of the prevailing economic interests.

In addition, the chapter notes that, owing to the shortcomings of the inclusionary approach in labour regulation, a special regime, where either the SEZ Act is modified to include specific labour rights or special SEZ labour legislation is enacted to protect SEZs workers' rights, is necessary in Kenya.

The chapter has also observed that inclusion of social policies and principles within the SEZs companies that are geared towards providing social benefits to their workers can contribute to inclusive development. The chapter recognises that SEZs' labour law compliance mechanisms should be strengthened within the legal and institutional framework, this to enable SEZs' workers to reap the benefits of labour best practices and conditions that should assist inclusive development.

The next chapter seeks to identify lessons that can be learnt from the international best labour standards and labour best practices applicable to SEZs, to enable Kenya's SEZs to attract sustainable investments and ensure inclusive development.



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CHAPTER FOUR

INTERNATIONAL LABOUR STANDARDS AND LABOUR BEST PRACTICES RELATED TO SPECIAL ECONOMIC ZONES, AND LESSONS FROM ETHIOPIA'S INDUSTRIAL PARKS

4.1. INTRODUCTION

The preceding chapter discussed the Kenyan legal framework governing SEZs workers' rights and recommended either an amendment to the SEZs Act to include labour rights or the enactment of special SEZs labour legislation to protect SEZs' workers' rights. But what is the role of the international labour standards and labour best practices in these reforms? This chapter seeks to answer the question by discussing the role of international labour standards and labour best practices in Kenya's SEZs' labour regulation.

Parts 4.2 and 4.3 of the chapter assess the role of the international labour standards and labour best practices in Kenya's SEZs labour regulation. Part 4.4 assesses certain aspects of Ethiopia's SEZs labour regulation and the legal framework governing its SEZs investments. This assessment is crucial in showing Kenya how to attract sustainable FDI and ensure inclusive development. There is limited literature on how the alignment of international labour standards and labour best practices could help in the transition of Kenya's SEZs to ensuring sustainable FDI inflows and inclusive development in Kenya. This chapter seeks to fill that gap by assessing the role of international labour standards and labour best practices in shaping the applicable labour legislation in Kenya's SEZs. The chapter draws on lessons from Ethiopia's IPs labour regulations that could help to improve Kenya's SEZs labour regulation.

4.2. RACE TO THE BOTTOM IN SPECIAL ECONOMIC ZONES' LABOUR REGULATION IN THE LIGHT OF INTERNATIONAL LABOUR NORMS

Economic growth is one of the principal policy agendas in most developing countries, including Kenya. However, UNCTAD observes that capital inadequacy often hinders

economic growth in developing countries.³⁷⁸ Without adequate capital, developing countries are unable to fully utilise the available labour force.³⁷⁹ In effect, developing countries have shifted their policies and focused on FDI attraction in order to boost their economic growth and ensure effective utilisation of the available labour force.³⁸⁰ As a result, MNCs prefer to relocate to developing countries where there is a higher supply of labour with a relatively low wage demand when compared to the MNCs' home countries.³⁸¹ A classic example is South Korea, where its labour-intensive manufacturing sector has led to increased FDI inflows and economic growth due to the associated cheap labour costs.³⁸² Therefore, the need for capital to accelerate economic growth has necessitated the establishment of programmes such as SEZs to both attract FDI and spur economic growth.

Calitz observes that countries endeavour to compromise labour rights in order to gain a competitive advantage in FDI attraction. As a result, there is increased capital mobility and SEZ expansion.³⁸³ However, such compromises often lead to unsafe working conditions (low wages, long working hours, unsafe and unhealthy workplaces) and diminished labour relations (weakened trade unions and collective bargaining power) in the workplace, including in SEZs.³⁸⁴ The flexibility of the Kenya inclusionary labour regime, and its ineffective enforcement in the SEZs, support the foregoing argument.³⁸⁵ Such incidences demonstrate that developing countries, including Kenya, focus on FDI attraction to enable economic growth. However, this appears to be at the cost of SEZs' workers' rights.

One of the ways of addressing this conundrum is to adopt and implement international labour norms in the SEZs' legal framework for labour regulation. International labour

³⁷⁸ UNCTAD *Trade and Development Report 2010 – Employment, Globalisation and Development* (2010) 100.

³⁷⁹ UNCTAD (2010) 100.

³⁸⁰ UNCTAD (2010) 101.

³⁸¹ Cho SK 'The Dilemmas of Export-Led Industrialization: South Korea and the World Economy' (1985) 30 *Berkeley Journal of Sociology* 67.

³⁸² Cho SK (1985) 80.

³⁸³ Calitz K 'The Harmonisation of Labour Law in Southern Africa' (2008) 41 *De Jure* 225.

³⁸⁴ Calitz K (2008) 227. Also as discussed in part 3.6 above.

³⁸⁵ See part 3.5 and 3.6 above.

norms are established through the international labour standards. International labour standards are legal instruments drawn up during consultation among the ILO constituents, including government, employer and employee representatives.³⁸⁶ The international labour standards provide for the basic principles and rights at work, and aim at ensuring the implementation of labour laws and social policies at the national level that are in conformity with internationally accepted standards.³⁸⁷

International labour standards can either be conventions or recommendations. Conventions are legally binding international treaties that set out basic principles to be implemented by ratifying members, while recommendations are non-binding guidelines that often supplement conventions.³⁸⁸ The ILO has adopted the Declaration on Fundamental Principles and Rights at Work and its Follow-Up.³⁸⁹ The Declaration contains the core principles that ILO member states are required to uphold even if they have not ratified the ILO conventions in which they are expressed.³⁹⁰ In 2022, the International Labour Conference amended the Declaration to add a safe and healthy working environment as the fifth principle and right.³⁹¹ The principle obligates member states to ensure a decent working environment in workplaces, including SEZs.³⁹² The International Covenant on Economic, Social and Cultural Rights also recognises a right to safe and healthy working conditions in all workplaces.³⁹³

International labour best practices are usually derived from the international labour standards that have been accepted and applied consistently.

³⁸⁶ ILO 'How International Labour Standards are Used' (2023) <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-use/lang--en/index.htm> (accessed 23 January 2023).

³⁸⁷ ILO 'How International Labour Standards are Used' (2023).

³⁸⁸ ILO 'How International Labour Standards are Used' (2023).

³⁸⁹ ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up Declaration, 1998(as amended in 2022).

³⁹⁰ ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up Declaration, 1998(as amended in 2022) para 2.

³⁹¹ ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up Declaration, 1998 (as amended in 2022) para 2(e).

³⁹² ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up Declaration, 1998 para 2(e).

³⁹³ International Covenant on Economic, Social and Cultural Rights, 1966 art 7(b).

Article 2(5) of the Constitution of Kenya provides that general rules of international law shall form part of the Kenyan law, while article 2(6) provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya in accordance with the Constitution.³⁹⁴ The effect of these provisions is that national law is on equal footing with international law including conventions, but the Constitution remains supreme. To this extent, and as held by the Industrial Court of Kenya in the case of *VMK v CUEA*³⁹⁵, Kenya's law-makers and courts refer to relevant international law with a view to aligning national legislation and court jurisprudence with international standards. The impact of adopting international labour norms in Kenya's SEZs will be discussed in the next part.

4.3. THE RELATIONSHIP BETWEEN LABOUR REGULATION IN KENYA'S SEZs AND INTERNATIONAL LABOUR NORMS

International labour standards play a significant role in shaping member states' domestic labour law. The international labour standards provide an authoritative benchmark framework that guides domestic institutions when formulating national labour legislation. The ILO considers that, when member states ratify its conventions, this entails international obligations which lead to improved labour standards in the countries concerned.³⁹⁶ Also, Koliev argues that the ILO influences domestic labour legislation during the preparatory stage of conventions. During this stage, the International Labour Office interacts with domestic law-makers and other groups. This increases these individuals and groups' learning capacities, which they then use when formulating domestic labour legislation.³⁹⁷ As a result, domestic labour legislation is not only improved but also conforms to the tenets of internationally agreed labour standards and labour best practices.³⁹⁸

³⁹⁴ Constitution of Kenya 2010 art 2(5) and 2(6).

³⁹⁵ *VMK v CUEA* (2013) eKLR.

³⁹⁶ ILO *Effective Protection for Domestic Workers: A Guide to Designing Labour Law* (2012) 4.

³⁹⁷ Koliev F 'Promoting International Labour Standards: The ILO and National Labour Regulations' (2022) 24(2) *The British Journal of Politics and International Relations* 365.

³⁹⁸ Kuruvilla SC & Verma A 'International Labour Standards, Soft Regulation, and National Government Roles' (2006) 48(1) *Journal of Industrial Relations* 8.

In addition, international labour standards can be used to enhance the efficacy of administrative structures such as labour administration and inspection institutions.³⁹⁹ The ILO enhances the efficacy of the labour administrative structures by providing technical support to national institutions, which are mandated not only to administer and inspect labour activities but also to regulate the employer-employee relationship.

The ILO was principally established to set labour standards and formulate programmes aimed at promoting decent work for all.⁴⁰⁰ Kenya became a member state of the ILO in 1965.⁴⁰¹ ILO member states are obligated to uphold the core principles by virtue of their membership, even if they have not ratified the ILO core conventions.⁴⁰² Kenya has ratified the core conventions related to labour standards.⁴⁰³ It has also adopted the ILO Decent Work Agenda framework,⁴⁰⁴ which, among other goals, seeks to promote social justice and respect for labour rights in all workplaces.⁴⁰⁵ Some of the core conventions are discussed below.

4.3.1. The Freedom of Association and Protection of the Right to Organise Convention

The Freedom of Association and Protection of the Right to Organise Convention (C87) of 1948 protects the right of workers and employers to form and join organisations of their own choice without prior authorisation.⁴⁰⁶ In terms of article 3(1) of C87, public authorities are prohibited from interfering with the exercise of this right. C87 obligates member states to take appropriate measures to ensure that workers and employers freely exercise the right to organise.⁴⁰⁷ Kenya ratified C87 in 1964. Therefore, the Kenyan legislature is

³⁹⁹ ILO 'Introduction to International Labour Standards' <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-use/lang--en/index.htm> (accessed 23 January 2023).

⁴⁰⁰ Calitz K (2008) 228.

⁴⁰¹ ILO 'International Labour Organisation in Kenya' (2023).

⁴⁰² Calitz K (2008) 228.

⁴⁰³ ILO 'Ratifications for Kenya' (2023) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103315 (accessed 1 February 2023).

⁴⁰⁴ ILO 'Ratifications for Kenya' (2023).

⁴⁰⁵ ILO *Decent Work and the 2030 Agenda for Sustainable Development* (2015) second goal.

⁴⁰⁶ The Freedom of Association and Protection of the Right to Organise Convention, 1948 (C87) art 2.

⁴⁰⁷ C87 art 11.

obligated to adopt and guarantee SEZs workers' right to join and participate in the affairs of a trade union without interference. Although the Kenyan legislature has adopted the provisions of C87 through the Constitution, EA and the LRA,⁴⁰⁸ its enforcement within the SEZs is yet to be fully realised.⁴⁰⁹

4.3.2. Right to Organise and Collective Bargaining Convention

In terms of article 1 of the Right to Organise and Collective Bargaining Convention (C98) of 1949, workers are accorded the right to adequate protection against anti-union discrimination in respect of their employment. C98 guarantees adequate protection to workers and employers' organisations against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.⁴¹⁰ Member states are also required to establish mechanisms that are appropriate to national conditions, where necessary, in order to ensure that the right to organise is respected, and that the right to collective bargaining is fully realised.⁴¹¹

The right is binding on member states and, although the Kenyan legislature has adopted these provisions in the Constitution, EA and the LRA,⁴¹² the government is further required to take necessary measures to enable its realisation for SEZs workers' right to organise and bargain collectively.

4.3.3. Forced Labour Convention

The Forced Labour Convention (C29) requires member states to prohibit any form of forced or compulsory labour.⁴¹³ C29 defines the term 'forced or compulsory labour' to mean all work exacted from any person under the menace of any penalty and for which the said person has not offered him- or herself voluntarily.⁴¹⁴ However, the term is excluded from applying in certain instances such as in military service.⁴¹⁵ In terms of

⁴⁰⁸ See part 3.3 above.

⁴⁰⁹ See part 3.6 above.

⁴¹⁰ Right to Organise and Collective Bargaining Convention, 1949 (C98) art 2(1).

⁴¹¹ C98 arts 3 and 4.

⁴¹² See part 3.3 above.

⁴¹³ Forced Labour Convention, 1930 (C29) art 1.

⁴¹⁴ C29 art 2(1).

⁴¹⁵ C29 art 2(2).

article 25 of C29, illegal exaction of forced labour or compulsory labour is punishable as a penal offence, and member states are obligated to ensure that the penalties imposed by law are adequate and strictly enforced.

The Kenyan legislature has ratified C29 and adopted its provisions as provided in the Constitution, EA and the OSHA.⁴¹⁶ The government is required to fully enforce the aforesaid provisions within workplaces, including SEZs, in order to protect workers from exploitation by their employers in the form of, for instance, working beyond their statutory timelines. However, this has often not been the case.⁴¹⁷

4.3.4. Discrimination (Employment and Occupation) Convention

The Discrimination (Employment and Occupation) Convention (C111) of 1958 defines the term 'discrimination' to include any distinction, exclusion or preference made on the basis of race, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.⁴¹⁸ In terms of article 1(2) of C111, any distinction, exclusion or preference in respect of a particular job based on the inherent requirements is not deemed to be discrimination. In terms of article 2 of C111, each member state is required to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation. The pursued national policy is aimed at eliminating any discrimination in any employment or occupation. C111 also requires member states to undertake appropriate measures in order to ensure full realisation of the policy.⁴¹⁹

C111 lays the ground for equality in employment, which should be upheld during the course of employment of every worker, including SEZs workers. C111 also requires each member state to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy.⁴²⁰ The Kenyan legislature

⁴¹⁶ See part 3.3 above.

⁴¹⁷ See part 3.6.4 above.

⁴¹⁸ Discrimination (Employment and Occupation) Convention, 1958 (C111) art 1(1)(a).

⁴¹⁹ C111 art 3.

⁴²⁰ C111 art 3(c).

has adopted the provisions of the C111 in the Constitution, EA, LRA and OSHA.⁴²¹ Even though the aforesaid provisions are supposed to apply within the SEZs without modifications, the Kenyan government is yet to fully enforce them. As a result, there have been instances of discrimination within the SEZs.⁴²²

4.3.5. Equal Remuneration Convention

The Equal Remuneration Convention (C100) of 1951 requires member states to apply appropriate methods in order to ensure the application of the principle of equal remuneration for men and women workers for work of equal value.⁴²³ The term 'equal remuneration for men and women workers for work of equal value' refers to the rates of remuneration established without discrimination based on sex.⁴²⁴ In terms of article 2(2) of C100, the principle of equal remuneration may, inter alia, be applied by means of national legislation or regulation or collective agreements. The Kenyan legislature has ratified C100.⁴²⁵ The provisions of C100 therefore apply even within the SEZs. The Kenyan legislature has also adopted the principle of equal remuneration in both the Constitution and the EA. Enforcement of the aforementioned provisions in workplaces, including SEZs, therefore ensures that SEZ companies respect, promote and realise the intent of the C100 provisions.

In addition to the above core conventions, the ILO has adopted governance conventions to enable effective functioning of its labour standards system. One of these conventions is the Labour Inspection Convention (C81) of 1947. C81 requires each member state to maintain a system of labour inspection in industrial workplaces.⁴²⁶ In terms of article 2 of C81, the established system of labour inspection is required to apply to all workplaces, in respect of which legal provisions relating to conditions of work and the protection of workers while engaged in their work are enforceable by labour inspectors. However, a

⁴²¹ See part 3.3 above.

⁴²² As illustrated in parts 3.6.3 and 3.6.5 above.

⁴²³ Equal Remuneration Convention, 1951 (C100) art 2(1).

⁴²⁴ C100 art 1(b).

⁴²⁵ ILO 'Ratifications for Kenya' (2023).

⁴²⁶ ILO Labour Inspection Convention, 1947 (C81) art 1.

member state, through its national law or regulations, may exempt mining and transport undertakings or parts of such undertakings from application of C81.

The system of labour inspection is required to, inter alia, secure the enforcement of legal provisions relating to conditions of work and the protection of workers while engaged in their work, in so far as such provisions are enforceable by labour inspectors.⁴²⁷ In terms of article 12(1) of C81, labour inspectors with proper credentials are empowered to enter, freely and without previous notice at any hour of the day or night, any workplace liable to inspection.

The system of labour inspection seek to ensure that ILO member states enforce conditions of work and workers' rights as provided in their legislation in all workplaces.⁴²⁸ In this regard, the labour inspection system strives to ensure compliance with international labour standards in all workplaces including SEZs. Therefore, violation of labour rights, as discussed above,⁴²⁹ contradicts the commitments made by Kenya through its accession to the ILO and ratification of the ILO core conventions.

4.4. THE ILO DISPUTE RESOLUTION MECHANISM AND SOFT LAW

The ILO works in tripartism and social dialogue, which entail cooperation between governments and employers and workers' organisation to foster economic and social progress.⁴³⁰ In this regard, the ILO structure does not have a permanent dispute resolution system, such as a quasi-judicial body that can handle cases for non-compliance with its standards or other labour disputes.⁴³¹ The ILO legal and institutional framework on labour dispute resolution is based on three principles that include the prevention of emerging labour disputes. In case of inevitable disputes, the labour dispute is referred to its internal resolution mechanism, and in case of further need, a third party

⁴²⁷ C81 art 3(1)(a).

⁴²⁸ ILO 'A look into the ILO Practices Promoting Effective Labour Law Compliance' https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_841290/lang--en/index.htm (accessed 24 June 2023).

⁴²⁹ In part 3.6.

⁴³⁰ ILO 'How the ILO Works' <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang--en/index.htm> (accessed 24 June 2023).

⁴³¹ ILO 'Structure' <https://www.ilo.org/global/about-the-ilo/who-we-are/lang--en/index.htm> (accessed 24 June 2023).

is to be involved.⁴³² Therefore, the ILO is devoid of a substantive dispute resolution body to hear and determine labour disputes that require its intervention.

Ordinarily, the ILO supervisory body, the Committee of Experts on Application of Conventions and Recommendations (CEACR), reports on violations of the ILO conventions and requires member states to rectify them.⁴³³ Also, in terms of article (26)(1) of the ILO Constitution, any member state has a right to file a complaint with the International Labour Office if it is not satisfied that any other member state is securing the effective observance of any Convention which both have ratified. In this case, the Governing Body, if satisfied, can, upon communicating with the government in question, refer the complaint to the Commission of Inquiry to consider the complaint and file a report thereon.⁴³⁴ The report filed by the Commission of Inquiry contains recommendations it may deem proper to meet the complaint.⁴³⁵ In terms of article 29(1) of the ILO Constitution, the Director-General of the International Labour Office is required to communicate the report of the Commission of Inquiry to the Governing Body and each government, concerned in the complaint. Each of the concerned governments is required within three months to inform the Director-General of the International Labour Office whether or not it accepts the recommendations contained in the report of the Commission of Inquiry, and if not, whether it proposes to refer the complaint to the International Court of Justice(ICJ).⁴³⁶ If the member state refers the complaint to the ICJ, the decision of the ICJ is final.⁴³⁷

In case a member state fails to carry out the recommendations of the Commission of Inquiry or the decision of the International Court of Justice, the ILO Governing Body may, in accordance with article 33 of the ILO Constitution, recommend to the International

⁴³² Heron R & Vandenabeele C *Labour Dispute Resolution: An Introductory Guide* (1999) 7.

⁴³³ ILO Committee of Experts on Application of Conventions and Recommendations (CEACR) 'Reports of the CEASR' <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang-en/index.htm#:~:text=The%20Committee%20of%20Experts%20was,regions%2C%20legal%20systems%20and%20cultures>. (accessed on 24 January 2023).

⁴³⁴ ILO Constitution 1919 arts 26(3) and (4).

⁴³⁵ ILO Constitution 1919 art 28(1).

⁴³⁶ ILO Constitution 1919 art 29(2).

⁴³⁷ ILO Constitution 1919 art 31(1).

Labour Conference that it take such action it may deem suitable to secure compliance. Article 33 of the ILO Constitution obliges member states to impose sanctions against a non-compliant state, as was the case with Burma in 2000, when it had continually applied forced labour.⁴³⁸

To ensure compliance with the core conventions,⁴³⁹ in 1998 the ILO adopted the Declaration on Fundamental Principles and Rights at Work, and its Follow-Up (amended in 2022). The aim of the Declaration is to promote fundamental principles and rights guaranteed in accordance with the ILO Constitution by conducting annual follow-ups and technical cooperation with member states.⁴⁴⁰ Article 2 of the Declaration underscores that member states, even if they have not ratified the core conventions, should respect, promote and realise, in good faith and in accordance with the ILO Constitution, the fundamental principles expressed in those conventions.

The general and unlimited application of the Declaration has been instrumental in establishing global labour standards which are crucial in protecting labour rights. Based on the general applicability of the Declaration, the ILO has gone a step further and been able to persuade member states to ratify the core conventions which has eventually led to adoption of the core labour standards globally.⁴⁴¹ The general application of the international labour standards, as required under the Declaration, translates to their application in the national legal systems of the member states, whether or not they have ratified the core conventions, thus conforming with internationally agreed labour standards and labour practices.

As regards the SEZs, the extent of labour rights' violation in the zones has impelled the ILO to intervene. In 1998, a Tripartite Meeting on Export Processing Zone-Operating Countries was held, and a report, entitled *Labour and Social Issues Relating to Export*

⁴³⁸ Kuruvilla SC & Verma A (2006) 9.

⁴³⁹ See part 4.3 above.

⁴⁴⁰ ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up, 1998(amended in 2022).

⁴⁴¹ Helfer LR 'The Future of the International Labour Organization' (2007) 101 *American Society of International Law* 391.

Processing Zones, was tabled.⁴⁴² The report was unanimously adopted, and concluded that governments, employers and workers' organisations should respect, promote and realise the principles contained in the Declaration, particularly the rights to freedom of association and collective bargaining in the EPZs (herein referred to as SEZs).⁴⁴³ The Meeting also concluded that guidance on areas of labour standards, wages and working conditions, and women workers' rights should be offered to member states with SEZs to ensure compliance with the relevant international labour standards and labour best practices.⁴⁴⁴ The report reiterated the importance of governments' partnering with SEZ investors in order to improve zone workers' social infrastructure, such as providing medical and school facilities for workers and their children.⁴⁴⁵ The Committee considered that the provision of such facilities would not only ensure that zone investments were sustainable, but also generate dynamic benefits for workers, including good health and education in the long run, thus advancing inclusive development.⁴⁴⁶

In addition to the report above, a joint publication by the United Nations Centre on Transnational Corporations (UNCTC) and the ILO detailed a wide array of labour issues within EPZs. The report observed the prevalence of unsafe working conditions, including long working hours, health hazards in workplaces, and poor industrial relations between workers and the multinational enterprises (MNEs) in the EPZs.⁴⁴⁷ The report noted that these issues were common among SEZs because most of them were developed along the enclave models.⁴⁴⁸ Pertinently, the report notes that host governments can leverage the role of SEZs in economic development to ensure that SEZs investments are sustainable and that workers work in good conditions.⁴⁴⁹

⁴⁴² ILO Committee on Sectoral and Technical Meetings and Related Issues *Report of the Tripartite Meeting of Export Processing Zone – Operating Countries* (28 September – 2 October 1998).

⁴⁴³ International Labour Office *Labour and Social Issues Relating to Export Processing Zones* (1998) 15.

⁴⁴⁴ ILO (28 September – 2 October 1998) 13.

⁴⁴⁵ ILO (28 September – 2 October 1998) 9.

⁴⁴⁶ ILO (28 September – 2 October 1998) 9.

⁴⁴⁷ UNCTC – ILO *Economic and Social Effects of Multinational Enterprises in Export Processing Zones* (1988) 83.

⁴⁴⁸ UNCTC – ILO (1988) 148.

⁴⁴⁹ UNCTC – ILO (1988) 149.

The emergence of globalisation has led to a shift from state control of labour regulation to private regulation due to the high participation of MNEs in cross-border investments.⁴⁵⁰ The prevalence of labour rights compromises by states in order to attract investments has prompted the diversion of attention to MNEs, which, in their operations, are bound by a certain code of conduct that has often improved labour standards.⁴⁵¹ Corporate social responsibility (CSR) is system of private regulation that requires MNEs to give consideration to their operations' impact on labour, social and environmental matters, both internally and externally. During such operations, MNEs are required to uphold CSR principles and values.⁴⁵²

CSR principles and values are incorporated into codes of conduct, which, when adopted by MNEs, govern companies' production and supply chains.⁴⁵³ Some codes of conduct refer to principles derived from the ILO standards.⁴⁵⁴ Due to growing consumer interest in goods produced ethically and in conformity with fundamental labour standards, MNEs have been prompted to apply good CSR labour practices in their production and supply chains.⁴⁵⁵ CSR requires global value chains (GVC) of MNEs, which include global suppliers (including SEZs companies) to apply international labour standards and labour best practices or face severe criticisms, or sanctions, in case of non-compliance.⁴⁵⁶ For instance, working conditions in Lesotho's textiles and clothing industries located in EPZs improved when international buyers imposed codes of conduct on suppliers and monitored their implementation.⁴⁵⁷ In Kenya, instances of poor labour conditions and ineffective enforcement of labour legislation within workplaces (including SEZs) have been a barrier to investment, particularly by those investors serving 'global brands'.⁴⁵⁸

⁴⁵⁰ Kuruvilla SC & Verma A (2006) 42.

⁴⁵¹ Kuruvilla SC & Verma A (2006) 47.

⁴⁵² ILO 'How International Labour Standards are used' <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-use/lang--en/index.htm> (accessed 24 January 2023).

⁴⁵³ ILO 'How International Labour Standards are used'.

⁴⁵⁴ ILO 'How International Labour Standards are used'.

⁴⁵⁵ ILO 'How International Labour Standards are used'.

⁴⁵⁶ Chan CKC & Nadvi K 'Changing Labour Regulations and Labour Standards in China: Retrospect and Challenges' (2014) 153 *International Labour Review* 514 – 515.

⁴⁵⁷ Farole T & Akinci G (2011) 266.

⁴⁵⁸ Farole T (2011) 234.

Even though Kenya, to a certain extent, has adopted international labour norms into its domestic legal labour systems, enforcement of these norms within SEZs is yet to be fully realised.⁴⁵⁹

The integration of CSR in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up and the MNE Declaration⁴⁶⁰ provides a guiding framework for achieving decent work, sustainable investment, and inclusive growth. Such integration also helps in realising the UN SDG Goal 8 (Decent Work and Economic Growth) target on promoting inclusive and sustainable economic growth, employment and decent work for all.⁴⁶¹ As a result, and as envisaged by UNCTAD, 'SDG model zones' will be created.⁴⁶² UNCTAD conceptually defines the 'SDG model zones' as a 'new type of SEZs that focus on attracting investments in "SDG-relevant" activities, adhere to the highest levels of ESG standards and compliance and that promote inclusive growth through linkages and spillovers'.⁴⁶³

Somewhat similar to the current SEZs, the SDG model zones will have specialised zones with customised set of incentives, and their location will be determined by the activities on which they intend to focus.⁴⁶⁴ The zones are to be developed by involving particular investors who have a stake in sustainable development and who ensure compliance with ESG standards.⁴⁶⁵ Companies operating in the zones could be required to sign up to customised codes of conduct.⁴⁶⁶ Companies operating in the zones are further required to adopt the highest international standards in their operations, including health and safety standards.⁴⁶⁷ In addition, such companies could offer amenities and services, including health and education facilities and social housing, which would benefit the broader

⁴⁵⁹ See part 3.6 above.

⁴⁶⁰ ILO *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 1977 (amended in 2017).

⁴⁶¹ ILO 'SDG Goal 8: Decent Work and Economic Growth' <https://www.ilo.org/global/topics/sdg-2030/goal-8/lang-en/index.htm> (accessed 24 January 2023).

⁴⁶² UNCTAD (2019) 202.

⁴⁶³ UNCTAD (2019) 202.

⁴⁶⁴ UNCTAD (2019) 204.

⁴⁶⁵ UNCTAD (2019) 203.

⁴⁶⁶ UNCTAD (2019) 203.

⁴⁶⁷ UNCTAD (2019) 202.

community in which they operate.⁴⁶⁸ Essentially, and as argued in the 2019 UNCTAD report, upon adopting and adhering to such high standards, SDG model zones would transform the race to the bottom into a race to the top in SEZs.⁴⁶⁹ Such a transformation would make sustainable development a new locational advantage in SEZs' growth and development.

Finally, reference by free trade agreements (FTA) and regional economic integration (REI) to ILO instruments and CSR in their labour clauses has also improved conformity with international labour standards in cross-border trade and investment. The provision of labour clauses in the FTA and REI has translated to improved labour practices domestically.⁴⁷⁰

Kenya has adopted some of the international labour standards and labour best practices discussed above through the provisions of the Constitution, EA, LRA and the OSHA.⁴⁷¹ Apart from their adoption, the Kenyan government is required to respect, promote and observe these standards and practices. However, the government is yet to fully enforce such standards and practices within the SEZs. In order to realise sustainable and inclusive development in the SEZs, the Kenyan government should not only ratify but also ensure enforcement of relevant international labour standards and labour best practices in the SEZs. Such enforcement would lead to the protection of the rights of SEZs workers, who are the primary instrument in ensuring SEZs' success. Also, during the formulation of the SEZs labour legislation,⁴⁷² drafters should at least consider the international labour standards and labour best practices. Drafters should draw lessons from the envisioned 'SDG model zones' in terms of their focus on highest international standards of operation, sustainable development and provision of widespread benefits, as compared to the current SEZs. Therefore, as Liukkunen notes, there is a need to develop and adopt

⁴⁶⁸ UNCTAD (2019) 203.

⁴⁶⁹ UNCTAD (2019) 203.

⁴⁷⁰ ILO 'How International Labour Standards are used' <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-use/lang--en/index.htm> (accessed 24 January 2023).

⁴⁷¹ See part 3.3 above.

⁴⁷² See part 3.7 above.

regulatory frameworks that not only respond to economic necessities but also ensure inclusive development.⁴⁷³

4.5. SPECIAL ECONOMIC ZONES: ETHIOPIAN CASE STUDY

As stated in the introduction to this chapter, this mini-thesis seeks to draw lessons crucial to Kenya's SEZs labour regulation from the Ethiopian IPs regulation.

4.5.1. Economic profile of Ethiopia

Ethiopia boasts one of the fastest growing economies in the world. In the last 15 years, the country's economy attained an average economic growth rate of 9.5 per cent.⁴⁷⁴ In the financial year 2020–2021, it attained a GDP of \$111.27 billion and real GDP growth rate of 5.6 per cent.⁴⁷⁵ Despite the country's impressive economic growth rate, though, it remains one of the poorest in sub-Saharan Africa.⁴⁷⁶ In 2021, with a population of 120 million, Ethiopia had a GDP per capita of \$925.1 (which measures economic output of a nation per person) that was low when compared to other neighbouring countries such as Kenya, which had a GDP per capita of \$2,081.8.⁴⁷⁷ Ethiopia is determined to attain the status of a middle-income country by 2025. In this regard, Ethiopia has embarked on an economic transformation agenda targeting key sectors to spur economic growth.⁴⁷⁸

Ethiopia's fast economic growth has been attributed to, among other factors, capital accumulation. Capital accumulation, particularly through foreign investment, has stimulated Ethiopia's economic growth. According to the UNCTAD *World Investment Report*, Ethiopia's FDI inflows rose to \$4,259 million in 2021 from \$2,381 million in 2020.⁴⁷⁹ Interestingly, in the same year, the East Africa region at large received total FDI

⁴⁷³ Liukkunen US 'The ILO and Transformation of Labour Law' 2020 *International Labour Organisation and Global Social Governance* 44.

⁴⁷⁴ World Bank 'The World Bank in Ethiopia' <https://www.worldbank.org/en/country/ethiopia/overview> (accessed 26 January 2023).

⁴⁷⁵ World Bank 'Data – Ethiopia' <https://data.worldbank.org/country/ET> (accessed 26 June 2023).

⁴⁷⁶ World Bank 'The World Bank in Ethiopia' <https://www.worldbank.org/en/country/ethiopia/overview> (accessed 26 June 2023).

⁴⁷⁷ World Bank 'Data – Ethiopia' <https://data.worldbank.org/country/ET> (accessed 26 June 2023).

⁴⁷⁸ World Bank 'Data – Ethiopia' <https://data.worldbank.org/country/ET> (accessed 26 June 2023).

⁴⁷⁹ UNCTAD (2022) 211.

inflows amounting to \$8.2 billion, as compared to Ethiopia's \$4.3 billion.⁴⁸⁰ In the same year, Ethiopia became the largest recipient of FDIs among the landlocked developing countries, which collectively received total FDIs of \$18 billion in 2021.⁴⁸¹

Ethiopia's high and consistent capital accumulation through investment is based on the reforms brought by the government's 10-year Development Plan. The 10-year Development Plan is based on the Home-Grown Economic Reform Agenda of 2019 and the Second Growth and Transformation Plan (GTP II), both of which seek to reinvigorate and sustain the country's economic growth through, inter alia, development policies advancing export strategies.⁴⁸² The export strategy is centred on Ethiopia's IPs (SEZs) where EOs are established to industrialise and diversify the country's exports.⁴⁸³ Currently, Ethiopia's IPs have received the largest portion of the country's FDI inflows.⁴⁸⁴ Therefore, Ethiopia's high FDI inflows sparks intriguing inquiries into its IPs' legal investment frameworks and labour regulation.

4.5.2. Ethiopia's special economic zones (industrial parks)

The Ethiopian government has undertaken economic reforms in an effort to spur economic growth. An economic shift from the feudal system to the socialist system in 1975, and eventually to a liberalised market economy in 1992, led to a progressive increase of the country's FDI inflows thereafter.⁴⁸⁵ The UNCTAD *World Investment Report* indicates that Ethiopia received FDIs amounting to \$3.3 billion in 2018, from nothing in 1992.⁴⁸⁶ Also, as observed by Edinger and Ntsoane, apart from economic and investment regime reforms, the Ethiopian government has formulated development plans and strategies aimed at attracting and retaining investment.⁴⁸⁷ The aim of these

⁴⁸⁰ UNCTAD (2022) 12.

⁴⁸¹ UNCTAD (2022) 18.

⁴⁸² World Bank 'The World Bank in Ethiopia' <https://www.worldbank.org/en/country/ethiopia/overview> (accessed 26 January 2023).

⁴⁸³ World Bank 'The World Bank in Ethiopia' <https://www.worldbank.org/en/country/ethiopia/overview> (accessed 26 January 2023).

⁴⁸⁴ Ethiopian Industrial Parks Development Corporation (IPDC) <https://www.ipdc.gov.et> (accessed 26 January 2023).

⁴⁸⁵ UNCTAD *Investment and Innovation Policy Review of Ethiopia* (2002) 25.

⁴⁸⁶ UNCTAD (2019) 9.

⁴⁸⁷ Edinger H & Ntsoane M 'Invest in Ethiopia Structural Reforms Set to Unlock East Africa's Largest Economy' (2019) *Deloitte* 7.

development plans is to attract more capital investment to Ethiopia in order to stimulate its economic growth agenda.⁴⁸⁸

One of the economic strategies adopted by Ethiopia to bolster its economic transformation is the Industrial Parks (IPs) programme. The development of the IP programme (used interchangeably with SEZs⁴⁸⁹) is in conformity with the GTP II, and it seeks to attract foreign investments, create jobs and boost Ethiopia's industrialisation initiative.⁴⁹⁰ The IP programme provides the basis for establishment of industrial parks and the Ethiopian Industrial Parks Development Corporation (IPDC) of 2014.⁴⁹¹ In accordance with the IP programme, production in the IPs is sector-specific for efficiency, and takes advantage of the available economies of scale.⁴⁹² The Hawassa Industrial Park, which specialises in garments and textiles, and the Bole Lemi Industrial Zone, which focuses on textiles, apparel and leather, are some of the notable IPs in Ethiopia.⁴⁹³ Currently, the IPDC reports establishment of over 13 IPs in Ethiopia, which have created about 83,000 jobs and generated revenue of more than \$1 billion.⁴⁹⁴ In 2020, IPs' exports accounted for 43 per cent (\$165 million) of the total manufactured exports (\$365 million) from Ethiopia.⁴⁹⁵ The IPs have therefore contributed to Ethiopia's economic growth.

Ethiopia's IPs offer a wide range of fiscal and non-fiscal incentives to investors. Fiscal incentives include income and custom duty exemption, while non-fiscal incentives include customs facilitation and legal guarantee against property expropriation.⁴⁹⁶ In addition, the low wages offered in Ethiopian IPs provide a competitive advantage over other SEZs

⁴⁸⁸ Abebe KA *The Role of Labour Regulation in Attracting Foreign Direct Investment: The case of Export Oriented Industries in Ethiopia* (published LLM thesis, University of Pretoria, 2019) 21.

⁴⁸⁹ Article 2(1) of the Industrial Parks Proclamation No. 886 of 2015 defines an industrial park as constituting a special economic zone.

⁴⁹⁰ Edinger H & Ntsoane M (2019) 4.

⁴⁹¹ Edinger H & Ntsoane M (2019) 4.

⁴⁹² Ethiopian Investment Commission (EIC) *An Investment Guide to Ethiopia* (2017) 8.

⁴⁹³ EIC (2017) 9.

⁴⁹⁴ Ethiopian Industrial Parks Development Corporation (IPDC) 'Industrial Parks in Ethiopia' <https://www.ipdc.gov.et> (accessed 26 January 2023).

⁴⁹⁵ CEPHEUS Research and Analytics *Ethiopia's Industrial Parks: A Data Pack on Recent Performance* (2020) 4.

⁴⁹⁶ EIC *An Investment Guide to Ethiopia* (2017) 7.

worldwide, thus attracting more investors.⁴⁹⁷ However, due to low wages, employee retention has been a challenge for some IPs. IPs workers' living conditions have been a concern.⁴⁹⁸ For instance, some IPs workers are not being paid a living wage, and they also work for long hours. In addition, some IPs workers work for six days in a week without compensation for overtime work.⁴⁹⁹

In an endeavour to improve workers' working conditions and welfare, the Ethiopian Investment Commission (EIC) introduced an IP labour database programme. The labour database provides information on labour supply and demand matching, and assists in monitoring working conditions in the IPs.⁵⁰⁰ The idea of a national labour database system was derived from the Hawassa Industrial Park Sourcing and Training of Employees in the Region (HIPSTER).⁵⁰¹ HIPSTER was a labour services market system that helped in the identification of employees for the IP, screening them, and grading and training those who got employed.⁵⁰² The HIPSTER model was launched in 2016 and expanded to include functions that enabled worker retention, such as technical training, soft skills, women's health and social services.⁵⁰³ The model led to improved labour productivity in the Hawassa IP, increased employee retention and satisfaction, and tracked labour law adherence in the IPs.⁵⁰⁴ The success of HIPSTER prompted the Ethiopian government to adopt a labour database management system in the IPs that could yield improved services and sustainability.⁵⁰⁵ As a result, the IP labour database programme was

⁴⁹⁷ Chen G, Geiger M & Fu M *Manufacturing FDI in sub-Saharan Africa: Trends, Determinants, and Impact* (2015) 1531 World Bank Group 26.

⁴⁹⁸ Davison W 'Park Life: Workers Struggle to make Ends Meet at Ethiopia's \$ 250 million Industrial Zone (2017) *The Guardian* <https://www.theguardian.com/global-development/2017/dec/05/ethiopia-industrial-park-government-investment-boost-economy-low-wages> accessed 26 January 2023).

⁴⁹⁹ Davison W (2017).

⁵⁰⁰ Mastercard Foundation 'Factories Across Seven Industrial Parks in Ethiopia to be Revolutionized through the Digitization of Labour Supply and Demand Matching' (2020) <https://mastercardfdn.org/factories-across-seven-industrial-parks-in-ethiopia-to-be-revolutionized-through-the-digitization-of-labour-supply-and-demand-matching/> (accessed 26 January 2023) Also, Enterprise Partners *Enterprise Partners in Support of Industrial Transformation – Building an Industrial Labour Services Market in Ethiopia* (2020) 40.

⁵⁰¹ Enterprise Partners (2020) 24.

⁵⁰² Enterprise Partners (2020) 24.

⁵⁰³ Enterprise Partners (2020) 29.

⁵⁰⁴ Enterprise Partners (2020) 34.

⁵⁰⁵ Enterprise Partners (2020) 35.

adopted. It is modelled along sourcing and screening of employees, job matching, skills development, workers' satisfaction, and retention and coordination in the IPs.⁵⁰⁶

The development of such a database may prove crucial to Kenya's SEZA because it would enable it to track the SEZs working conditions, workers' welfare, training and skills development, and the nature of labour relations within the SEZs. As such, SEZs workers' conditions would be improved, leading to inclusive development. In addition, it would lead to an increase in labour productivity, which would also boost SEZs companies' performance and reputation.

4.5.3. Ethiopian investment legal framework

The Ethiopian IPs enjoy a competitive advantage in FDI attraction. The available young and semi-skilled labour force, and also the low wages paid to workers, give the IPs a competitive advantage as compared to other SEZs in Africa.⁵⁰⁷ As a result, the IPs have experienced an increase in investments, which has prompted the government to improve the legal and institutional framework governing the IPs. The GTP I⁵⁰⁸ was one of the policies enacted that led to the establishment of the first five IPs, which, however, as Azmach observes, experienced initially slow performance due to institutional challenges and regulatory complexities.⁵⁰⁹

In the period 2012–2014, Ethiopia's IPs were developed and regulated by the Ministry of Industry. The Ministry had three state ministers who were tasked with industrial zone development and overseeing development of the textile industry and the leather sector, respectively.⁵¹⁰ In 2014, the Ethiopian Industrial Zones Development Corporation (IZDC) was established, primarily to manage and administer IPs.⁵¹¹ Subsequently, the Ethiopian Investment Commission (EIC) was established.⁵¹² The EIC exercises powers conferred

⁵⁰⁶ Enterprise Partners (2020) 49.

⁵⁰⁷ Bessette A 'Special Economic Zones: Ethiopian Case Study' 2022 *trade law centre* 7.

⁵⁰⁸ GTP I was a derivative of the Industrial Development Strategy of Ethiopia of 2002.

⁵⁰⁹ Azmach EW 'Regulating Industrial Parks Development in Ethiopia: A Critical Analysis' (2019) 10 *Beijing Law Review* 39–40.

⁵¹⁰ Azmach EW (2019) 42.

⁵¹¹ Council of Ministers Regulations No. 326 of 2014.

⁵¹² Council of Ministers Regulation No. 313 of 2014.

on it in terms of article 35 of the Investment Proclamation, which includes promoting investment matters in the country and initiating and implementing policy measures necessary for the creation of a conducive investment climate.⁵¹³ In accordance with the Industrial Parks Proclamation, the EIC has the power and duty to register and give legal personality to IP developers,⁵¹⁴ revoke certificates of IP residency,⁵¹⁵ and provide one-stop-shop service within the parks.⁵¹⁶

The Council of Ministers established another IP regulatory body, the Ethiopian Investment Board (EIB).⁵¹⁷ The EIB has, inter alia, the power to designate and oversee the administration and supervision of IPs.⁵¹⁸ The Ethiopian Industrial Parks Proclamation establishes a tripartite modality which entails an arrangement where representatives of the government (Ministry of Labour and Social Affairs), employers (IP developer, IP operator or IP enterprise) and employees address labour issues through constructive consultation.⁵¹⁹ The representatives of these entities together constitute a tripartite council tasked with solving labour disputes arising out of IPs through joint discussion and consultations.⁵²⁰ These consultations are based on a tripartite modality in order to promote effective social dialogue and cooperation between the government, employers and employees' in addressing labour matters.⁵²¹ On the basis of this tripartite modality, the Ministry of Labour and Social Affairs is required to establish the rules and procedures on labour issues in consultation with the Ministry of Industry.⁵²²

⁵¹³ Investment Proclamation No. 1180 of 2020 art 35.

⁵¹⁴ In accordance with article 2 of the Industrial Parks Proclamation No. 886 of 2015, an IP developer is defined as any profit-making public, public-private or private developer, including the IPDC, engaged in designing, constructing or developing IPs in accordance with the Investment Proclamation and Investment Regulations, IP developer permit, and IP developer agreement.

⁵¹⁵ In accordance with article 2 of the Industrial Parks Proclamation No. 886 of 2015, an IP resident is defined as a natural person granted a certificate of industrial-park residence by the EIC in order to reside within the residential area of the IP. A certificate of IP residency is issued to any IP resident subject to meeting the requirements specified in the Industrial Parks Proclamation Regulations.

⁵¹⁶ Industrial Parks Proclamation No. 886 of 2015 arts 17–18 & 30.

⁵¹⁷ Council of Ministers Regulation No. 313 of 2014 reg 3.

⁵¹⁸ Industrial Parks Proclamation No. 886 of 2015 art 29(1).

⁵¹⁹ Industrial Parks Proclamation No. 886 of 2015 art 2.

⁵²⁰ Industrial Parks Regulations on Industrial Parks, 2015 reg 18 and 19.

⁵²¹ ILO 'National Labour Law Profile: Federal Republic of Ethiopia' https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158894/lang--en/index.htm (accessed 24 July 2023).

⁵²² Industrial Parks Proclamation No. 886 of 2015 art 28(3).

Unlike in Kenya, the tripartite model of discussion and consultation in Ethiopia enables SEZs stakeholders to address and take into account different issues affecting the SEZs, including workers' rights. Application of the tripartite model to resolve labour issues emanating from the development and administration of SEZs translates to protection of SEZs workers' rights and interests.

However, the Ethiopian IP legal framework for labour regulation is not devoid of regulatory ambiguities.⁵²³ Pursuant to the provisions of the Industrial Parks Proclamation, regulation of labour, environment and technology transfer is mainly bestowed upon three different ministries.⁵²⁴ The EIC and EIB, which are mostly involved in the administration and management of the IPs, therefore do not have powers or duties to regulate these matters. The practicality of regulation labour, environment and technology by the three ministries which are not fully involved in the administration and management of the IPs therefore becomes a challenge.⁵²⁵ Despite this regulatory ambiguity, the tripartite model could, to a certain extent, prove a viable model for Kenya's SEZs in addressing operational, monitoring and compliance issues in labour regulation.

In addition to the foregoing institutional framework, the Constitution of Ethiopia guarantees Ethiopians' the right to benefit from the country's resources.⁵²⁶ Article 89(5) of the Constitution bestows the power to control land and other natural resources upon the government to ensure that all Ethiopians benefit equally from these resources. Furthermore, the Federal government is mandated to enact legislation governing matters related to land use and other natural resources, as well as foreign trade and inter-state commerce.⁵²⁷ As such, the Constitution provides a general framework for investment in the country, one from which all investment activities derive their legitimacy.

The Investment Proclamation is the primary legislation governing investment in Ethiopia. The Proclamation distinguishes between sectors that are a reserve for joint investment with the Ethiopian government, for domestic investors, for joint investment with domestic

⁵²³ Azmach EW (2019) 44–45.

⁵²⁴ Industrial Parks Proclamation No. 886 of 2015 arts 28 and 29.

⁵²⁵ Azmach EW (2019) 51.

⁵²⁶ Constitution of the Federal Republic of Ethiopia, Proclamation No. 1 (1995) art 89(1).

⁵²⁷ Constitution of the Federal Republic of Ethiopia, Proclamation No. 1 (1995) arts 55(2)(a) and (4).

investors, and for that open to foreign investors.⁵²⁸ Sectors such as banking and insurance are for Ethiopian investors only.⁵²⁹ Postal services and distribution of electricity are reserved for joint investment with the government.⁵³⁰ Domestic air transport services are permitted for a joint investment with domestic investors.⁵³¹ Manufacturing and agriculture are open to foreign investors.⁵³²

The Investment Proclamation also establishes the general objectives of investment, including enhancing the competitiveness of the national economy by promoting investment in productive and enabling sectors.⁵³³ In addition, the Ethiopian Industrial Parks Proclamation stipulates the objectives of the IPs, which include creating job opportunities and achieving sustainable economic development.⁵³⁴

4.5.4. Labour regulation in Ethiopia's special economic zones

The growing Ethiopian labour force has been a key factor in drawing FDIs into the IPs. The country's large labour supply has led to payment of low labour wages to IP workers.⁵³⁵ As a result, Ethiopia has gained a competitive advantage in its IPs' FDI attraction, but this has come at the expense of the IPs workers' rights.⁵³⁶ The need for the protection of IP workers' rights in the IPs has therefore been considered by the Ethiopian legislature, which has endeavoured to lay down a legal infrastructure to ensure legal protection of IP workers.

The provisions of the Constitution of Ethiopia are key to promoting inclusive development for Ethiopian workers. The Constitution anchors a wide range of fundamental rights and principles of labour rights. Its article 18(2) prohibits all forms of forced and compulsory labour. The right to freedom of association is protected in accordance with articles 31 and 41(1)(a) of the Constitution. Article 35 grants women the rights to, inter alia, be fully

⁵²⁸ Investment Proclamation No. 1180 of 2020 art 6.

⁵²⁹ Council of Ministers Regulation No. 474 of 2020 reg 4.

⁵³⁰ Council of Ministers Regulation No. 474 of 2020 reg 3.

⁵³¹ Investment Proclamation No. 1180 of 2020 art 5(1).

⁵³² Council of Ministers Regulation No. 474 of 2020 reg 6.

⁵³³ Investment Proclamation No. 1180 of 2020 art 5.

⁵³⁴ Industrial Parks Proclamation No. 886 of 2015 art 4.

⁵³⁵ Davison W (2017).

⁵³⁶ Bessette A (2022) 7.

consulted during the formulation of national development policies, equal employment, equal pay and promotion, and maternity leave with full pay. Article 42(2) of the Constitution entitles workers to a reasonable limitation of working hours, to rest, leisure, to periodic leaves with pay, to remuneration for public holidays, as well as to a healthy and safe work environment. In terms of article 89(8) of the Constitution, the Ethiopian government is mandated to protect and promote the health, welfare and living standards of the working population in the country.

Article 28(1) of the Ethiopian Industrial Parks Proclamation provides that the general labour law applies fully in the IPs; thus, it follows the inclusionary approach. Article 28(1) of the Proclamation requires that labour contracts be negotiated between the employers and individual employees.⁵³⁷ Negotiation of the labour contracts between employers and employees ultimately disadvantages employees due to their weaker bargaining power.⁵³⁸ As a result, and compounded with other general labour concerns, Ethiopia overhauled its labour legislation in 2019 and a new Labour Proclamation was enacted.⁵³⁹

The Council of Ministers Regulation on Industrial Parks establishes a tripartite committee in every IP.⁵⁴⁰ The tripartite committee consists of representatives from the government (Ministry of Labour and Social Affairs, and the Ministry of Industry), employers (industrial park developer, operator or enterprise) and employees.⁵⁴¹ The committee is responsible for, inter alia, ensuring that the rights and duties of workers are respected, and creating conducive conditions to prevent conflicts through continuous consultation and engagement.⁵⁴² As such, the committee ensures protection of workers' rights, prevents potential conflict by engaging stakeholders in continuous consultation, and maintains 'industrial peace'.⁵⁴³ In addition, the Council of Ministers' Regulations on Industrial Parks require that complaints and collective or individual labour disputes that arise between a worker and his or her employer in an IP be resolved in accordance with the national labour

⁵³⁷ Industrial Parks Proclamation No. 886 of 2015 art 28(2).

⁵³⁸ Cotula L & Mouan L (2021) 352.

⁵³⁹ Labour Proclamation No. 1156 of 2019.

⁵⁴⁰ Council of Ministers Regulation on Industrial Parks No. 417 of 2017 art 35(1).

⁵⁴¹ Council of Ministers Regulation on Industrial Parks No. 417 of 2017 art 35(1).

⁵⁴² Council of Ministers Regulation on Industrial Parks No. 417 of 2017 art 35(2)(a).

⁵⁴³ Council of Ministers Regulation on Industrial Parks No. 417 of 2017 art 35(2).

law, which gives first preference to use of ADR mechanisms.⁵⁴⁴ In essence, a similar tripartite committee may be a crucial tool for Kenya's SEZs in not only protecting and monitoring labour rights within the zones but also solving labour disputes between SEZs workers and their employers.

Ethiopia's Labour Proclamation (LP) regulates key employment terms. Employment terms such as wages,⁵⁴⁵ working hours and overtime work,⁵⁴⁶ annual and sick leave,⁵⁴⁷ and occupational health and safety⁵⁴⁸ are all regulated. Unlike the Kenya EA, the LP provides extensive protection of women's rights. The LP specifically stipulates the working conditions of women and young workers.⁵⁴⁹ It prohibits any form of discrimination in all respects against women on the basis of their work.⁵⁵⁰ Without prejudice to the foregoing provision, the LP gives priority to women over men when competing for employment, promotion or any other benefit if they get equal results.⁵⁵¹ In terms of article 87(4), employers are prohibited from both assigning pregnant workers night work between 10 pm and 6 am, as well as any overtime work. In addition, employers are required to transfer pregnant workers to new places of work if the current place is hazardous to their health or the foetus, as ascertained by a physician.⁵⁵² In accordance with article 88 of the LP, pregnant workers are entitled to different types of leave during their pregnancy. These include leave with pay for medical examination, 30 consecutive days of pre-natal leave with pay, and a period of 90 consecutive days of post-natal leave. The foregoing extensive protection is crucial, as the IPs employ a higher ratio of women workers compared to male workers.⁵⁵³ In this regard, and as Sheba Tejani observes,

⁵⁴⁴ Council of Ministers Regulation on Industrial Parks No. 417 of 2017 art 21(2).

⁵⁴⁵ Labour Proclamation No. 1156 of 2019 art 53.

⁵⁴⁶ Labour Proclamation No. 1156 of 2019 part iv.

⁵⁴⁷ Labour Proclamation No. 1156 of 2019 part v.

⁵⁴⁸ Labour Proclamation No. 1156 of 2019 part vii.

⁵⁴⁹ Labour Proclamation No. 1156 of 2019 part vi.

⁵⁵⁰ Labour Proclamation No. 1156 of 2019 art 87(1).

⁵⁵¹ Labour Proclamation No. 1156 of 2019 art 87(2).

⁵⁵² Labour Proclamation No. 1156 of 2019 art 87(5).

⁵⁵³ Cotula L & Mouan L (2021) 355.

special attention should be given to enhanced protection and empowerment of women IPs workers, taking into account the associated risks in the IPs.⁵⁵⁴

Unlike Kenya's EA, the LP requires that certain stipulated labour disputes relating to working conditions, wages and collective agreements be settled either by the Labour Relations Board or through conciliation in an amicable manner.⁵⁵⁵ The rationale for establishing such separate mechanisms from the normal judicial system to solve particular labour disputes is because the ordinary law courts experience, among other challenges, backlogs of cases and weak institutional capacity, which lead to a delay in dispute resolution.⁵⁵⁶

Ethiopia's IPs legal framework for labour regulation presents invaluable lessons to Kenya. As the discussion above has shown, the tripartite modality, tripartite committee and extensive protection of women workers' rights in the Ethiopian labour law and IPs legal framework, among other key lessons, can prove crucial to Kenya in ensuring effective labour regulation in its SEZs.

4.6. CONCLUSION

The discussion in this chapter has elucidated key lessons that could improve Kenya's SEZs labour regulation in order to ensure sustainable and inclusive development. The first part of the chapter observed that international labour standards, labour best practices and CSR play an important role in influencing the nature of the domestic labour legislation. The adoption of the international labour standards, labour best practices and CSR by the ILO member states, as noted, ensures that domestic labour legislation conforms to internationally agreed best labour standards and labour practices. As a result, ILO member states, Kenya included, have, to a certain extent, been able to shape labour legislation governing their SEZs in accordance with the international labour standards and labour best practices, in order to realise sustainable and inclusive development. The

⁵⁵⁴ Tejani S 'The Gender Dimension of Special Economic Zones' in Farole T & Akinci G *Special Economic Zones: Progress, Emerging Challenges, and Future Directions* (2011) 251.

⁵⁵⁵ Labour Proclamation No. 1156 of 2019 arts 142, 143 and 145.

⁵⁵⁶ Bisare B 'Resolution of Collective Labour Disputes by Labour Relations Board in Ethiopia: Critical Reflections' (2022) *Mizan Law Review* 230.

discussion further observed that, even though the Kenyan legislature has ratified the core ILO conventions and adopted the international labour standards to an extent through legislation such as EA, LRA and OSHA, enforcement of such statutory provisions within the SEZs is yet to be fully realised.

In addition, Ethiopia's IPs labour regulation presents invaluable lessons to Kenya's SEZs labour regulation. The second half of the chapter observed that Ethiopia's labour force offers the country a competitive advantage in FDI attraction. In addition, due to the increase in FDI inflows, Ethiopia's IPs have spread, leading to demand for more labour. However, the nature of labour regulation within the Ethiopian IPs has given rise to labour issues that need to be addressed by legislation. The Ethiopian legislature enacted the IPs' investment and labour legislation, aimed at promoting FDIs and protecting IPs workers' rights, respectively. The legal framework on investment has facilitated an increase in FDI inflows, while the labour framework guarantees, and has provided mechanisms that enhance, the protection of labour rights within the IPs. Ethiopia presents other lessons, including the labour database system, the tripartite modality and the tripartite committee, which are necessary tools for establishing, protecting and monitoring labour rights within SEZs.

The above lessons, as well as the findings in the mini-thesis, will be summarised in the next chapter. The chapter will then draw conclusions and make recommendations, with the aim of establishing an SEZs labour-law approach that would enable the attraction of sustainable investments and ensure inclusive development in Kenya.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1. INTRODUCTION

The conclusion and recommendations of the mini-thesis are made in this chapter. The chapter is divided into two sections. The first section summarises the findings of the mini-thesis, which are derived from the preceding chapters' discussions. The findings are based on the analysis of the significance of SEZs in accelerating economic growth in Kenya by attracting sustainable FDI. The findings are also premised on the role of labour rights in Kenya's SEZs in attracting sustainable FDI and promoting inclusive development. Furthermore, the findings touch on the role that international labour standards and labour best practices can play in shaping Kenya's SEZs labour legislation.

The final section outlines the recommendations of the mini-thesis. These seek to provide guidance on how Kenya can regulate labour activities within its SEZs to attract sustainable FDI and ensure inclusive development. The recommendations are derived from the arguments of the mini-thesis, which are based on Kenya's SEZs labour regulation, international labour best practices, and lessons learnt from Ethiopia.

5.2. SUMMARY OF FINDINGS

In assessing the significance of SEZs in Kenya, chapter two established that the implementation of the SEZs programme in Kenya has led to, among other benefits, attraction of foreign direct investments.⁵⁵⁷ The chapter argued that even though Kenya's SEZs programme has contributed to FDI attraction, questions have been raised as to whether these investments are sustainable.⁵⁵⁸ As a result, the chapter found that Kenya's SEZs investment experience elucidates a gap between its economic significance and inclusive development.⁵⁵⁹ In conclusion, it was established that Kenya's SEZs programme

⁵⁵⁷ Chapter 2, part 2.5.2.

⁵⁵⁸ Chapter 2, part 2.9.1

⁵⁵⁹ Chapter 2, part 2.10.

is yet to engender the more dynamic benefits expected by its workers, thus inhibiting the role of the programme in promoting sustainable and inclusive development.

Chapter three discussed the role of labour rights in SEZs in promoting sustainable FDI inflows and inclusive development in Kenya. The chapter found that Kenya has employed an inclusionary labour law regime in the SEZs' labour regulation.⁵⁶⁰ The chapter established that, even though the national labour legislation applies within the SEZs, its enforcement has been ineffective.⁵⁶¹ As a result, there has been infringement of labour rights within the zones.⁵⁶² The chapter asserted that, for Kenya to realise sustainable SEZs' investments and inclusive development, labour rights should be enforced within the SEZs irrespective of the prevailing economic interests. In addition, the chapter established that the contribution of SEZs' FDIs to economic growth in Kenya is supposed to translate concurrently to inclusive development. Finally, the chapter argued that the enforcement of labour rights provisions and incorporation of the ESG standards, gender-inclusive practices and social policies within the SEZs programme would not only generate economic gains for the country but also ensure inclusive development.⁵⁶³

The first section of chapter four argued that adoption of international labour standards, labour best practices and CSR would ensure that domestic labour law conforms to internationally accepted standards.⁵⁶⁴ Implementation of such standards and practices in the SEZs' labour regulation framework proves instrumental to ensuring good working conditions and labour relations in the SEZs, thus promoting inclusive development.⁵⁶⁵ Although Kenya has adopted some of these standards and practices by ratifying the ILO conventions, they are, as the chapter found, yet to be enforced effectively in the SEZs. The mini-thesis takes the position that ILO member states should at least consider and adopt the said standards and practices as guiding frameworks and recommendations when formulating domestic labour law.

⁵⁶⁰ Chapter 3, part 3.4.1.

⁵⁶¹ Chapter 3, part 3.4.1 para 2.

⁵⁶² Chapter 3, part 3.6.

⁵⁶³ Chapter 3, part 3.7.

⁵⁶⁴ Chapter 4, part 4.3.

⁵⁶⁵ Chapter 4, part 4.3 para. 3.

The second section of the chapter established that in Ethiopia, as in Kenya, the national labour legislation fully applies in the IPs (inclusionary regime). Pertinently, Ethiopia's regulation of labour activities in the IPs presents invaluable lessons to Kenya on how to administer SEZs and ensure the protection of workers' rights.⁵⁶⁶ The labour database system, tripartite modality and the tripartite committee are necessary tools for establishing, protecting and monitoring labour rights within SEZs. In addition, extensive provision of IPs women workers' rights in the Labour Proclamation ensures their adequate protection.⁵⁶⁷ The chapter argued that such provisions, inter alia, lay the groundwork for addressing, protecting and monitoring SEZs workers' rights. This translates into inclusive development and ensures that investments in SEZs are sustainable.

5.3. RECOMMENDATIONS

In view of the findings above, the following proposals, if adopted and implemented, would facilitate both the realisation of sustainable FDI inflows into SEZs and inclusive development in Kenya.

5.3.1. Adoption of a special regime for labour regulation in special economic zones

As discussed in chapter three, the inclusionary approach in Kenya's SEZs labour regulation has its shortcomings. The SEZ Act has failed to provide for workers' rights. The government has also yet to fully enforce labour rights within the SEZs. This failure on the part of the SEZs Act and the government has attracted criticism and labour concerns arising from the violation of SEZs workers' rights.

Kenya should adopt a special legal framework where either the SEZ Act is amended to include specific labour rights, or special SEZ labour legislation is enacted to protect SEZs workers' rights. While amending the SEZs Act or enacting SEZs labour legislation, Parliament should endeavour to make provision for SEZs labour rights, enforcement mechanisms, and an evaluation and monitoring system to ensure compliance. The EA and the SEZs Acts, as currently drafted, do not make provision for these mechanisms.

⁵⁶⁶ Chapter 4, part 4.5.3.

⁵⁶⁷ Chapter 4, part 4.5.4.

During the amendment, or the SEZs labour legislation formulation process, the government of Kenya should consider and draw lessons from international labour standards and labour best practices, particularly on legal and regulatory frameworks.

The process of amendment or enactment of SEZs labour legislation should also consider and draw lessons from Ethiopia's IPs labour regulation. Structures such as extensive protection of women workers' rights, the labour database, tripartite modality and the tripartite committee on resolution of labour disputes have proved crucial to effective labour regulation in Kenya's SEZs. Essentially, the SEZs labour legislation should be in conformity with the Constitution and the EA. In case of conflict, the Constitution is to prevail.

5.3.2. Enforcement of labour rights within special economic zones

As demonstrated in the mini-thesis, especially in chapter three, enforcement of the EA provisions within the SEZs has been ineffective. The government has often compromised labour rights within the SEZs in order to attract FDIs.

Adopting regulatory enforcement mechanisms will ensure implementation of labour rights within the SEZs. Mechanisms such as the establishment of an independent body or committee will actualise enforcement of labour legislation within SEZs. The envisioned independent body or committee should be established through statutory amendments to the SEZs Act by Parliament, and either body should be given specific powers to ensure enforcement of labour rights within the SEZs. Implementation of labour rights within the SEZs would lead to the protection of employees from exploitation and hazardous work conditions.

In the long run, protection of SEZs workers' rights will translate into enhanced workers' welfare, safe and healthy working conditions, desirable wages and unionisation. As a result, there will be improved socio-economic conditions among workers, and thus inclusive development. Application of labour rights within the SEZs companies would also attract investments that conform to sustainability requirements.

5.3.3. Inclusion of social principles and policies within the special economic zones' companies

Kenya's SEZs companies are yet to incorporate social policies in their operations. As discussed in chapter three, such failure has been one of the contributory factors to poor inclusive development.

To curb this inadequacy, SEZs companies should adopt social policies that are geared to providing social benefits to their workers and local communities. As demonstrated by the ELIDZ and the Ismailia FZ companies,⁵⁶⁸ policies aimed at, inter alia, training and development, creating health awareness, promoting gender inclusivity, and empowering education among workers and local communities go a long way towards ensuring inclusive development.

The benefits of such policies would also translate into increased productivity in companies due to, among other factors, reduced staff turnover.

5.3.4. Adoption of a monitoring and compliance benchmark system in special economic zones

The discussions in chapters two, three and four revealed inadequate monitoring and compliance systems of labour activities within Kenya's SEZs. Neither the SEZs Act nor the EA provides tools to evaluate and monitor labour activities within the SEZs to ensure compliance with the respective labour provisions.

In this regard, Parliament should amend the SEZs Act to either provide for such tools, or to make it mandatory for the SEZs companies to adopt benchmarks that contain monitoring and compliance mechanisms, as advanced by international labour standards, labour best practices and CSR. The adoption of such tools would ensure that SEZs' labour activities conform to both national and internationally accepted standards. As a result, workers would be able to reap the benefits of good labour practices and conditions, a situation that in turn would contribute to inclusive development.

⁵⁶⁸ Chapter 3, part 3.7.

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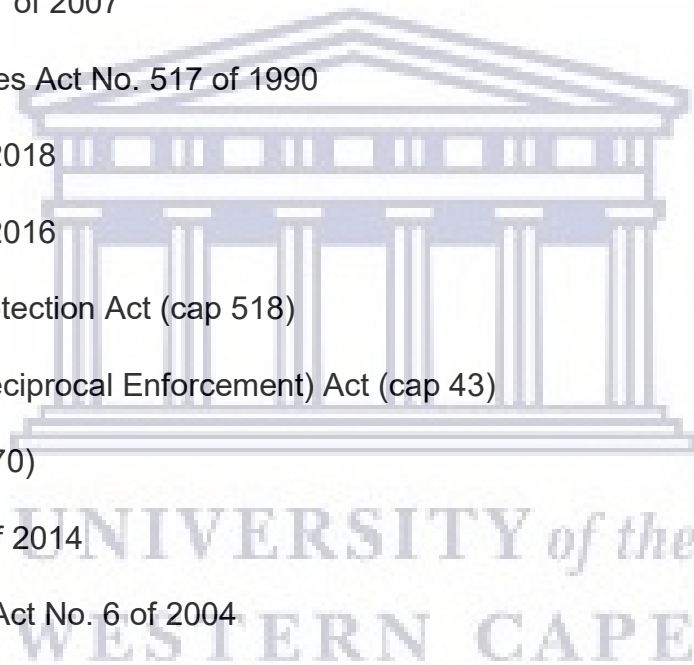
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