

**MIGRATION AND TRADE AGREEMENTS: CASE OF KENYAN
MIGRANT WORKERS IN THE UNITED ARAB EMIRATES**

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GEORGE OGEMBO ABUDHO

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Declaration

I declare that this thesis is my original work and has not been exhibited or published in any way and has never been presented in any academic institution.

Name:.....

Signature.....

Date.....

Approval:

This thesis has been submitted for examination with my approval as the supervisor.

Supervisor's Name:.....

Signature.....

Date:.....

DEDICATION

This thesis is dedicated to my uncle Caleb Onyango whose selfless generosity set me on the path of immense knowledge.

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My sincere gratitude to my supervisor Ms. Florence Simbiri-Jaoko for her immense support and co-operation. Last but not least, I thank the Almighty God for His inspiration.

List of Abbreviations and Acronyms

CCALC	-Canada-Chile Agreement on Labour co-operation
COMESA	-Common Market for Eastern and Southern Africa
DHC	- Dubai Healthcare City
DIFC	- Dubai International Financial Centre
EAC	-East Africa Community
FTA	-Free Trade Agreement
GATS	- General Agreements on Trade in Services
GATT	- General Agreement on Tariffs and Trade
GCC	- Gulf Cooperation Council
ICMW	- International Convention on the Protection of the Rights of All Migrant Workers and their Families
ILO	-International Labour Organization
IOM	- International Organization for Migration
JPEPA	- Japan-Philippines Economic Partnership Agreement
NAALC	-North American Agreement for Labour Cooperation
NAFTA	- North America Free Trade Agreement
NOC	- No-objection Certificate

PTA - Preferential Trade Agreements

UAE - United Arab Emirates

WTO - World Trade Organization

TABLE OF STATUTES

Kenya

Employment Act

Foreign Diaspora Policy

UAE

Federal Law No. 8 of 1980 on labour and employees

Federation Law No. 6 of 1973

Conventions

Convention No. 97 of 1949 (C 97) concerning Migration for Employment and

Convention No. 143 of 1975 (C 143) concerning Migration in Abusive Conditions and the
Promotion of Equality of Opportunity and Treatment of Migrant Workers.

International Convention on the Protection of the Rights of All Migrant Workers and their
Families (ICMW)

Migrant Workers (Supplementary Provisions) Convention (No. 143)

Universal Declaration of Human Rights, 1948

ABSTRACT

For a long time, Kenya has grappled with news of violation of the labour rights of its citizens working in UAE owing to various factors key being unfavourable labour laws and practices. In an effort to curb these violations, Kenya has undertaken various policy and legislative measures aimed at promoting the labour standards of its citizens working in UAE. This includes effecting temporary ban on various employment agencies with links to UAE, enacting the Diaspora Policy among other important steps. The thesis therefore interrogates these measures with the aim of exposing their weaknesses in effectively protecting the labour rights of Kenyan migrant workers in UAE.

Despite the fact that both Kenya and the UAE have laws in place governing the employment relationships, when it comes to migrant workers, the law is not adequate and its weak enforcement is what principally leads to widespread abuse of migrant workers' labour rights in UAE. Further, the ILO has not been effective in developing adequate measures to address the issue of Kenyan migrants in UAE. Being cognizant of the fact that there is no comprehensive system at the international level governing labour migration, the thesis evaluates the importance of integrating trade with migration in achieving the critical social obligation of enhancing the interests of Kenyan migrant workers in UAE.

CHAPTER ONE

INTRODUCTION

1.0 Background

In the past three decades, the United Arab Emirates (UAE)¹ has been a lure for both low and high skilled immigrant workers from countries all over the world, Kenya is no exception. The United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW) defines a migrant worker as any person who is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.² A migrant worker is considered as documented or in a regular situation if they are authorized to enter, stay and engage in a remunerated activity in the State of employment pursuant to the law of that State. Otherwise, they are referred to as non-documented.³ At present, there are approximately 175 million migrants around the world with roughly half of them being workers.⁴

By the year 2013, UAE had the fifth-largest international migrant stock in the world with 7.8 million migrants (out of a total population of 9.2 million).⁵ However, the immigration laws have made it extremely difficult, if not impossible for Kenyans and other foreign people to settle permanently in UAE leaving majority of them to be temporary migrant workers. Temporary

¹ United Arab Emirates, a country in the Persian Gulf, is a federation consisting of seven emirates namely Abu Dhabi, Dubai, Sharjah, Ajman, Umm al Kwain, Ras al Kaimah and Fujeirah.

² Full text <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx>> accessed on 5 January 2015

³ Ibid, Article 5

⁴ ILO, <<http://ilo.org/global/standards/subjects-covered-by-international-labour-standards/migrant-workers/lang--en/index.htm>> accessed 21 August 2015

⁵ Froilan T. Malit, Ali Al Youra, "Labor Migration in the United Arab Emirates: Challenges and Responses" <<http://www.migrationpolicy.org>> accessed 5 January 2015

migrant worker has been defined as 'skilled, semi-skilled or untrained workers who remain in the destination country for definite periods as determined in a work contract with an individual worker or a service contract concluded with an enterprise'.⁶ It is reported that there are over 40,000 Kenyans working in UAE with many of the skilled working in the hotel and construction industries.⁷ Elsewhere, conservative figures put the number of Kenyan nationals currently working in Gulf countries such as Dubai, Qatar and UAE at 100,000 but the number could be much higher.⁸

Even though the migrant workers have contributed to economic improvement of the UAE, they face various forms of exploitation, human trafficking and other labour rights violations. Various scholarly works have discussed the foregoing situation such as Nicholas Cooper who wrote that, in the past two decades, the city of Dubai within UAE has experienced exponential growth, made possible by vigorous foreign investment and its robust tourism industry. He argued from a human rights perspective that beneath the glossy visage of the city lies a foundation of pervasive human rights violations; primarily slavery and that many migrants arrive willingly, signing contracts to become domestic workers or work in Dubai businesses, only to have employers confiscate their passports and force them to work as prostitutes.⁹

⁶ International Organization for Migration, Key Migration terms, <<http://www.iom.int/cms/en/sites/iom/home/about-migration/key-migration-terms-1.html>> accessed 21 August 2014

⁷ 'Creation of Awareness on Migrant Workers in Kenya' <http://www.actrav-courses.itcilo.org/en/a1-55169/a1-55169-part-material/action-plans/kenya/at_download/file> accessed 27 August 2015

⁸ Brian Ngugi, 'Kenyan Government Moves to Combat Migrant Worker Abuse in the Gulf' 2014, <<http://www.equaltimes.org/kenyan-government-moves-to-combat>> accessed 27 August 2015

⁹ Nicholas Cooper, 'City of Gold, City of Slaves: Slavery and Indentured Servitude in Dubai' 2013, Vol. 6, No 5, 65-71 Journal of Strategic Security <<http://www.scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1302&context=jss>> accessed 18 January 2015

A newspaper report also gave a chilling account of how Kenyan migrant workers undergo various human rights abuses in the UAE. Some of these migrants have been trafficked to UAE through various human trafficking rings clinically carried out on the back of the Kenyan government while others have been recruited to work in UAE without the involvement of the Ministry of Labour thereby threatening their labour rights.¹⁰

Elsewhere, the US State Department reported that Kenyan men, women and children voluntarily migrate to other East African nations, Europe, Middle East-particularly UAE and Saudi Arabia in search of employment, where they are trafficked into domestic servitude, massage parlours brothels, and forced manual labour especially in the construction industry.¹¹ The report is similar to a study conducted by the Human Rights Watch in 2011.¹² It further depicted various reported abuses as non-payment of wages, unsafe work environments, and squalid living conditions in labour camps and withholding of travel documents all of which go on to show that labour rights of migrant workers are not adequately protected.

The United States of America has consistently placed Kenya on Tier 2 Watch List¹³ which in essence is a confirmation that the country has failed to fully comply with the minimum standards

¹⁰ Joe Kiarie, "Tears as Kenyans Suffer in Slavery in Saudi Arabia" 11th September 2015, Standard Newspaper, <<http://www.standardmedia.co.ke/article/2000042568/tears-as-kenyans-suffer-in-slavery-in-saudi-arabia>> accessed 12 October 2015

¹¹United States Department of State, 2011 Trafficking in Persons Report-Kenya, 27 June 2011, available at <<http://refworld.org/docid/4e12ee6c.html>> accessed 21 August 2014

¹² Human Rights watch Country Summary, United Arab Emirates, 2011. <http://www.hrw.org/sites/default/files/related_material/uae_3.pdf> accessed 25 August 2014

¹³ The Report confirms that Kenya does not fully comply with the minimum standards for the elimination of trafficking; the Government enacted the Counter-Trafficking in Persons Act in October, 2012, but has not launched and implemented its national plan of action, convened the Counter-Trafficking in Persons Advisory Committee; taken tangible action against trafficking complicity among law enforcement officials; monitor the work of overseas labour recruitment agencies; or provided wide-scale anti-trafficking training in persons. See Index Mundi, 'Kenya Trafficking in Persons' Available at <http://www.indexmundi.com/kenya/trafficking_in_persons.html>accessed 10 October 2015

for elimination of trafficking. Notwithstanding its poor rating on the Watch List, Kenya has put in place various legal and administrative measures specifically aimed at regulating the migration of Kenyan workers into UAE from the employment perspective.

Kenya has enhanced the surveillance of the local and international recruitment agencies within its borders. In a move to curb the increased migration to the UAE, the Kenyan Government on 29th September 2014 suspended the licenses of over 900 agencies recruiting and sending Kenyans to the Arabian Gulf countries.¹⁴ A task force was thereafter formed to *inter-alia* consider the existing framework for the management and regulation of recruitment agencies and assess its effectiveness in protecting Kenyans recruited to work outside the country; develop a policy direction and advise the government on whether to maintain or ban the exportation of Kenyan workers to the Middle East and Gulf Regions. In addition to this, it was mandated to recommend considerations to be taken into account in vetting and accreditation of recruitment agencies.¹⁵ Even though the task force has completed its work and forwarded the report to the Cabinet Secretary for Labour, Social Security and Services, the report has neither been made public nor implemented.

Additionally, the government of Kenya launched the Kenya Diaspora Policy on 20th January 2015.¹⁶ Being the first policy ever touching on the overall protection of migrant workers, it forms a convenient policy bedrock for the inclusion of minimum labour standards in trade agreements.

¹⁴<www.gulfnews/news/gulf/saudi-arabia/kenya-suspends-recruitment-to-middle-east_I1392240> accessed 26 August 2015

¹⁵ The Kenya Gazette, Vol CXVI-No. 126, 24 October 2014 Pg. 2888

¹⁶Government of Kenya, The Kenya Diaspora Policy' Available at, <www.kenyaembassy.com/pdfs/Kenya_Diaspora_Policy.pdf> accessed 26 August 2015

Paragraph 2.4.5 of the Policy calls for the protection of Kenyans abroad through various mechanisms such as negotiation and signing of bilateral labour agreements.

However, this study has identified that there are practical difficulties in practical enforcement of these measures. It is against this background that bilateral trade agreements are explored in this study as the next frontier in expanding the intervention measures. Several States have achieved substantive progress towards the protection of migrant workers at bilateral levels within a defined legal framework.

1.1 Justification of the Study

Trade and migrant labour issues as it relates to Kenya and UAE are complementary. There is greater demand for migrant labour in UAE. In 2010, it was estimated that there are more than 4 million foreign labourers that work around 260,000 private establishments.¹⁷ On the other hand, the unemployment rate in Kenya currently stands at 40 percent.¹⁸ In the circumstances there exist key elements of reciprocity in negotiations for inclusion of key migration clauses in trade agreements between the respective countries.

In spite of the unilateral intervention measures taken by the government of Kenya, the key issue that remains unaddressed is the protection of Kenyan migrant workers who are already working in the UAE. The concern cannot be effectively addressed without a high level of co-operation between the sending and receiving States.

¹⁷Mouawiya Al Awad, "The Cost of Foreign Labor in the United Arab Emirates, Institute for Social & Economic Research, " Working Paper No.3 July 2010 at Page 3
<<http://www.iser.ae/files/contents/Working%20Paper%20No%203.pdf>> accessed 25 August 2015

¹⁸Trading Economics, 'Kenya Unemployment Rate' <<http://www.tradingeconomics.com/kenya/unemployment-rate>> accessed 25 August 2015

At the international level, significant achievements have been made by the ILO towards the protection of migrant workers. On 1 July 2003, the International Convention on the Protection of the Rights of All Migrant Workers and Rights of their Families (hereinafter “Convention”) entered into force. It is considered to be the most comprehensive international treaty addressing the issues that substantively addresses critical or pertinent issues directly or indirectly affecting migrant workers.

The Convention sets the standards for laws including judicial and administrative acts and procedures of the individual State parties to the Convention. Further, the State parties are required to reform their laws, administrative procedures and regulations governing migrant workers to conform to the provisions of the Convention. The States are also required to adopt relevant measures necessary to protect and enforce the rights of migrant workers.¹⁹

Even though UAE is a migrant-receiving State, it has not ratified the Convention.²⁰ Hence, they are not bound by the provisions of the Convention that delineates the responsibility of States to ensure protection of rights of migrant workers within their territories. Similarly, the UAE has not ratified the Migration for Employment Convention (No. 97)²¹ and the Migrant Workers (Supplementary Provisions) Convention (No. 143).²²

¹⁹ Office of the UNCHR (2005), "International Convention on Migrant Workers and its Committee," Fact Sheet No. 24 (Rev. 1) Page 1

²⁰ The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) is an international agreement governing the protection of migrant workers and families. It was signed on 18th December 1990 and entered into force on 1 July 2003.

²¹ C097-Migration for Employment Convention (Revised) , 1949 (No.97) Full Text <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312242> accessed 5th October 2015

²² C143-Migrant Workers (Supplementary Provisions) Convention, 1975 (No.143) Full Text <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312288> accessed 5th October 2015

The ILO's efforts in setting and enforcing the labour rights and standards of migrant workers are hampered not just by the UAEs non-ratification but also the lack of effective enforcement mechanisms for migrant rights at the ILO level. These apparent weaknesses has given way to incorporation of labour standards in bilateral or free trade agreements. In that regard, there has been a steady rise of trade agreements with social clauses provision over the last two decades.

The study highlights the experience of Chile and the Philippines on the move to incorporate labour standards directly affecting migrant workers within the bilateral trade agreements or frameworks. With the aid of lessons from comparative experiences, the study calls for the adoption of social clauses in the existing and future trade agreements between Kenya and UAE. The key existing agreement between Kenya and UAE that are essential focus of the study include; Avoidance of Double Taxation Agreement and Promotion and Protection of Investment Agreement.

In summary, these agreements were signed without appreciating the need for the inclusion of substantive framework for the protection of not just investors but migrant workers in UAE. The study herein seeks to expand such protection by proposing the establishment and adoption of sustainable normative and structural framework to ensure the rights of Kenyan migrants in UAE are effectively protected.

The study further advocates for the inclusion of specific clauses with labour dimension either within the text of trade agreements or in parallel but closely related agreements. The minimum labour standards being advocated for inclusion would be from a contextual perspective due regard being to the specific and identified problems faced by Kenyan migrants in UAE; not expressly following the ILO's guideline

1.2 Statement of the Problem

While there exists bilateral trade and investment agreements between Kenya and UAE, little concern has been created over the bilateral inclusion and enforcement of core minimum labour standards of Kenyan migrant workers in UAE. This poses a challenge in terms of the protection of the rights of the Kenyan migrant workers in the UAE. Inclusion of labour standards in bilateral trade agreements would effectively supplement the existing unilateral mechanisms and bolster protective mechanisms.

1.3 Research Objectives

The main objective of this study is to examine the efficacy of the existing national and bilateral mechanisms between Kenya and UAE in protecting the interests and rights of Kenyan labour migrants in UAE. Other specific objectives include:

1. To examine the adequacy of the national laws including bilateral trade and investment treaties between Kenya and UAE as well as establishing whether the said agreements address the plight of Kenyan migrant workers in UAE.
2. To investigate the practice adopted by other States in terms of inclusion of such labour standards in their bilateral/free trade agreements aimed at effective protection of migrant workers' rights.
3. To identify and recommend measures that can be adopted so as to safeguard the Kenyan migrant worker in the UAE and to improve the trade relations between Kenya and the UAE.

1.4 Research Questions

This study answers the following questions:

1. What is the adequacy of the national laws as well as bilateral trade and investment treaties between Kenya and UAE in addressing the plight of Kenyan migrant workers in UAE?
2. What is the efficacy of inclusion of migrant workers rights in bilateral trade agreements?
3. What are some of the State practices in terms of inclusion of such labour standards in their bilateral/free trade agreements for the protection of migrant workers' rights and the effect therein?
4. What are some of the best measures that can be adopted so as to safeguard the Kenyan migrant worker in the UAE and to improve the trade relations between Kenya and the UAE?

1.5 Hypotheses

This study is premised on the hypotheses that the existing national laws and measures addressing Kenyan migrants moving to the UAE do not adequately address the key concerns of the migrant workers. However, the practice of including minimum labour standards in bilateral trade agreements for the protection of the rights of migrant workers has been adopted by various States and this has had the effect of protecting migrant workers, promoting trade and improving relations among States that have entered such agreements.

1.6 Literature Review

The topic on the treatment of migrant workers in the UAE has been scrutinized and debated by various scholars. The literature reviewed herein attempts to paint the wide picture of the migrant worker in the UAE.

Sevil Sonmez, Yorghos Apostopoulos, Diane Tran and Shantyana Rentropé in their article titled, **Human Rights and Health Disparities for Migrant Workers in the UAE**²³ posit that from the year 2000 until 2009, the Gross Domestic Product of the United Arab Emirates grew at an unprecedented average annual rate of 6.2 percent, fuelled by increase in oil prices and foreign investment, and that accompanying this growth has been systematic violations of the human rights of migrant workers that have led to striking health disparities. The authors argue that there are a number of factors that draw large numbers of Western expatriates to the UAE. They note that tax-free salaries and numerous perks and wealthy Emiratis with large household staffs have fuelled the influx of cheap migrant labour.

The article points out that the large continuing influx has numerous negative implications for economic growth has also led to a boom in the UAEs sex trade; women and girls trafficked into the country while other go voluntarily to make money. This article propounds the argument that while laws are in place to address many of the foregoing issues, they are not enforced. Urgent action is hence needed to ensure basic human rights for migrant labourers who are entrapped by inhumane conditions, deprived of basic nourishment, susceptible to injuries and accidents, vulnerable to multiple types of abuse and deprived of basic healthcare. In that regard, the authors

²³Sevil Sonmez, Yorghos Apostopoulos, Diane Tran and Shantyana Rentropé, "Human Rights and Health Disparities for Migrant Workers in the UAE" 2011, Vol 13, No 2, Health and Human Rights Journal Available at <<http://hhrjournal.org/wp-content/uploads/sites/13/2013/06/Sonmez21.pdf>> accessed 10 January 2015

conclude that any meaningful change would require effort not only from the UAE but also countries with the power to impose sanctions to stop human rights violations.

This article is highly important to this study as it highlights some of the plights of the migrant workers in the UAE in general. The article does not however focus on migrant workers from Kenya nor does it examine the possibility of having social clauses in trade agreements between Kenya and the UAE.

Neha Misra in her article titled, **The Push and Pull of Globalization: How the Global Economy makes Migrant Workers Vulnerable to Exploitation**²⁴ analyses globalization *vis-a-vis* vulnerability of migrant workers. She posits that the international community must address the push and pull factors created by globalization and specifically, how international trade agreements and global economic policies make migrant workers vulnerable to exploitation. Neha's main argument is that globalization directly leads to the exploitation of migrant workers owing to the conditions surrounding and influencing the economy. The author notes that in the context of worker rights, significant push factors for migration include poverty level incomes, low wages in rural areas, and lack of employment opportunities in urban areas and rich nations.

The author avers that global economic policies, initiated through market liberalization are the major causes of the gap in income and employment opportunities, displacing workers from their local livelihoods. And that globalization and neoliberal economic policies are leading to an increased flexibility of the workforce and the 'degradation of work', where workers are increasingly moving from formal to informal sectors of the economy, from permanent to temporary and contract work, and receiving fewer benefits from their employers and so, such a

²⁴ Neha Misra, "The Push and Pull of Globalization: How the Global Economy makes Migrant Workers Vulnerable to Exploitation" 2007 Policy Brief Solidarity Centre, <<http://www.law.washington.edu/AsianLaw/HumanTrafficking/Misra-PushPull.pdf>> accessed 12 January 2015

situation puts workers into an increasingly vulnerable position, as the safety net that used to catch them when they were laid off, injured, or unable to find work no longer exists. The author additionally argues that global trade agreements, which rarely include adequate labour standards and protections, often contribute to the exploitation of migrant workers. Even though this article advances almost a similar argument as the study herein, it does not focus on the experiences of Kenyan migrant worker.

Clotilde and Jean, **Core Labour Standards in Trade Agreements: From Multilateralism to Bilateralism**²⁵, contend that the increasing openness of developing countries has not been accompanied by a rapid improvement in labour standards. They note that the term ‘social clause’ can be defined as any trade agreement provision that constrains the signatory States to respect core labour standards. The authors further acknowledge that the ‘contractual’ nature of the social clause makes it more binding for contracting parties than a simple moral commitment. In particular, the clause allows the contracting parties to check the respect of standards in partner countries and to act to make the respect of the standards more effective. While citing the example of the European Union, their argument is that the EU is favourable to the insertion of a social clause in trade agreements but is increasingly reluctant to impose sanctions against unfair countries.

According to the authors, the existence of a social clause thus does not prejudge the nature of actions to take: negative trade sanctions (like additional duties, fines) but also positive trade sanctions such as preferences granted to the country respecting core standards. The authors’

²⁵Clotilde Granger and Jean Marc Siroen, "Core Labour Standards in Trade Agreements: From Multilateralism to Bilateralism"
<<http://www.basepub.dauphine.fr/bitstream/handle/123456789/255/2ECFE995d01.pdf?sequence=2>> accessed 19 July 2015

analysis however does not cite the mode of enforcement of such agreements or either any case study giving examples of how the inclusion has alleviated the plight of migrant workers.

According to Sabin and Lucas in their analysis of U.S Free Trade Agreements and enforcement of labour law in Latin America,²⁶ enforcing labour regulations requires a government in a given country to possess both the capacity and the political will to uphold the law. They opine that labour provisions in trade agreements are intended to hold the signatories responsible for upholding certain commitments with respect to labour rights and that these commitments pertain to: the scope of national laws in protecting labour rights and the extent to which they are coherent with international standards; and the enforcement of existing laws.

In addition, the authors argue that labour provisions in free trade agreements matter for robust provisions can provide the appropriate incentives, oversight and capacity building assistance to garner the necessary political will and bolster a country's ability to effectively enforce its labour laws. Their analysis although useful, is only limited to a study of the U.S jurisdiction, Latin America and Caribbean countries. It does not examine the situation in regard to the UAE and the Kenyan migrant workers.

On their part, Maria and Carolan in **A Race to the Top: Should Labour Standards be Included in Trade Agreements?**²⁷ aver that although labour standards do not form parts of trade agreements protocol, the inclusion of such standards are becoming more common. They allude to the emerging State practice of increased usage of such clauses for the protection of the rights of

²⁶ Sabina Dewan and Lucas Ronconi, "U.S Free Trade Agreements and Enforcement of Labour Law in Latin America" 2014, Inter-American Development Bank Working Paper Series No 1, <<http://www.publications.iadb.org/document.cfm?id=39256073>> accessed 19 July 2015

²⁷ Maria Artuso and Carolan Mcharney, "A Race to the Top: Should Labour Standards be Included in Trade Agreements?" Vol 40, Issue 1, 1-14, Vikalpa the Journal for Decision Makers (SAGE Journals)

migrant workers. They argue that the relationship between trade agreements and labour standards is closely linked to changes occurring in the global market place, and the labour market. The authors express the view that the main objective of labour standards is to facilitate international trade and as such, it makes good business sense to include enabling codes for the betterment of international trade, reputation and socio-economic development.

It is their contention further that labour standards, code of conducts and fundamental principles of work are foundational provisions that provide a level playing field in trade agreements, promoting labour standards through international economic governance. The authors do not however offer a comparative analysis in regard to State practice in terms of the incorporation of such labour standards in free trade agreements.

Remi and Arslan in **Social Clauses in Free-trade Agreements: An Efficient Tool to Improve Labour Standards?**²⁸ present views similar to the foregoing. They express the sentiments that the failure to develop consensus on rules concerning labour rights within the World Trade Organization system encouraged the rise of labour-related issues in the alternative policy instruments such as Preferential Trade Agreements and that in recent PTAs, governments coordinate and cooperate by pursuing deeper integration processes that involve not only the negotiations on further dismantling of tariff barriers, but also other policy areas such as standards and regulatory systems for labour and environmental protection.

The authors posit that States are increasingly negotiating those (new) areas, especially with the social-dimension (such as anti-corruption; labour, environment, human rights) in the PTAs. From the foregoing therefore, PTAs are occupying a central role as not only the instrument of trade

²⁸Remi Bazillier and Arslan Rana, "Social Clauses in Free-trade Agreements: An Efficient Tool to Improve Labour Standards?" <http://www.rdw2015.org/uploads/submission/full_paper/145/bazillier_rana_juillet2015.pdf> accessed 20 July 2015

policy but also of foreign policy. The main motivation to incorporate labour clauses in PTA negotiation is to encourage the partner government to undertake domestic policy reforms in its respective labour market and make stringent laws to improve labour conditions. The arguments although limited to a general overview of the role of trade agreements, are quite helpful as they underscore the importance of the inclusion of labour protection clauses in the modern era.

However, having reviewed these articles, a number of gaps have been identified that this study has now dealt with. These gaps include:

- (a) The actual status of the Kenyan migrant workers in UAE and key factors that lead to violation of their rights in UAE;
- (b) The adequacy of the unilateral and multilateral intervention mechanism to address the issue of migrant rights in UAE;
- (c) The actual nexus between labour standards and trade; and
- (d) The efficacy of inclusion of labour standards in bilateral trade agreements between Kenya and UAE.

1.7 Theoretical Framework

This study is founded and based on the theory of distributive justice.²⁹ The study proceeds from the premise that there is need to re-order the existing and future economic or trade relations to

²⁹ Distributive Justice concerns the nature of a socially just allocation of goods in the society. Chris Armstrong, (*Global Distributive Justice: An Introduction* (Cambridge University Press, 2012). <<http://books.google.com/books?id=LJU0djAZ1osC>>.) defines distributive justice as the ways that the benefits and burdens in our lives are shared between members of a community or society. The principle tells us how these benefits and burdens ought to be shared or distributed. The distributive norms that guide the distribution includes equity, equality, power, need and responsibility.

achieve a just division of benefits and burdens between and within States. The trade-labour linkage advanced in this study principally aims at advancing a mechanism through which the benefits of trade ought to be cognizant of and mirror the basic liberties and social life. The theory of distributive justice advances normative principles aimed at bringing about and maintaining or guiding the allocation of benefits and burdens of economic activity. These principles were widely advanced by John Rawls³⁰ in *A Theory of Justice*³¹ which was later reformulated in *Political liberalism*.³² Rawls proposes the following principles of justice:³³

- (a) The maximization of liberty, subject only to such constraints as are essential to the protection of liberty itself;
- (b) Equality for all, both in the basic liberties of social life and also in the distribution of all other forms of social goods, subject only to the exception that inequalities may be permitted if they produce the greatest possible benefit; and
- (c) Fair equality of opportunity and the elimination of all inequalities of opportunity based on birth or wealth.

The principle social obligation of governments under the distributive principle is simply to develop economic frameworks that ensure just distribution of benefits and burdens. The theory focuses on identifying the suitable framework to achieve the envisaged distribution for the benefit of the society. This study shares similar concerns, which is to design an appropriate economic frameworks or institutions to achieve the required level of distribution of benefits and

³⁰ 1921-2002

³¹ Rawls, John. *A theory of Justice*. Harvard, MA: Harvard University Press. 1971

³² Rawls, John, *Political Liberalism*, (Columbia University Press, 1993 New York)

³³ M.D.A Freeman, *Lloyd's Introduction to Jurisprudence*, 7th Edition, (Sweet and Maxwell, 2008, London) Pg. 533

burdens. According to Hayek, there appears to be no reason why in a free society, government should not assure protection against severe deprivation in the form of minimum income, or develop a floor below which nobody needed to descend. He proceeds to state that it is a moral duty of all persons or institutions to help the underprivileged in any organized community.³⁴

Garcia³⁵ also addresses the issue of social justice in international economic law. He examines whether or not the existing international economic law can be used to bridge the gap between the gains of business owners and employees as well as implement the socio-economic policies implicit in the distributive justice theory. He posits that trade negotiators, diplomats and beauractrats ought to be influenced by concerns over justice, fairness and progressive social outcomes within the limits of their institutional mandates.

In the circumstances, theory of justice can assist in evaluating whether or not international economic law as a whole, and specific treaties, rules and institutions in particular are fair or unfair. He argues further that the task of international justice is to furnish principles that will serve both as a standard for evaluating the social response to natural inequalities and as a guide to social institutions in making the distributive allocations that will justify social inequalities. The interface between Rawlsian justice and trade law lies in understanding the normative significance of markets as markers for the cumulative effects of natural and social inequalities which requires the legitimate intrusion of social justice.³⁶

³⁴ Hayek Friedrich, "Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy" (Rutledge and Kegan Paul Ltd, 1982) pg 87

³⁵ Garcia "Theories of Justice and International Economic Law" Boston College Law School Legal Studies Research Paper No 252, Available at <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1424&context=lsfp>> accessed 27 August 2015

³⁶ Ibid

Relying on these principles of distributive justice, the study operates on the premise that trade gains alone cannot form a genuine and primary objective of trade in a society. Instead, the concept of sustainable development with focus on human capital development ought to heavily influence trade norms, treaties, agreements and institutions. The study believes that the rights and interests of migrant workers forms an integral part of the human capital development that ought to inform and influence international economic order. In order to achieve just division and benefits, it is imperative that social clauses aimed at the protection and rights of migrants are included in bilateral trade agreements.

1.8 Research Methodology

This research study will be achieved by use of qualitative methods and shall primarily focus on library and desktop research. The research shall also benefit from official data from various international bodies or agencies that are directly or indirectly involved in labour migration and trafficking of persons. Relevant official reports and investigative journalism materials that exist to highlight on the situation facing the Kenyan immigrant in the UAE will be examined.

In addition, this study shall rely on materials from various departments dealing with migration issues such as: the Department of Immigration in the Ministry of State for Immigration and Registration, which falls under the responsibility of the Office of the President; Department of Civil Registration; the National Registration Bureau; and the Refugee Department.³⁷

³⁷ The Immigration Department is responsible for the control of the entry and exit of all persons, as well as the residence of foreigners and issuance of work permits, passports and visas. International Centre for Migration Policy Development, 'East Africa Migration Route Initiative: Gaps and Needs Analysis Project Country Reports, Libya, Ethiopia and Kenya' Available at http://www.igad.int/index.php?option=com_docman&task=doc_download&gid=16&Hemid=144> accessed 30 August 2015

The study shall also take a comparative study approach analysing the practices in Chile and Philippines. Chile has been chosen owing to its policy of trade openness and the fact that it has signed various bilateral agreements incorporating labour clauses in a variety of forms. She also acts as a receiving and sending State in respect of migrant workers. Philippines has been chosen since, like Kenya, is a labour surplus nation that has exploited her trade with various receiving States to negotiate for labour standards aimed at protection of her citizens working abroad.

1.9 Limitations

There is lack of adequate data on the Kenyan labour migration to the United Arab Emirates. This is partly due to lack of a comprehensive empirical study of the situation of the Kenyan migrant situation in the United Arab Emirates. This is also contributed by the fact that the sub-Saharan labour migration to the Gulf Co-operation Council (GCC) countries has been partly neglected in global migration literature. This, despite the increasing labour flows in the United Arab Emirates. The study shall however benefit from the official data from various bodies such as the US Department of State, Trafficking in Persons Reports; IOM official reports and Human Rights Watch, Country Summary Reports. The study shall not rely on direct interviews or questionnaires owing to the difficulty in conducting interviews on Kenyan immigrants in the UAE.

1.10 Chapter Breakdown

Chapter One- this is the introductory part of this study. It contains the background, the problem statement of the study, objectives, questions the research seeks to answer, methodology adopted, theoretical framework and the limitations of the study.

Chapter two-This Chapter will analyse the following:

- (a) The concept of migration, migrants, migrant workers as it relates to labour standards;
- (b) The situation of Migrant workers in UAE;
- (c) Legislative and policy framework governing migrant workers in UAE; and
- (d) The Kenyan pre-admission policies, institutional and legislative framework governing migrant workers.

Chapter Three-This Chapter will analyse the following:

- (a) The link between migration, trade and labour rights;
- (b) Efficacy of Supra-national Institutions in protecting the rights of migrant workers;
- (c) Bilateral Trade Agreements and migrant rights;
- (d) Nature and extent of incorporation of migrant labour standards in trade agreements; and
- (e) Incorporation of migrant labour standards in bilateral trade agreements between Kenya and UAE.

Chapter Four- this Chapter will analyse the following:

- (a) Chile experience with trade agreements and labor standards and lessons for Kenya; and
- (b) Philippines experience with trade agreements and labor standards and lessons for Kenya.

Chapter Five- contains a summary of the findings, conclusions and makes various suggestions towards the protection of the Kenyan migrant workers in the UAE and the improvement of trade between Kenya and the UAE.

CHAPTER TWO

2.0 PROTECTION OF THE KENYAN MIGRANT WORKER IN THE UAE: ARE THE UNILATERAL MEASURES IN PLACE ADEQUATE?

2.1 The Concept of Migration

International Organization for Migration (IOM)³⁸ defines migration as the movement of a person or a group of persons, either across an international border, or within a State. It is a population movement, encompassing any kind of movement of people, whatever its length, composition and causes; it includes migration of refugees, displaced persons, economic migrants, and persons moving for other purposes, including family re-unification but excludes tourists, business travellers and pilgrims.³⁹

There exist complex and varied motivators for migration. The reasons that lead to migration consists of pull and push factors. Push factors that influence migration include unemployment and low wages. Others include persecution, armed conflict and environmental disasters which may lead to forced migration as opposed to voluntary and the search for better economic and social benefits.

Pull factors have to do with the conditions in the host countries that influence the type of migration that they may attract. They include both economic and non-economic motivators that influence migration into the host State. Overall, migration holds both risk and promise with

³⁸ IOM is the leading inter-governmental organization in the field of migration and works in the four broad areas of migration management being: migration and development; facilitating migration; regulating migration and forced migration.

³⁹ IOM, Key Migration Terms <www.iom.int/key-migration-terms> accessed 3 April 2016

migrants experiencing some measures of success in receiving States but also exploitation and abuse. For host countries, migration has similar risks and promise, the promise of additional, or supplementary skills and labour where they may be deficient, and risks of integrating new comers into their social, political, economic and cultural contexts.

2.2 Forms of Migration

Migration is categorized depending on the number of migrants, reasons, causes, nature and duration of their movement.⁴⁰ The broad classification of migration includes:-

(a) Internal Migration

This involves movement of persons to a different administrative unit within the national boundaries. It may include seasonal migration or rural-urban migration.⁴¹ Internal migration does not ordinarily present huge challenges as it is based on the immutable freedom of movement. Specifically, Article 13(1) of the Universal Declaration of Human Rights, 1948 states that every person has a right to freedom of movement and residence within the borders of each State.⁴² Additionally most national laws provide for free and unrestricted movement, including the freedom to work and own property in any place of one's choice within national borders.

⁴⁰Russel King, "Theories and Typologies of Migration: An Overview and Primer", MIM, <<https://www.mah.se/upload/Forskningscentrum/MIM/WB/WB%203.12.pdf>> accessed on 3 November 2015

⁴¹ Robert E.B Lucas, "Internal Migration in Developing Economies: An Overview", KNOMAD Working Paper 6 <http://www.knomad.org/docs/working_papers/KNOMAD%20Working%20Paper%206_Lucas_Internal%20Migration.pdf> accessed 23 November 2016

⁴²Full text <http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf> accessed 3 November 2015

(b) International Migration

International migration is a process of territorial relocation of people between nation-States. It involves movement from the country of origin which is the source of migration flows to a receiving country and includes a wide range of sending, destination and transit countries and also encompasses diverse groups of migrants.⁴³ The global scale of migration coupled with the concept of globalization has made States dependent on each other. This is to the extent that any policy or law which directly or indirectly affects migrants in one State may have wider ramifications in another State. It is partly on the basis of the interdependence and the realization of the positive contributions that migrants have made over the years, that this study advocates for closer co-operation and involvement of both sending and receiving States in international migration management.

International migration may be orderly or irregular, additionally historically, there have been large group movements or what one may term mass migration. While orderly migration involves movement of persons from a usual to another State in accordance with the laws and regulations of the designated State as it governs transit and entry; irregular migration occurs outside the relevant laws and regulations of the designated or receiving State as it governs transit and entry. It is notable that in the recent past there have been large movements leading to migration that also end up in the labour market, considering that these are often as a result of conflict, oppression and discrimination, the challenge to receiving states and their citizens, has been how to deal with this sudden overflow into their social, economic, social and cultural space. Whether

⁴³ Ibid

orderly or irregular, the management of migration demands the existence of a planned approach with regards to policy, legislative and administrative responses.⁴⁴

This study will examine transnational labour management between UAE as a receiving country and Kenya, as a sending country. It will take into account the shared concerns of these two States on how to effectively generate productive employment for Kenyan migrant workers on one hand and protection of the various labour rights of the migrants workers on the other hand. It is premised on the notion that UAE as a State and its citizens are beneficiaries of migrant labour and that in line with their international obligations, they ought to be at the forefront in search for solutions in collaboration with sending States to ensure a seamless and harmonious management of such labour.

2.3 The Concept of Migrants and Migrant Workers in the context of Labour Rights

People migrate for many different reasons. These may be economic, social, political environmental reasons or concerns. Notwithstanding this, migration as a factor in the labour market continues to play a central role within the socio-economic systems of many States. It is estimated that migrant workers currently account for 150 million of the world's approximately 244 million international migrants.⁴⁵

IOM provides a broader definition to the term migrant. It includes any person who is moving or has moved across the international border or within a State away from his/her habitual place of residence, regardless of (1) the person's legal status; (2) whether the movement is voluntary or

⁴⁴ UN, "International Migration Report 2013"
<http://www.un.org/en/development/desa/population/publications/pdf/migration/migrationreport2013/Full_Document_final.pdf > accessed 23 September 2016

⁴⁵ [www.ilo.org \(http://www.ilo.org/global/topics/labour-migration/lang--en/index.htm\)](http://www.ilo.org/global/topics/labour-migration/lang--en/index.htm) Accessed on 4th June 2016)

involuntary; (3) what the causes for the movement are; or (4) what the length of stay is.⁴⁶ The definition is all inclusive and does not differentiate between migrants who depart from their home country or within a State as a result of conflicts or environmental concerns on one hand, and those that depart with the objective of improving their economic well being on the other hand.

There exists a distinction between migrants in general and migrant workers in particular. The ILO Convention on Migration for Employment 1949, (No. 97) defines ‘migration for employment’ to mean a person who migrates from one country to another with a view of being employed otherwise than on his own account and includes any person properly admitted as a migrant for employment.⁴⁷ However, the Convention does not apply to frontier workers, short term entry of members of the liberal professions and artistes; and sea men.

The ICMW on the other hand provides a broader definition of the term migrant worker. It defines such a migrant as a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.⁴⁸ It excludes *inter-alia* refugees and stateless persons who are mainly categorized as forced migrants.

IOM and United Nations General Assembly in a joint report define voluntary migrants to include people who move abroad for employment, study, family re-unification and other personal factors. Forced migrants on the other hand, leave their country to escape persecution, conflicts,

⁴⁶ Ibid (39)

⁴⁷ Article 11, Full text <http://blue.lim.ilo.org/cariblex/pdfs/ILO_Convention_97.pdf> accessed 25 July 2016

⁴⁸ Ibid (2), Article 2

repression, natural and human made disasters or other situations directly or indirectly affecting their lives, freedom and livelihood in the sending States.⁴⁹

There is a thin line of distinction between voluntary and forced migrants. This is principally due to the fact that a combination of factors may compel a person to leave his country in search for better conditions for survival lacking in the country of origin. Similarly, voluntary migrants may subsequently find situations in their original homes untenable and consequently becomes forced migrants. In any case, considering that the UN and regional treaties and Conventions require States to facilitate economic and social development, it effectively means that States that fail to do so to the extent that large populations of their citizenry are forced to seek greener economic pastures in other countries, and more so notwithstanding deplorable conditions such migrants face, would be failing in their core obligations.⁵⁰ In some instances, such migrants are forced to take up positions that are below their qualifications in the recipient States simply due to corrupt national systems that do not invest in facilitating a healthy developmental and economic culture at the domestic level. The study adopts the definition of migrant workers as provided for by ICMW.

2.4 Historical Background to Migrant Workers in UAE

As previously indicated, UAE has been a lure for both low and high skilled immigrant workers from all over the world, including Kenya. As it stands currently, Saudi Arabia is the largest

⁴⁹ IOM/United Nations World Migration Report 2000 <[www.
http://publications.iom.int/system/files/pdf/wmr_2000_edited.pdf](http://publications.iom.int/system/files/pdf/wmr_2000_edited.pdf)> accessed on 25 October 2016

⁵⁰ Tiffany O. Howard, "The Tragedy of Failure: Evaluating State Failure and Its Impacts of the Spread of Refugees, Terrorism and War", PSI Reports < <https://faculty.unlv.edu/wpmu/thoward/files/2012/05/3.-THE-TRAGEDY-OF-FAILURE-EBOOK.pdf>> accessed 25 October 2016

recipient of migrant labour among the Gulf Cooperation Council(GCC) States,⁵¹ with the UAE close behind with over 75 per cent of its population classified as migrant workers.⁵²

The movement of migrant workers to the UAE is not a fairly recent phenomenon and was influenced by various factors at different stages:

(a) Oil boom

The surge of migrant workers into the Middle East began in the early 1970s, when increased petroleum production brought with it a demand for skilled and unskilled labour and as living standards rose for nationals, opportunities in the service sector for migrant labour expanded. To further illustrate the role labour migrants have played in the economy of UAE, regard had to be on its status before the country began export of oil. Before independence in 1971, the Emirates that comprise UAE were impoverished without defined boundaries. However, in a shortly after independence, the UAE's economy grew so rapidly to become one of the richest countries in the world. In 1980 to be precise, the UAE was rated the richest country in the world with oil income accounting for 88 per cent of national revenue income in the period 1975-1985.⁵³

The demographic gap between the native nationals and migrants has been a great concern to UAE since independence. In 1975, just four years after the establishment of the UAE Federation;

⁵¹ GCC is a political and economic alliance of six Middle Eastern countries-Saudi Arabia, Kuwait, the United Arab Emirates, Qatar, Bahrain, and Oman.

⁵²RominaHalabi, "Contract Enslavement of Female Migrant Domestic Workers in Saudi Arabia and the United Arab Emirates" Topical Research Digest: Human Rights and Contemporary Slavery, Available at <<http://www.du.edu/korbel/hrhw/researchdigest/slavery/fmd.pdf>> (accessed 24 April 2015)

⁵³ Rima Saban, "United Arab Emirates: Migrant Women in United Arab Emirates" ILO Working Paper No. 10, Series on Women and Migration, Page. 2

356,000 foreign workers were already in the country representing 64 per cent of the population.⁵⁴ Increased oil production required new skills and more labour which had to be supplemented by foreign labour. The UAE government started recruiting large scale labour immigrants in order to undertake various oil related projects. These jobs to which migrant or foreign labour was sought included oil field workers, crew chiefs, drillers, mechanics, technicians and geologists and all related infrastructural requirements.

The oil boom during the 2000s led to intensive and diversified developments in the economy focused on reducing reliance on oil exports which in turn led to sharp rises in foreign labour in areas such as construction. This effectively ushered in various labour-intensive activities such as construction and infrastructure development.⁵⁵

(b) Construction Boom

UAE witnessed an unprecedented construction boom during the early 2000s, attracting large number of western expatriates and increasing demand for cheap unskilled migrant labour. Between 1995 and 2005, Dubai city's size quadrupled and its population doubled. Other cities designed their development visions with greater emphasis on construction and infrastructure expansion projects.⁵⁶

⁵⁴ Ibid

⁵⁵ GLLM (2015), "Demography, Migration, and the labour markets in the UAE", <http://cadmus.eui.eu/bitstream/handle/1814/36375/GLMM_ExpNote_07_2015.pdf?sequence=1> accessed on 5 October 2016

⁵⁶ Mohamed Shihab, "Economic Development in the UAE," <https://www.uaeinteract.com/uaeint_misc/pdf/perspectives/12.pdf> accessed on 5 June 2015

A case in point is Abu Dhabi's 2030 Roadmap launched in April 2009. Apart from laying plans for building of new industries, hotels, schools and hospitals; it also plans for development of Al Ain, the second biggest city in the Emirate. In 2014, the construction industry topped the list of employers where the number of workers employed within the industry being over 1.5 million or 34 per cent of the entire workforce.⁵⁷ The dictates of the economy, international trade, contingent and contract labour makes it more likely that the demand for migrant labour in UAE will increase.

In recent years, temporary labour migration from Kenya to the entire GCC countries both as skilled and unskilled workers has increased significantly. UAE has become a popular destination for temporary labour immigrants and it is estimated that Kenyan immigrants in the UAE are approximately 40,000 people and the number continues to grow. Semi-and low skilled workers have dominated Kenyan migration to UAE. Kenyans are majorly recruited as domestic workers, construction labourers, cleaners, hospitality servers, security officers, and taxi drivers.⁵⁸

Rising unemployment rates combined with the difficulty of gaining entry to Western countries combined with the UAE's economic growth and proximity represents the key push and pull factors at play.⁵⁹ The key challenge facing Kenya as a sending country is the abuse of its nationals in the UAE particularly those who have been trafficked into the region through unscrupulous agents.

⁵⁷ Ibid

⁵⁸ Froilan Malit & Ali Al Youha, "Kenyan Migration to the Gulf Countries: Balancing Economic Interests and Worker's Protection", <www.migrationpolicy.org> accessed 5 June 2016

⁵⁹ Ibid

The 2011 United States Department of State reports on Trafficking in Kenya indicates that Kenyan men, women and children voluntarily migrate to other East African nations, Europe, Middle East-particularly Saudi Arabia and UAE in search of employment, where they are trafficked into domestic servitude, massage parlours and brothels, and forced manual labour, including the construction industry.⁶⁰ Criminal groups have exploited global migration and severely reduced the opportunities available to migrants to move to other countries safely and legally. Both sending and receiving States have a shared responsibility to ensure migration occurs through legal channels; ensuring the protection of the rights of migrants; preventing the exploitation of migrants, especially those in vulnerable situations; and combating the crimes of smuggling of migrants and trafficking in persons.⁶¹

2.5 Status of Migrants in UAE

2.5.1 Labour Market Segmentation

UAE's economy is extra ordinarily dependent on foreign labour. The contemporary population figures clearly show that foreigners outnumber nationals in the private labour sector in the UAE. In 2010, it was estimated that there are more than 4 million foreign labourers that work around 260,000 private establishments.⁶² It is clear that foreign labour dominates most economic sectors with UAE keen on diversifying the source of labour migrants.

⁶⁰ United States Department of State, 2011 "Trafficking in Persons Report-Kenya, 27 June 2011," <<http://refworld.org/docid/4e12ee6ec.html>> accessed 21 August 2015

⁶¹UNODC, Toolkit to Combat Smuggling of Migrants' <https://www.unodc.org/documents/human-trafficking/SOM_Toolkit_E-book_english_Combined.pdf> accessed on 21 August 2014

⁶²Mouawiya Al Awad, "The Cost of Foreign Labor in the United Arab Emirates", Institute for Social & Economic Research, Working Paper No.3 July 2010 at Page 3

There exists 'demographic imbalance' in the workforce between national and migrant workers. In 2009, the public sector (federal and local) was made up of 90 per cent of working nationals with the private sector comprising of 65% foreign workers and 15% national ones. Similarly, 15% of foreign workers worked as domestic workers with 65% of them working in the private sector.⁶³

UAE economy is divided into two parts or segments called the 'primary' and 'secondary' sectors. This dualism has theoretically been analyzed by the Marxist school and has also found expression as a principle of labour dynamics.. Workers in the upper tier or primary sectors enjoy high wages with benefits, job security and in most cases, are unionized. On the other hand, workers in the lower tier or secondary sectors face poor working conditions accompanied by job insecurities and low wages.

The dualism has effectively led to categorization of jobs within the context of primary and secondary labour markets. The former involves capital-intensive, stable jobs while the latter involves productivity-intensive, unstable and low skilled jobs. In UAE, public sector employment largely constitutes the primary labour market while secondary labour markets which exists within the private enterprises is majorly characterized by poor working and living conditions and exploitation of low-skilled migrant workers.

Additional levels of segmentation can be identified in UAE's secondary labour markets. There is a preference by employers for migrant Asian workers rather than migrant Arab workers on the perceived notion that the former costs less to employ and manage.⁶⁴ Further, several rigidities

⁶³ Ibid,8

⁶⁴Briggite Suter (2005), "Arab versus Asian Migrant Workers in the GCC Countries"
<http://www.un.org/esa/population/meetings/EGM_Iitmig_Arab/P02_Kapiszewski.pdf> accessed 4 June 2016

also exists within the secondary markets owing to the level of restrictions imposed by UAE on migrant workers hence perpetuating discrimination and poor working conditions or pay as the case maybe.

Notwithstanding the differentiation between primary and secondary labour markets, differential pay rates are also segmented due regard being to the nationality of the migrant worker with Emirati and highly skilled western expatriates earning the highest, closely followed by other western expatriates, then Filipinos, South African and Arabs from Lebanon and Palestine in that order.⁶⁵ This results in wage differentials between various migrant workers depending on the migrant's nationality and sector affiliation as opposed to worker's endowments.

From the early 2010s, the UAE developed a very strong policy of tightened control over migrant workers that has led to various human rights abuses. Several waves of Lebanese expatriates have been expelled since 2009 for flimsy reasons. A report by a leading UAE newspaper states that on 18th March 2015, as many as 500 mostly Shia Lebanese were told that they were 'unwanted' and given 48 hours to leave UAE.⁶⁶

In an investigative report, a Kenyan local daily newspaper,⁶⁷ gave a chilling account of how Kenyan immigrant workers undergo various labour rights abuses within UAE. Recruitment

⁶⁵ Omar Saeed Al-Qubaisi (2012), "ICT, Human Capital Development and Emiritization of the Labour Market in the United Arab Emirates", Royal Holloway University of London, Doctoral Thesis
< https://repository.royalholloway.ac.uk/file/fd0f4da5-9222-131c-3d26-7a8bd6bab1b0/8/_FINAL_PDF_6_JUNE_Omar_Al_Qubaisi_Thesis_1_.pdf> accessed 5 June 2016

⁶⁶ The New Arab Newspaper <<https://www.alaraby.co.uk/english/news/2015/3/18>>accessed 5 June 2016

⁶⁷See Kenyan "Sunday Standard", September 11, 2011 at Page 5

networks operating in Kenya have also been accused of recruiting Kenyan workers to work in UEA without the involvement of the Ministry of Labour.

In another exclusive report, the Kenyan media interviewed various Kenyan workers in the UAE and highlighted their plight. Amongst those interviewed were Binti Said, Ushi Hussein and Bahati Ramadhan. Binti Said narrated how the communication between her, her family and the recruiting agent became impossible upon arrival in UAE. Ushi Hussein on the other hand complained of being very weak and extremely overworked. Bahati Ramadhan had not received any salary for almost a year and a half and neither had she been allowed to leave her place of employment.⁶⁸ These few narrations are just a fraction representation of the reality on the ground as regards treatment of Kenyan migrant workers in UAE.

2.5.2The Kafala/ Sponsorship System

The *Kafala* system was introduced in 1971 in not only EAU but also the entire GCC States. It is a time-honoured tradition of the Bedouin principle of hospitality, which sets obligations in the treatment and protection of foreign guests. According to the *Kafala* system, a foreigner was not allowed to work in the GCC countries without local sponsorship (*kafeel*). If and once the employment relationship is broken, foreign workers become illegal residents and must leave the country.

⁶⁸ Joe Kiarie, 'Tears as Kenyans Suffer in Slavery' Standard Newspaper, <<http://www.standardmedia.co.ke/article/2000042568/tears-as-kenyans-suffer-in-slavery-in-saudi-arabia>> accessed 3 June 2015

The system aims to meet the demand for labour with migrant workers while at the same time ensuring that those workers are only temporary residents in the country.⁶⁹ Once labourers acquire a work contract and permit for entry residence, they are contractually tied to sponsors. The system involves withholding labourers' passports to regulate their residency and employment which gives employers near-total control over migrant workers' salary, living conditions, nutrition, ability to work elsewhere, and even their ability to return home.⁷⁰

Approximately 600,000 migrants in UAE have obtained work permits through this route.⁷¹ This method led to the recruitment of migrant workers by the private employers at the latter's sole option, some workers being recruited to undertake tasks that are considered menial tasks for the benefit of the sponsors of *kafala* system, as will be later discussed, is the main cause of various labour rights abuses of the migrant workers in the UAE.

The *kafeel* grants permission for foreigners to enter the country, monitors their stay and approves their exit. Since the *kafeel* is responsible for all aspects of the foreigner's stay, if the *kafeel* withdraws sponsorship, the foreigner has no legal right to stay in the country. Many *kafeels* are only nominally involved in the employment of the migrant workers they sponsor. Instead, they allow their names to be used to sponsor foreigners in exchange for payments from employees,

⁶⁹ Azfar Khan and Helene-Tavel, 'Reforming the Kafala: Challenges and Opportunities in Moving Forward' Vol 20, Nos 3-4, 2011, Asian and Pacific Migration Journal, <http://www.smc.org.ph/administrator/uploads/apmj_pdf/APMJ2011N3-4ART2.pdf> accessed 12 April 2015

⁷⁰ S. Saseendran, 'Law to Unify Safety Norms for Workers' Khaleej Times, 2010, Issue 4 <<http://www.khaleejtimes.com/DisplayArticle09.asp?xfile=>> accessed on 3 June 2015

⁷¹ Ibid

recruiters or others. Many low-skilled migrants never meet their kafeel sponsors, and deal with them through intermediaries who may be nationals of their country of origin.⁷²

It was noble principle, which unfortunately no longer holds the same meaning today. Instead, it is being denounced globally as a system of structural dependence between an employer and a migrant worker, which enables the violations of fundamental human rights. The *Kafala* system has been condemned in the entire GCC states by various civil society and human rights organizations and called for its entire abolition.

In December 2010 through Cabinet Resolution No. 25 of 2010, the UAE initiated reforms to the *Kafala* system. The resolution abolished the requirement of production by an employee of No-objection Certificate (NOC) from a previous employer upon expiry of the contract.

Previously, an employee was required to secure NOC from his previous employer before changing employment to avoid being subjected to a visa ban. This presented the migrant worker with no option but to return back to his country of origin. This previous requirement was subject to abuses by employers. This is such that workers fired by their employers effectively lost their visa status and was required to leave UAE.

The study notes that there has been reluctance by the UAE and indeed the entire GCC states to radically reform *Kafala* as it still grants them full control over labour migrants. Since the system is skewed in favour of the employer and suppression of the rights of the migrant, there has been very little incentives to radically reform the system.

⁷² Migration News, 'GCC: Kafala, UAE' 2012, Vol 19, No 1, <<http://www.migration.ucdavis.edu/mn/more.php?id=3740>> accessed 10 April 2015

In conclusion, various inferences can be drawn from the *Kafala* system namely; it is a system that gives an employer total control and power over an employee; it involves the confiscation of an immigrants passport and travel documents so as to curtail his or her movement; it restricts and prohibits an employee's choice of work to do as he is bound to remain under the employment of the person who sponsored him or her; and it puts an employee in a position whereby he or she is bound to act according to the dictates of the sponsor.

The effect of all the above is that the system greatly impairs and inhibits various employees' rights as recognized in a number of international and regional instruments such as the right to movement; fair employment standards and choice amongst others. The study argues that even though the practice is being implemented in the context of national law and practice, its effects on Kenyan migrants can be mitigated through bilateral negotiations between Kenya and UAE within the context of trade negotiations.

2.5.3 Key Legislative and Policy Frameworks Governing Migrant Workers in UAE

Apart from the negative effects of the *Kafala* system, poor policy and regulatory framework governing migrant workers including implementation gaps has also contributed to violations of their rights in UAE. Even though the enactment and enforcement of labour laws falls within national government, majority of these laws and regulations falls short of the international labour standards or suffers from poor enforcement.

The study shall examine key laws and regulations governing labour migrants with the objective of exposing various regulatory gaps. It is argued that these gaps have largely contributed to the apparent discrimination and diminishing labour standards of migrant workers. It is therefore expected that well negotiated labour provisions within the context of bilateral trade agreements

between Kenya and UAE could supplement the existing laws and offer better protection to Kenyan migrant workers.

The key legislative, regulations and policies includes:

2.5.3.1 Federal Law No. 8 of 1980 on Labor and Employees⁷³

This is the principal law governing migrant labour in UAE. Even though the law provides that it is applicable to all the employees working in UAE whether nationals or expatriates, the following workers are exempted from its application.⁷⁴

- (a) Staff and workers employed by the Federal Government, government departments of the member emirates, the municipalities, public bodies, federal and local public institutions and those staff and workers employed in federal and local government projects;
- (b) Members of the armed forces, police and security units
- (c) Domestic servants; and
- (d) Agricultural workers and persons engaged in grazing.

The law was enacted principally to regulate migrants with the entire Federal government workforce, which are largely native workers, being excluded being excluded from the application of the law.

In UAE, domestic servants are not recognized as part of regular employment and hence not covered under the Federal Law. It is partly for this reason that the domestic workers are more exposed to various labour rights abuses. The law itself is inherently weak and discriminatory as relates to the protection of the migrant labour rights. They work in unregulated and undervalued job sector exposing them to higher degree of exploitation and abuse. The overall result is that

⁷³ The text of the Statute can be accessed at
<<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/11956/69376/F417089305/ARE11956.pdf> > accessed 23
September 2016

⁷⁴ Article 3

migrant domestic workers remain to be among the least protected workers of the labour force. In addition they have virtually no recourse when they experience abuse or exploitation.⁷⁵

Even though the law regulates the private sector employment where majority of migrant workers are employed, there are further serious gaps that have rendered the law unfavourable and ineffective in addressing migrants' issues. Key gaps include;

To begin with, the Federal law prohibits formation of trade unions or collective bargaining agreements.

Secondly, the Federal law has no provisions or specific regulations governing redundancy. The employer has no mandatory procedures to guard the interest of employees during such exercises. This obvious deficiency coupled with the Emiratization programme which have contributed to reduced employment protection of labour migrants in the UAE.

In addition to this, the law does not prescribe minimum wage. The non-prescription has led to abuse by the private sector employers. Further, the law grants wide discretion on private sector employers to determine the manner and the period of payment of wages.

Besides, the rules relating to change of jobs are very restrictive and complex. In general, employees upon termination are banned from being employed by new employers with the exception of engineers, doctors, pharmacists and hospital attendants. In January 2011, the government of UAE improved the job mobility provision but the provision did not affect the day labourers, construction workers and domestic servants.⁷⁶

⁷⁵ Latham & Watkins (2009), "Employment Issues in the United Arab Emirates", <https://www.lw.com/upload/pubcontent/_pdf/pub2801_1.pdf> accessed 21 September 2015

⁷⁶ Ibid

Supplementary to this, the domestic workers in UAE falls under the jurisdiction of the Ministry of Interior and labour laws do not apply to them. The unregulated conditions and situation of the domestic workers has made them vulnerable to working for long periods with minimum pay.

Finally, the law limits or restricts access to social benefits such as housing, social benefits and medical care. Further, while the nationals of UAE are legally protected against arbitrary dismissals, the same protection is not extended to migrant workers who can be dismissed for varied and expanded grounds.

In conclusion, a careful reading of the law and practice reveals that there is a deliberate move to legally exclude migrant workers from enjoying the full spectrum of labour rights including the fundamental rights as espoused by the ILO.

2.5.3.2 Federation Law No. 6 of 1973

Federal Law No 6 of 1973 as amended by Federal Law No 13 of 1996, followed by several decrees and resolutions from the Ministry of interior, governs the entry and residence of expatriates in the UAE.⁷⁷ Although the immigration law is Federal, it is not applied consistently in all of the Emirates. Each Emirate in the UAE has its own General Directorate of Residence and Foreign Affairs to administer the entry permits and visas of foreign persons and immigration for employment purposes

(c) Employees in the Free Zones

Free zone is a geographical area within the UAE established by the UAE government to encourage foreign direct investments into the UAE. Unlike offshore entities, foreign investors

⁷⁷ The text of the Statute can be accessed at < <http://gulfmigration.eu/uae-federal-law-no-6-of-1973-on-entry-and-residence-of-aliens>> accessed 21 September 2015

can establish a 100% foreign owned entities in free zones.⁷⁸ The key Free Zones existing in UAE include the Dubai International Financial Centre (DIFC) and the Dubai Healthcare City (DHC). Employees in Free Zones are subject to the rules and regulations of the Free Zone concerned with the key focus being on the exact terms of the individual contracts of employment. Although the DHC has not enacted its own comprehensive Employment Law, the DIFC has in place an Employment Law that still has various provisions that has the effect of further lowering the standards of migrant workers within the DIFC.⁷⁹

Since the rules and regulations governing employment in Free Zones are not subject to the Federal law, the Ministry of labour has minimal role in the employment contracts of employees as the sponsoring employers or Free Zone authorities report directly to the immigration authorities. In general, the regulations within the Free Zones is wholly weighted in favour of employers further weakening the protection of migrant labour rights and standards in UAE.

In conclusion, a detailed analysis of the labour laws, regulations and policies, it is safe to conclude that labour migration governance within UAE is weak and hardly effective as far as the rights and interests of migrant workers are concerned. The laws and practices have also failed to uphold the minimum labour standards as stipulated in various ILO Conventions. These standards are principally aimed at reducing the migrant workers' exposure to abuse when they migrate into UAE.

In addition, laws and regulations directly affecting migrant workers are illiberal and deliberately discriminate against migrant workers with different laws and policies applied to UAE nationals.

⁷⁸ PKF, Free Zones in the UAE
<<http://www.pkf.com/media/135638/free%20zones%20in%20the%20uae%202009.pdf>> accessed 21 September 2016

⁷⁹ The relevant employment law is DIFC Law No. 4 of 2005

Apart from enjoying elevated incomes, Emirates nationals enjoy rights to State benefits and favourable treatment by the police and judiciary. This is coupled with the right to hire and sponsor migrants. It is no wonder that UAE nationals hardly ever agree on employment by private firms but gain immensely from the labour of migrant workers.

It would be safe to advance an argument that UAE is a classic example of the struggle or use of the power of capital to minimize the potential negative effect of the existing unfavourable capital and labour ratio. However, the balance is being carried out by UAE at the expense of the migrant workers' rights and labour standards

2.7 Analysis of Legislative, Policy and Institutional Frameworks governing Pre-departure of Migrants from Kenya to UAE

The interrogation of the status of migrant workers in UAE cannot be complete without examination of the legislative, policy and institutional frameworks pursued by Kenya, as a sending State, in safeguarding the rights of migrant workers either enroute or already within UAE and other migrant receiving States. Kenya has been alive to the situation of Kenyan migrants in UAE and other migrant receiving States. It has sought to enact various legislations, policies and practices to manage the outflow of migrant workers into various States including UAE and bolster protection mechanisms. These intervention mechanisms has included effecting ban on labour migration in order to effectively minimize the risk of human rights abuses within the receiving States. However, significant gaps in protection remain that requires various levels of initiatives as proposed in this thesis.

The key institutions concerned with migrant issues in Kenya are the Ministry of Foreign Affairs and International Trade and the Ministry of East Africa Community (EAC), Labour, and Social

Protection. Some of the functions of the Ministry of Foreign Affairs and International Trade include: management of Kenya's foreign policy, bilateral and multilateral relations, management of joint commissions and joint trade committees with other countries, international trade affairs and acts as a trade representative/special advisory/negotiation services.⁸⁰ The Ministry of East African Community (EAC), Labour and Social Protection on the other hand is tasked with *inter-alia* formulation, review and implementation of employment and social policy, national human resource planning and development, facilitating and tracking employment creation, workplace inspection and workman's compensation.⁸¹

The following are the key sources of legislations and policies including their attendant weaknesses:

2.5.1 Employment Act, 2007

The Kenyan Employment Act contains various provisions directly aimed at labour migration governance. Part XI of the Act expressly provides for foreign contract of service. Section 83 of the Act provides that a foreign contract of service must be in prescribed form attested by a labour officer to ensure it satisfies certain set criteria. Section 86 thereof makes it an offence to induce or attempt to induce an employee to proceed outside the limits of Kenya without entering into a foreign contract of service. On conviction, the offender is liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months or both.

Practical difficulties arise in the enforcement of the law requiring entering into a contract of service before departure to UAE. First, the trans-boundary nature of migration makes it harder to arrest and arraign suspects in law courts within the Republic of Kenya. Secondly; the penalties

⁸⁰ www.mfa.go.ke

⁸¹ www.labour.go.ke

for breach is very low and disproportionate to the commercial benefits of illegal migration. Thirdly; the legislation is weak given the fact that majority of low skilled migrants find their ways into UAE through various routes and means and the Kenyan Court or enforcement agencies will have no control once the migrants crosses over to UAE.

2.5.2 Regulations of Recruitment Agencies

Recruitment agencies in Kenya have a recent history. They first emerged in 1990s as a private sector initiative to address local and foreign employment promotion. However, the number has grown significantly from 5 in 1998 to over 700 in 2013.⁸² Unscrupulous agencies have constantly exploited unsuspecting but desperate Kenyan job seekers by not only extorting money from them but also linking them to exploitative employment in UAE. By circumventing legal procedures, these agencies have contributed significantly to irregular migration patterns which have led Kenyan labour migrants into abusive employment relations in the hands of private employers in UAE. However, the Kenyan government has a residual function of not only taming these rogue agencies but also protecting the rights and interests of Kenyan labour migrants already in UAE irrespective of their mode of entry.

In 2007, the ILO formulated a guide to private employment agencies. The guide effectively incorporates *inter-alia* the government regulatory responsibilities including the legal requirements for establishing and operating private employment agencies.⁸³ However, Kenya has not enacted a specific law that governs recruitment agencies within its borders. It is only on 3rd

⁸² Speech by Hon. Kazungu Kambi, Cabinet Secretary, Ministry of Labour, Social Security and Services on Inauguration of the Task Force to review matters relating to Foreign Employment and Management of Labour on 3rd November 2014. <www.labour.go.ke> accessed 25 October 2015

⁸³ ILO, Guide to Private Employment Agencies-Regulation, Monitoring and Enforcement' Geneva, 2007 <www.ilo.org> accessed 25th October 2015

November 2014 that it established a Task Force whose terms of references included: considering the existing framework for the management and regulation of recruitment agencies and assess its effectiveness in protecting Kenyans recruited to work outside the country; reviewing existing framework and recommend how it can be strengthened to ensure effective protection of Kenyans, and developing a policy direction and advice the government of Kenya on whether to maintain or lift the existing ban on export of Kenyan workers to the Middle East and Gulf Region.⁸⁴

The task force was formed after the government had previously revoked all accreditation certificates of private employment firms including imposing a ban on export of domestic workers to Middle East and the Gulf region. The task force delivered its final report to the government on 15th September 2015 where they *inter alia* made concrete recommendations for regulation of private recruitment agencies, training of recruits before departure, co-ordination of migrants abroad and formulation of national policy on labour migration.⁸⁵ The government is yet to adopt the report or order the end of recruitment freeze.

2.5.3 Formulation of Kenya Foreign Diaspora Policy

In June 2014, the Kenya Foreign Diaspora Policy was enacted. The policy was developed in recognition of the urgent need to mainstream the Kenyan Diaspora into national development process in line with the aspirations and goals of the Kenya Vision 2030.⁸⁶ The broad objective of

⁸⁴Samuel Kazungu Kambi, "Speech During Inauguration of the Task Force to Review Matters Relating to Administration of Foreign Employment and Management of Labour Migration, 3rd November, 2014" <<http://www.labour.go.ke/downloads/CS%20Speech%20Inauguration%20of%20Task%20Force.%20November%203,%202014-01.pdf>> accessed 25 October 2015

⁸⁵ "Daily Nation", Foreign employment task force delivers recommendations, <<http://www.nation.co.ke/video/-/1951480/2871578/-/ij64qn/-/index.html>> accessed 25 October 2015

⁸⁶ <www.kenya.asn.au> accessed 25 October 2015

the policy is to mainstream and empower Kenyans abroad to effectively make significant contributions to the development of the country. The key objectives of the policy, therefore, is to harness and maximize the potential of Kenyans abroad to contribute to Kenya's transformation Agenda while at the same time meeting their needs and expectations through a mutually beneficial and lasting partnership. The specific objectives of the policy include to:

1. Develop and implement strategies to empower, engage and mainstream Kenyans abroad into national development process;
2. Mobilize Kenyans abroad to form town, city or country specific umbrella associations as well as regional and global umbrella associations for effective representation and engagement;
3. Develop measures to enhance protection of Kenyans abroad; and
4. Establish the necessary institutional mechanism for co-operation and administration of issues of Kenyans abroad.⁸⁷

Under the Policy, among the strategies include the enhancement of mechanisms for protecting Kenyans abroad. Under this strategy, the government seeks to: negotiate and sign bilateral labour agreements with host countries; strengthen regulatory framework for employment agencies; conduct pre-departure training for migrant workers and students going for further studies abroad; conduct awareness creation for Kenyans going abroad through travel advisories, and facilitate registration of Kenyans abroad through the Kenya Missions, and revamp labour recruitment system to make it more professional and accountable.

⁸⁷ Full text < https://www.kenyaembassy.com/pdfs/Kenya_Foreign_Policy.pdf> accessed 25 October 2015

The policy further seeks to establish a National Diaspora Council of Kenya whose mandate shall include advising the Government on issues of Kenyans abroad and conducting research into ways and means of improving policies, programmes and institutional arrangements for the mutual benefit of the country and Kenyans abroad. Further the Council in consultation with the Ministry of Foreign Affairs and International Trade and other stakeholders, will be charged with the responsibility of organizing annual home-coming conferences by Kenyans abroad, organizing an award scheme for the recognition of outstanding Associations of Kenya and individuals and any other activities within and outside the country. This Council is intended to operate under the Ministry of Foreign Affairs and International Trade.⁸⁸

While the policy has indeed contextualized the trade related benefits of labour migration, it has not effectively addressed the actual measures or framework for the inter-play between trade and protection of the rights of migrant workers in various receiving States. It has instead placed emphasis on negotiation and signing of bilateral labour agreements. However, it is the argument of this thesis that such a measure has not registered desired progress in various States that have adopted the model.

2.6 Conclusion

Even though the economy of UAE highly depends on the skills and efforts of migrant workers, they have not received favourable treatment within UAE. The examination of the laws, regulations and practices governing migrant workers in UAE points to the fact that there exist discriminatory tendencies within the text of the laws, their effects and implementation

⁸⁸Government of Kenya, 'Kenya Foreign Diaspora Policy' Available at http://www.kenyaembassy.com/pdfs/Final_National_Diaspora_Policy_Revised_13.06.2014.pdf> accessed 9 June 2015

mechanisms. A system ought to be developed to mitigate and improve on the laws, practices and their implementation mechanisms as it relates to Kenyan Migrant workers without negatively affecting the sovereignty of UAE.

Further examination of the existing legislative and institutional framework in Kenya governing the pre-departure of Kenyan migrants in to UAE is inadequate and does not adequately protect the migrants' human rights and fundamental freedoms. The existing framework does not further provide efficient supervision mechanisms which would, for instance, allow the Kenyan Government to deploy its agents to the UAE in order to investigate the conditions under which the migrant workers are living and working under.

The principal conclusion derived from the analysis of the Kenyan laws and policies is that, in an effort to address the regulatory and policy gaps, increased co-operation between Kenya and UAE is crucial. This would assist in availing real protection which includes establishing mutually agreed mechanisms for protecting Kenyan migrant workers in distress; create effective complaint mechanisms, craft mutually agreed and enforceable contracts among other mechanisms. It is on the above background that this thesis advances the use of bilateral trade agreements as a basis to negotiate and implement these mechanisms.

CHAPTER THREE

3.0 CRITICAL APPRAISAL OF BILATERAL TRADE AGREEMENTS AND MIGRANTS' LABOUR RIGHTS

3.1 Introduction

The examination of migrant situation in the UAE exposes violation of the labour rights of migrants in UAE that ought to be addressed. States determine the extent of their immigration and labour laws with minimal international intervention. Cross border labour migration or mobility has not been effectively liberalized in a multilateral scale as States still retain higher levels of sovereignty or control especially as regards migration governance within and around the State borders.

Despite the fact that globalization has created opportunities for integration of labour markets, complex national immigration and labour market regulations have continued to stifle any attempts made at liberalization or integration of labour markets to increase trade and services. This has led to the rise of undocumented migrants who mainly are low or semi-skilled within the migrant receiving States.

This study argues that labour migration relationship is relatively difficult to manage from a purely political viewpoint and this justifies the focus on the integration of labour markets, including the social aspects, through economic lens. This Chapter evaluates the importance of integrating trade with migration in achieving the critical social obligation of enhancing the interests of migrant workers.

The actual nexus between trade and promotion of migrant workers' rights and standards will be examined with greater emphasis on the place of migrant labour rights within the bilateral trade agreements between Kenya and UAE. In this regard, the chapter advocates for the infusion of migrant labour standards and enforcement mechanisms enforcements in trade agreements.

3.2 The Nexus between Migrant Labour Standards and Trade

Migration and trade may be said to be closely related since each has an influence over the other in some way. Due to this apparent nexus, none can be fully addressed without full involvement and co-operation of the other. Migrants can foster trade links between sending and receiving countries to a large extent. When immigrants move to other countries, they do not just carry with them their labour, but other aspects of their human existence, including non-market activities, culture, political and religious beliefs. Free immigration (open borders for people) is simply free trade in labour and what economists have called 'human capital'.⁸⁹

Labour migration is often closely related to and compared with international trade. With trade, the product of foreign labour comes into a country in the form of goods. In the case of labour migration, the labourers themselves go to a particular country for work.⁹⁰ Labour migration generally have significant socio-economic impacts in both sending and receiving countries. Some of the implications are direct while others are indirect and may even go unnoticed. By migrants moving to another country, they export their labour, skills and knowledge which in turn benefits the receiving countries while the country of origin is at a disadvantage as it loses economic manpower.

⁸⁹Bryan Caplan, "Immigration and Trade" <<http://www.openborders.info/immigration-and-trade/>> accessed 4 May 2015

⁹⁰Steven A. Camarota, "Immigration: Trade by Other Means?" Centre for Immigration Studies, Immigration Review No 31, 1998, <<http://www.cis.org/Immigration%2526Trade>> accessed 4 May 2015

Trade provides a convenient fulcrum for maximizing the mutual economic benefits of migration. Based on the concepts of freer trade, the labour markets of both the UAE and Kenya can easily be integrated. Further, concrete legal structures can be created or developed principally to regulate labour surplus and shortage between the countries while addressing the issue of access to the labour markets, protection of the basic rights of Kenyan migrants coupled with non-discriminative enforcement of each country labour laws as a means of maximizing the mutual benefit of migration.

While efforts have been made at liberalization of trade in goods and services within WTO framework, most States utilize immigration laws as means of reserving the authority of States to regulate or prevent altogether migrants from crossing the nation's borders.⁹¹ In response to these national defences and viewpoints on labour migration, the universalist approach, which advocates for shared humanity of nationals and non-nationals; argue that these limitations on movement impair global distributive justice, serving as barriers to movement from poor countries to more affluent or developed ones.⁹²

This approach is hardly shared by many States going by the level of commitments at international levels towards protection of the rights and interests of migrant workers. The ILO and United Nations have developed legally binding instruments relating to migrants. The ILO has adopted the Convention No. 97 of 1949 (C 97) concerning Migration for Employment and Convention No. 143 of 1975 (C 143) concerning Migration in Abusive Conditions and the

⁹¹ The international human right to leave one country does not include the right to emigrate to a given country despite various steps achieved towards globalization.

⁹² Dietrich Thranhardt, "Steps towards Universalism in Immigration Policies: Canada and Germany" RCIS Working Paper No. 2014/2
<[http://www.ryerson.ca/content/dam/rcis/documents/RCIS_WP_Thraenhardt_No_2014_2\(1\).pdf](http://www.ryerson.ca/content/dam/rcis/documents/RCIS_WP_Thraenhardt_No_2014_2(1).pdf)> accessed 2 October 2016

Promotion of Equality of Opportunity and Treatment of Migrant Workers. The United Nations on the other hand adopted the International Convention on the Protection of the Rights of All Migrant Workers and their Families (ICMW) of 18 December 1990.

States have been slow in ratifying these instruments and implementing the various provisions aimed at safeguarding the rights and interests of labour migrants already in the receiving States. For example, the ICMW has had a difficult history. Its adoption was formally proposed by a General Assembly Resolution of 17 December 1979. The final text was not endorsed by the General Assembly until 18 December 1990. Upon being endorsed, it only entered into force on 1st July 2003 after the threshold of 20 ratifying States was reached in March 2003.⁹³ Since then, ratification has proceeded slowly, with a total of 44 States having ratified by early 2011.⁹⁴

This study shifts from the exclusive focus on these Conventions by advocating for improved and structured labour mobility through avenues or opportunities created through bilateral trade. Since national governments have always been reluctant to cede control of migration to supra-national bodies or authorities, the idea is not for States to be compelled to accept control by such authorities, but seek to achieve the desired global distributive justice for migrant workers at bilateral level through migration-trade linkages or mechanisms.

Kenyan migrants in the Diaspora have had significant impact on the Kenyan economy through their periodic remittances. The Central Bank of Kenya conducts a monthly survey to determine Diaspora remittances through commercial banks and other international remittance service

⁹³ Bernard Ryan, "In Defence of the Migrant Workers Convention: Standard Setting for Contemporary Migration," 21 Ashgate Research Companion <<https://ira.le.ac.uk/bitstream/2381/28897/3/In%20Defence%20of%20the%20Migrant%20Workers%20Convention%20Standard%20Setting%20for%20Contemporary%20Migration.pdf>> accessed 21 June 2016

⁹⁴ Ibid

providers in Kenya. According to the Central Bank of Kenya latest statistics, remittances to Kenya increased by 8.6 per cent, to USD 119.7 million in May 2014 as compared to USD 110.1 million in May 2013. Further, the cumulative twelve month remittances increased from by 11.89 per cent to USD 1,341 million in May 2014 from USD 1,198 million in May 2013.⁹⁵ It is believed that migrants endure the oppressive conditions because the jobs in UAE allow them to send home remittances to support their families in Kenya. The critical challenge has been how to achieve the critical and sustainable balance between trade benefits of migrants and the protection of migrant rights and labour standards.

3.3 Efficacy of the Supra-National Institutions in Protection of Migrant Worker's Rights

The rights and interests of migrants continues to be violated within the receiving States. The key issue is whether multilateral institutions in the field of trade and labour rights have fully embraced the linkage between labour and trade in order to establish effective mutual strategies for protection of migrant workers. Even though there is a wide consensus on the need to secure or obtain certain minimum but concrete labour standards to protect migrant workers at multilateral levels, achieving uniform global governance has been slow and difficult.

However, trade and labour standards debate is a longstanding and important issue in both the WTO and ILO. Despite its historic and wide mandate in protection of labour rights, the study will demonstrate that ILO has not been effective and efficient on issues around protection of migrant workers' rights. Similarly, the International Organization on Migration (IOM), which is a

⁹⁵ Central bank of Kenya "Diaspora Remittances Statistics" <<https://www.centralbank.go.ke/index.php/news/369-increase-in-diaspora-remittances-for-may-2014>> accessed 28 August 2014

body outside the UN systems, the constitutive instruments have only granted it a fairly narrow portfolio of service provision.⁹⁶

In addition, notwithstanding the nexus between trade and migration, WTO has failed to fully incorporate the issue of migrants in international trade leaving it to be exclusively dealt with by the ILO. It is this unending circus that justifies the actions of States in formulating unilateral and bilateral mechanisms designed to protect the rights and interests of migrant workers.

3.3.1 ILO and Protection of Migrant Labour Rights

The ILO was founded in the year 1919 and became the first specialized agency of the UN in 1946. It is the only United Nations Agency with the primary obligation of protecting migrant workers with its mandate stretching way back from the year of its inception. ILO does so in line with its fundamental goal of achieving decent work for all workers. Unlike other specialized agencies of the UN, it brings together governments, employers and workers representatives of the 187 States to achieve its overall objective or goal by setting standards, developing policies and various relevant programmes.⁹⁷

The key functions of ILO includes collection and dissemination of information, setting internationally accepted norms, fostering and engaging in technical co-operation activities. Although ILO's Convention sets out the international labour standards for all workers, including migrants; there are two sets of Conventions that are of particular interest to migrant workers, namely: The Migration for Employment Convention (Revised) 1949 (No. 47) and Migrant

⁹⁶ Kathleen Newland, "The Governance of International Migration: Mechanisms, processes and Institutions, Global Commission on International Migration (GCIM)" <www.gcim.org>accessed 28 August 2014

⁹⁷ www.ilo.org

Workers (Supplementary Provisions) Convention, 1975 (No. 143). However, UAE has not yet ratified these key Conventions.

The ILO has also promoted multilateral dialogue around the issues affecting migrant workers. In 2004, the 92nd Session of the International Labour Conference undertook a General Discussion on Migrant Workers and adopted an ILO Plan of Action on Migrant Workers.⁹⁸ Pursuant to the Plan of Action, the ILO convened a tripartite meeting of experts in Geneva in November 2005. The Meeting adopted a multilateral framework called Non-Binding Principles and Guidelines For a Rights-Based Approach to Labour Migration.⁹⁹

On 1 July 2003, the ICMW entered into force. It is considered to be the most comprehensive international treaty addressing the issues affecting migrant workers. The Convention sets the standards required when formulating and implementing laws as well as judicial and administrative acts that directly or indirectly affects migrants within the individual State parties to the Convention. In addition, State parties to the Convention are required to reform their laws, administrative procedures and regulations governing migrant workers to conform to the provisions of the Convention. Further, States are also required to adopt relevant measures necessary to safeguard migrant workers' rights.¹⁰⁰

The Convention aims at protecting the rights of both documented and undocumented immigrants. This is reaffirmed in the preamble to the Convention which *inter-alia* recognizes the

⁹⁸ ILO, <http://www.ilo.org/global/topics/labour-migration/WCMS_232817/lang--en/index.htm> accessed 24 October 2015

⁹⁹ Full text of Principles < http://www.ilo.org/global/topics/labour-migration/publications/WCMS_178672/lang--en/index.htm> accessed 24 October 2015

¹⁰⁰Office of the UNCHR (2005), "International Convention on Migrant Workers and its Committee", Fact Sheet No. 24 (Rev. 1) Page 1

fact that irregular migrants are frequently exploited and face serious human rights violations. States are therefore, encouraged to prevent and eliminate clandestine movements and trafficking in migrant workers while ensuring the protection of their human rights.

Despite these noble initiatives, both the Conventions and ILO in general have not been effective in ensuring full protection of the rights and interests of the migrants. Key challenges include:

First, relevant member States have been slow in ratifying ICMW. In a United Nations Educational, Scientific and Cultural Organization (UNESCO) sponsored study in 2003, researchers from Asia Pacific Migration Research Network set out to investigate why 7 countries in Asia-Pacific were not willing to ratify the ICMW. In their summary, they identified two key obstacles or hurdles; First, the sending countries feared that the ratification would lead to loss of labour markets in destination States to their non-ratifying counterparts. Secondly, the receiving States faced sensitive political obstacles in that they may be required to admit irregular migrants and their families.¹⁰¹

Secondly, despite their comprehensive nature, these Conventions provide inadequate protection since the labour migration landscape has so far changed from the period they were first adopted. Some of the key changes and contemporary challenges include:

- a) the decreasing significance of the State in recruiting migrant labor and the increasing importance of private agents and intermediaries;

¹⁰¹ Piper, Nicola and Robyn Iredale (2003). "Identification of the Obstacles to the Signing and Ratification of the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families." UNESCO Series of Country Reports <<http://unesdoc.unesco.org/images/0013/001395/139528E.pdf>> accessed on 4 October 2016

- b) the feminization of migrant labor with women migrant workers predominant in the sex sector and domestic work — areas characterized by a strong bond of subordination between the employer and employee, and usually beyond the protection of labor law;
- c) the increasing short-term nature of labor migration; and
- d) the considerable growth in irregular migration and the need for states to balance control measures with measures that facilitate labor migration and protect migrant workers.¹⁰²

Thirdly, there exists a challenge on how to harness the wide mandate in labour issues with a view of achieving a more effective and sustained promotion and protection of the labour standards across member States. The ILO registers complaints against entities violating international rules but rarely imposes sanctions on governments for violation of these set labour standards.¹⁰³ Apart from the ILO supervisory systems, there exists no viable multilateral labour rights enforcement regime to fully actualize these accrued rights.

The adoption of the Declaration on Fundamental Principles and Rights at Work in 1998 was a step in the right direction. The Declaration listed 8 core Conventions to be observed by all member States.¹⁰⁴ Even though governments are obliged to make a commitment to the relevant Conventions, the immediate application of them has not been enforced. The implementation

¹⁰² Ryszard Cholewinski, "Protecting Migrant Workers in a Globalized World" Migration Policy Institute. <<http://www.migrationpolicy.org/article/protecting-migrant-workers-globalized-world>> accessed on 20 September 2016

¹⁰³ Limberley Ann Elliott (2000), "The ILO and Enforcement of Core Labour Standards" International Economic Policy Briefs <<https://pie.com/publications/pb/pb00-6.pdf>> accessed 20 September 2016

¹⁰⁴ The Conventions include freedom of association, the right to collective bargaining, the elimination of forced and compulsory labour, the abolition of worst forms of child labour, and elimination of discrimination in the workplace.

process is still relatively weak in that ILO only offer technical assistance to improve implementation.¹⁰⁵ The prevailing situation calls for new or additional approaches to the protection of the rights of migrant workers.

3.3.2 WTO and Protection of Migrant Labour Rights

Given that the membership of the ILO have so far not succeeded in establishing an enforceable multilateral labour regime, early efforts were pioneered by the US government to have the General Agreement on Tariffs and Trade (GATT) assist in ensuring observance of labour rights at multilateral levels. The nexus between international trade and labour standards within the framework of WTO has a long history. Its roots can be traced from the discussions that led to the enactment of the Havana Charter when several attempts were made to link labour and trade. However all these early efforts proved unsuccessful.¹⁰⁶

WTO was established on January 1,1995 as a result of the Uruguay round of GATT negotiations that occurred between 1986-1994. It provides a permanent arena for member governments to substantively address trade issues and implement various trade agreements between them. It covers a wide range of issues such as tariffs, intellectual property, subsidies, food policies and relevant domestic policies that directly or indirectly affects trade between the member States.

¹⁰⁵ Guy Standing, "The ILO: An Agency for Globalization?"
<http://www.guystanding.com/files/documents/ilo_published_article.pdf>

¹⁰⁶ WTO, "The GATT years: From Havana to Marrakesh"
https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm> accessed 9August 2016

The membership of WTO stood at 164 States as at 29th July 2016.¹⁰⁷ UAE is an active member of the WTO since 10 April 1996 while Kenya has been a member since 1 January 1995.¹⁰⁸

The question of WTO and labour standards was first substantively addressed during the Ministerial Meeting held at Singapore in 1996. During the meeting the Ministers came up with the Declaration on the question of the WTO and labour standards. The Declaration spelt out the WTO's position on the question thus:

*We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the use of labour standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the World Trade Organization and the International Labour Organization Secretariats will continue their existing collaboration.*¹⁰⁹

The above denotes the clear commitment by WTO on the question of promotion of core labour standards provided they are not of a protectionist character. However, the underlying issue is whether or not trade actions could be used to formulate and force the implementation of set labour standards within the member States of WTO. Further, while the Declaration speaks of

¹⁰⁷ <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 8 August 2016

¹⁰⁸ www.wto.org

¹⁰⁹ WTO, "Singapore WTO Ministerial 1996: Ministerial Declaration" WT/MIN (96)/Dec, <http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm> accessed 25 May 2015

continuation of existing collaboration between WTO and ILO, it is not clear whether WTO really intended to create a framework for substantive involvement of ILO in its core operations and rules system. So far, the only credible collaborative efforts revolves around technical discussions, exchange of documentations and informal co-operation between ILO and WTO secretariats.¹¹⁰

Currently, labour standards are not part of the WTO agreements but member States advocating for its inclusion argue that such a move would stimulate the observance or improvement of labour standards amongst member States. On the other hand, the developing countries have consistently opposed any attempts towards such linkage at the WTO level. An attempt to incorporate a worker's rights clause into WTO during the 1999 Ministerial meeting in Seattle failed as result of opposition from developing countries. At the meeting, more than 100 WTO members from developing countries opposed the attempted incorporation.¹¹¹

The failure was so resounding to the extent that the subsequent Doha Ministerial meeting in 2001 did not bother including the social clause issue on its agenda. The opposition has been primarily based on the concern that the linkage may be motivated by protectionism tendencies. There are other concerns that revolve around issues of neo-colonialism and sovereignty.

The calls for inclusion of labour standards by developed nations in trade is often decried as 'disguised protectionism' on the belief that these nations merely seek to protect their economic interests as against those of the developing countries. Advocates of the principle principally argue that if the core labour standards were to be observed as a direct condition to trade flow, it

¹¹⁰ www.wto.org

¹¹¹ Garry S. Feilds (2003), "International Labour Standards and Decent Work: Perspectives from Developing World", ILR Collections <<http://digitalcommons.ilr.cornell.edu>> accessed 11 August 2016

would likely raise the cost of doing business in developing member States effectively losing their competitive or comparative edge. The underlying fact is that most developing countries are unlikely to comply with the higher standards of labour at the national level. It is ironical that developing countries who contribute majority of migrant sending States would be in the forefront in advocating for non-inclusion of labour standards or working rights within the framework of WTO.

Generally, the issues proposed for discussion and inclusion are those where the developing countries must give one way concessions. The feeling among the developing countries is that the labour standards sought for inclusion do not capture the prevailing socio-political-economic conditions and requirements of these States. Example, the rights of migrants which is subject to quasi-slavery conditions in parts of the industrial world, are not on the proposed agenda.¹¹²

While the debate for linking of WTO and labour standards rages, the feasibility of an effective action or implementation of such move is limited. It is this clear opposition and uncertainty that has safely ushered in a transition from a WTO centred linkages to a focus on the roles of Preferential Trade Agreements (PTA) whether at bilateral, regional plurilateral levels.

3.4 Bilateral Trade Agreements and Migrant Workers' Rights

Even though there is no consensus achieved on the question of whether to include labour rights in WTO, there is a wide consensus or trend that favours inclusion of such rights by trade partners in either Bilateral Agreement, Free Trade Agreements or International Investments Agreements. The transition to Preferential Trade Agreements has effectively catalyzed a move towards

¹¹² Singh, Nirvikar (2001), "The Impact of International Labor Standards: A Survey of Economic Theory" UCSC Economics Working Paper No. 483. Available at SSRN: <http://ssrn.com/abstract=288351>

inclusion of labour rights and standards in these alternative trade instruments. This has created more space for improving the standards of migrant workers in many States.

In recent years, there has been a growing trend of incorporation of labour standards in bilateral trade agreements. According to the ILO report, 58 trade agreements included labour provisions in June 2013, up from 21 in 2005 and 4 in 1995-including 16 South-South trade agreements.¹¹³

States largely find it easier to negotiate labour standards in bilateral agreements since such negotiations are flexible and free from the need to comply with WTO's Most Favoured Nation Principles (MFN).¹¹⁴ According to the ILO, such labour clauses not only list minimum commitments for the protection of human rights at work, but they also provide for conflict resolution systems as well as funds and parallel labour cooperation or consultation.¹¹⁵

Many bilateral pacts contain a desire by the States concerned to pursue integration beyond mere removal of tariffs and trade barriers. The move has broken barriers and proceeded to strengthen the various linkages between trade and migrant labour rights that hitherto proved impossible to integrate within the multilateral framework. There are various reasons why it is viable to link trade with labour standards. The key aim relevant to the study herein is to encourage countries to carry out domestic policy reforms in their labour markets and immigration, however minimal, to comply with international labour standards advanced by ILO and ease movements in line with distributive justice principles.

¹¹³ ILO(2013), "Social Dimensions of Free Trade Agreements" < http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_228965.pdf> accessed 21 May 2015

¹¹⁴ Under MFN, countries cannot normally discriminate between their trading partners. If a trading partner is granted a special favor, a member State so granting the favor has to extend the favor to all WTO member States. However, when member States set up a free trade agreement that applies only to good traded within the group, they can discriminate against goods from outside the trade area.

¹¹⁵ ILO, "Free Trade Agreements and Labour Rights" < <http://www.ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/lang--en/index.htm>> accessed 26 September 2016

Deeper commitments are effectively achieved through bilateralism and agreements reached faster without prejudice to the respective multilateral commitments and sovereignty. It is for this reason that many regional agreements contains commitments that go beyond the multilateral commitments to include issues that have not yet been addressed by the WTO.

The international trend when negotiating bilateral trade agreements is to accept the incorporation of labour and social standards. The most commonly included provisions are: an explicit reference to the 4 core labour standards (with or without referring to ILO), their extension to other aspects of decent work (acceptable working conditions, minimum wage, working hours, health, and safety in the workplace), the existence of a procedure for settling disputes or imposing sanctions, and co-operation procedures.¹¹⁶

The U.S is largely regarded as the pioneer and main proponent of incorporation of labour provisions in trade agreements. Since the year 1990, U.S has provided a fertile ground for experimentations as regards this new area of deep integration. It has taken great strides in this area by concluding a host of bilateral agreements incorporating labour rights and standards. These include its bilateral trade agreements with Jordan, Chile, Singapore, Bahrain, Australia, Morocco and many other countries. In 1994, the North American Free Trade Agreement (NAFTA) came into force involving United States, Canada and Mexico. In the same year, the member States enacted a side agreement to NAFTA called North American Agreement on Labour Co-operation (NAALC) This was the first agreement incorporating labour standards as a side agreement to a trade agreement.

¹¹⁶ EC, "The Use, Scope and Effectiveness of Labour and Social provisions and Sustainable Development Aspects in Bilateral and Regional Free trade Agreements" <www.ec.europa.eu/social/BlobServlet?docId=2112> accessed 26 October 2015

The main objective of NAALC was to improve the working and living conditions within the member States while on the other hand, promoting trade and closer economic ties through NAFTA. The NAALC was proposed by the U.S as an addition to NAFTA in response to domestic concerns or fears of relocation by U.S companies to Mexico in order to take advantage of the lower labour standards. The Mexican government, though initially resisted the inclusion of labour and environmental rights in NAFTA, agreed to the enactment of NAALC after a series of negotiations and compromise.¹¹⁷

Labour law is broadly defined in the agreement to include laws and regulations affecting migrants within each member's territory. The methodology adopted for protection of such rights and interests include technical assistance, consultations and exchanges of information. Notwithstanding the earlier motivations, NAALC member States have opted to address the labour issues through consultative process without invocation of sanctions.

The approach taken by the member States in formulating NAALC was replicated in subsequent trade agreements with various modifications. The labour provisions in these bilateral agreements are varied and provide a suitable model to be replicated in subsequent bilateral trade agreements. NAALC required member States to enforce their domestic labour laws without the need to incorporate the ILO labour standards. However, the approach was modified in subsequent trade agreements whereby member States made commitments to enforce the minimum ILO labour standards. The 2009 US trade agreement with Peru requires the parties to comply with all the

¹¹⁷Frank H. Bieszcza, Labor Provisions in Trade Agreements: From the NAALC to Now, 83Chi.-Kent. L. Rev.1387 (2008). P.1388

principles of the ILO's 1998 Declaration without restrictions, in addition to enforcing their labour laws.¹¹⁸

Apart from the NAALC, other bilateral agreements incorporating labour standards that would be closely examined include Chile experience with trade agreements incorporating labour standards and Japan-Philippines Economic Partnership Agreement (JPEPA). There exists good practice elements in these and other trade agreements that Kenya can borrow from in negotiating bilateral trade agreements.

The success in such inclusions in other jurisdictions provides a convenient starting point to generate and carry forward the debate for inclusion of the concerns of the migrant workers in all bilateral trade agreements signed between Kenya and UAE. This could be done by either direct inclusion of social clauses in the text of the trade agreements or signing of separate labour agreements, annexes or memoranda of understanding expressly linked to the trade agreement

3.4.1 Nature and extent of incorporation of labour standards in Trade Agreements

This study proceeds on the basis that it is indeed possible to link trade policy on one hand and a non-trade social policy in one or related agreement on the other hand and achieve a high level of influence and intergovernmental co-operation in achieving the set labour standards while advancing the principle of distributive justice. This is evidenced by the multiplication of FTAs that have incorporated labour clauses.

Labour rights include substantive rights-such as maximum working conditions, minimum wages, and health and safety precautions-and procedural rights, such as the right to union formation and

¹¹⁸ Franz C. Ebert, Anne Posthuma, "Labour provisions in trade agreements: Current trend and perspectives" ILO <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_192807.pdf> accessed on 25 May 2015

collective agreements. Indeed labour law and standards can effect a change in bargaining disparities and unjust conditions by both regulating the bargaining process and by mandating specific labour conditions.¹¹⁹

There is no standard model of incorporation of labour standard clauses. While some agreements only mention the clauses in the preamble, others have a separate section incorporating the clauses. Further, in some agreements, the incorporation is through a separate agreement annexed to the trade agreement.

The Declaration on Fundamental Principles and Right at Work was published by ILO in 1998. It contains core labour standards that States ought to avail to all workers within their territory. The Declaration states in its Preamble that the ILO "should give special attention to the problems of persons with the special needs, particularly the unemployed and migrant workers, and mobilize and encourage international, regional and national efforts aimed at resolving their problems, and promote effective policies aimed at job creation"¹²⁰

The move by ILO in distilling the minimum standards and demanding observance at the national and regional levels especially as regards migrant workers has generally contributed to increased acceptance of these standards within the bilateral trade regimes.

The Declaration commits member States to respect and promote principles and rights in four categories, whether or not they have ratified the relevant Conventions. These include:

- (a) freedom of association and the effective recognition of the right to collective bargaining;

¹¹⁹ Michael A. Cabin, "Labor rights in the Peru Agreement: Can vague principles yield concrete change?" Columbia Law Review, 2007, Vol. 109 Pg. 1051

¹²⁰ Text of Declaration < <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>>

- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.¹²¹

The Declaration advances the principles of distributive justice as it expressly aims to reconcile the desire to stimulate national efforts to ensure that economic progress is undertaken in a manner that does not prejudice social and other related concerns. It emphasizes the right of all persons, including migrant workers to pursue their economic goals irrespective of race or places of origin in conditions of freedom of dignity, equal opportunity and economic security. The Declaration provides the core labour standards that parties should incorporate in the social clause.

State parties may consider inclusion of other standards beyond that provided for by the Declaration. Examples; wages, hours of work and health issues. They range from mere provisions on labour standards to addressing the issues arising in the labour market of the recipient States. Labour provisions may deal with aspects of labour market access or labour mobility, employment related safeguard provisions, enhanced employment promotions policies, general co-operation and co-ordination on job placements, institutionalized recruitment, migrant return guarantees, visa and asylum provisions.

As regards implementation mechanisms, labour provisions may be classified into conditional and promotional provisions. Conditional provisions makes non-compliance with a particular trade or labour provisions subject to the imposition of sanctions, while promotional provisions basically relies on good will and co-operation between the States concerned and employs mechanisms

¹²¹ Article 2

such as dialogue and technical co-operation.¹²² Trade Agreements may contain both conditional and promotional provisions or merely promotional. About 40 percent of the trade agreements with labour provisions have conditional dimensions while the remaining 60 per cent include labour provisions that are promotional in nature with the dominant being between South-South trade agreements.

Even though some trade agreements provide for conditional or sanction based option, they encourage the adoption of prior consultations and negotiations before the imposition of sanctions. The pre-conditions have so far worked well to prevent labour related disputes to require the imposition of sanctions. With respect to NAALC which has an elaborate sanction based option, no case had reached the sanction level as of June 2013. Key explanation given for this is that NAALC parties prefer to settle complaints on an amicable basis rather than through the conditional or sanction based model under NAALC.¹²³

Key in all the agreements with labour provisions is the adoption of a suitable institutional framework for co-operation, monitoring, consultations and knowledge sharing. In addition, other labour provisions may include more elaborate institutional framework in form of labour committee or council complete with a secretariat to monitor the co-operation, consultations, knowledge sharing and dispute resolution mechanisms.

The study turns the spotlight on the opportunities available within the context of trade between Kenya and UAE sufficient enough to distil aspects of migrant labour protection standards.

¹²²Quentin Delpech & Franz Ebert, "Labour market Concerns and Trade Agreements: Case of Employment Policy Provisions", International Labour Office (Feb. 2014) Page 5

¹²³Ibid

3.4.2 Incorporation of Labour Standards in Trade Agreements between Kenya and UAE

Kenya remains the largest economy in the EAC, with an estimated GDP of about 43.6bn in Financial Year 2012/13. Over the last six years, both Kenya's exports and imports have registered a sustained upward trend. The exports have averaged at 27% of GDP with imports averaging at 46% of GDP. The imports have mainly originated from India, United Arab Emirates and China. This glaring trade balance deficit was cushioned by strong rising Diaspora remittances which doubled from USD 611m in 2008 to 1,267m in the year 2013.¹²⁴

Oil products accounts for most of the imports from UAE. Kenya exports to the UAE are largely confined to agricultural products to which it has a comparative advantage over UAE and the products enjoy a sizeable market share in UAE. Trade deficit between Kenya and UAE grew by 436 per cent from USD 223.8 million in 2003 to USD 1.2 billion in 2007.¹²⁵ Despite the deficit, Kenya continues to expand and diversify its exports to UAE. Trade offers the best link between the two countries which could be exploited to enhance the welfare of Kenyan population keen on accessing the labour market in UAE. Both UAE and Kenya have expressed a desire to further enhance trade relationship through signing of various bilateral agreements amongst themselves.

Kenya is a member of various multilateral and bilateral trade treaties and systems, key being WTO, EAC, COMESA, ACP/Cotonou Partnership Agreement, AGOA and GSP. In addition, Kenya has signed various bilateral agreements with several countries worldwide.

In April 2009, Kenya adopted a National Trade Policy. Chapter 8 of the Policy deals with trade related issues and trade and labour standards has been captured in Para. 8.9. However, it does not include a strategy or programme for negotiation of minimum labour standards or protection

¹²⁴ADBG, "Kenya, Country Strategy Paper 2014 to 2018." <www.afdb.org> accessed 7 August 2014

¹²⁵www.epckkenya.org

of migrant workers within the context of trade. This has partly contributed to lack of initiatives aimed at negotiating and incorporating relevant labour standards and commitments in various bilateral trade agreements between Kenya and other migrant receiving States including UAE.

As regards its trade relationship with UAE, Kenya has signed the following trade agreements:

- a) The Prevention of Avoidance of Double Taxation Agreement
- b) The Promotion and Protection of Investments Agreement

The aims and provisions of these agreements are highlighted as follows:

(a) The Prevention of Avoidance of Double Taxation Agreement

This bilateral agreement was signed between Kenya and UAE on 21st November 2011. The aim of the agreement is to avoid double taxation of income or gains arising from one territory and paid to the residents of the other territory or jurisdiction. Under the agreement, all UAE national carriers including Emirates Airline, Etihad Airways, Air Arabia and RAK airways will be exempted from taxes in Kenya. Further, students, sovereign funds, staff members of airlines, income and capital in both public and private sectors are also exempted from all taxes. The agreement also reduced tax on dividends of the private sector in Kenya from 20% to 5%.¹²⁶ The agreement requires parties to amicably resolve any financial disputes between them and constantly exchange information. The agreement however does not contain labour provisions either in its text or by way of a separate agreement.

¹²⁶ UAE Interract, "The Economy-Double Taxation Agreements"
<<http://www.uaeinteract.com/french/news/default.asp?ID=354>> accessed on 25 May 2015

(b) The Promotion and Protection of Investments Agreement

The Promotion and Protection of Investment Agreement was signed between Kenya and UAE on 23rd November 2014. It is principally designed to stimulate investment flows between Kenya and UAE. The agreement is intended to ease some restrictions between the two States as regards investments while offering reciprocal protections of respective companies doing business within the partner countries. It specially provides that investments by investors of either contracting parties shall enjoy full protection and security in the territory of the other contracting party in accordance with the domestic laws of the host contracting party and the applicable rules of international law. The protection extends to non-commercial and political risks key being indirect nationalization, seizure and also provide for compensation in case the investments are destroyed by any acts of the state, conflicts or civil uprising. The agreement, however noble, does not contain labour provisions either in the text or by way of separate agreement.

While the signing of the bilateral agreement is a key step in the protection of the rights of Kenyan businesses in UAE, it does not address the key concerns of this study. This is to the extent that the agreement does not include substantive labour commitments or labour co-operation agreement either within the text or as a separate agreement. The protection offered through the agreement is confined to exporting businesses and not in respect of the Kenyan migrant workers in general.

Lack of labour standards clauses or agreement with respect to the bilateral agreement signed between UAE and Kenya can still be corrected. The relevant clauses that relates to migrant workers can be negotiated and incorporated before or after the conclusion and signing of bilateral

trade agreements. Studies have shown that these labour provisions or clauses can still lead to significant changes in labour legislation and practices in the respective countries.¹²⁷

Kenyan government has set the tone by the enactment of the Kenya Foreign Diaspora policy. One of the key pillars of the policy is to enhance protection of Kenyans abroad. The trade agreements currently existing between Kenya and the UAE provides a convenient starting point for incorporation of labour issues of concern to the Kenyan migrants in the UAE. Even though Kenya has recently announced to the public that 10,000 employment opportunities has been secured in UAE for the benefit of Kenyan population, it is not clear the legal mechanisms or standards that has been adopted to set and secure their labour rights while in UAE.

3.5 Conclusion

As has been shown above, trade and immigration are closely related. So long as the push and pull factors exists within two States, labour migration will still continue and a sustainable legal framework must be developed by both the sending and receiving State to address migrants' labour standards and concerns. In this chapter, the success or otherwise of the two multilateral institutions, being WTO and ILO has been discussed. While ILO has the direct mandate on issues revolving around migrant rights, it has its own inefficiencies, which have clearly been highlighted.

On the other hand, while WTO provides a strong multilateral forum for the advancement of the migrant labour rights, all the attempts made to link labour standards and trade at that level have so far failed. State parties have instead opted to include labour provisions in the various bilateral trade agreements between themselves. This move has proved very beneficial and continues to

¹²⁷ ILO, Social Dimensions of Free Trade Agreements (Accessed at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_228965.pdf)

gather speed. Kenya and UAE are indeed strong trading partners. However, they have no labour agreements or labour standard clauses in their trade arrangements.

This chapter concludes by laying an emphasis that there is need for Kenya and UAE to adopt labour clauses and standards in their bilateral trade agreements as a better way of improving the rights and conditions of Kenyan migrant workers in UAE.

CHAPTER FOUR

4.0 COMPARATIVE STUDY ON MODELS OF INCORPORATION OF LABOUR RIGHTS IN TRADE AGREEMENTS

4.1 Introduction

This Chapter explores best practices as far as incorporation of labour standards in bilateral trade agreements is concerned. The study uses Chile and Philippines as case studies since they have achieved significant steps on the issue of incorporation of labour standards in bilateral trade agreements. The two case studies provide useful lessons worth considering and applying the benchmark or lessons. Even though Chile is a small country in geographical size, it has been specifically selected because it has been successful in incorporating labour standards in varied forms with positive outcomes. Further, Chile is mostly known as a migrant-sending country since between 750,000-1 million Chileans live abroad (about 6 per cent of the country's population.)¹²⁸

Chile has successfully implemented various forms of incorporation with varied trade partners of diverse economic structures and in various regions of the world. This has taken the form either as labour commitments, demanding clauses, labour co-operation agreements, memorandum of understanding or commitments on labour co-operation. Her success is important in designing heterogeneous models that Kenya can easily apply in its negotiations for incorporation of labour

¹²⁸ Cristián Doña-Reveco, Amanda Levinson, "Chile: A Growing Destination Country in Search of a Coherent Approach to Migration" <<http://www.migrationpolicy.org/article/chile-growing-destination-country-search-coherent-approach-migration>> accessed 4th October 2016

standards with UAE. The example is also useful as it also offer lessons on how Kenya could easily manage the labour agreements without having any significant impact on trade between Kenya and UAE.

Philippines on the other hand has been selected since it is a labour surplus nation that has managed to have labour provisions inserted in its bilateral trade agreement with Japan. It is a migrant sending State that has exploited the close trade ties to successfully negotiating a comprehensive bilateral trade agreement with Japan incorporating labour provisions. The lessons and experiences of Philippines would serve as an important lesson and case study that Kenya can effectively emulate in migrant labour management. This Chapter is useful in identifying and distilling the best practices from the countries selected for comparative studies.

4.2 Chile's/an Experience with Trade Agreements and Labour Standards

Trade liberalization in Chile commenced in earnest after ushering in the democratic governance in 1990 and has continued to gather pace. Currently, Chile is the 44th largest export economy in the world. In 2014, it exported \$77.3bn and imported \$69.1bn, resulting in positive trade balance of \$8.22bn. Its top export destinations are China and the United States of America.¹²⁹ Its trade relations with the neighbouring State of Peru continues to thrive amidst long period of tensions between the two States. For a long time, their diplomatic and trade relations have been overshadowed by a long drawn maritime border dispute at the International Court of Justice

¹²⁹ OEC, <<http://atlas.media.mit.edu/en/profile/country/chl>> accessed 4 October 2016

(ICJ).¹³⁰ However, Peru remains the fourth biggest recipient of Chilean investment in the world while Chilean companies have \$13.6bn investments in Peru.¹³¹

As regards Chilean migrant population in US and Peru, there is a constant flow of migrant population out of Chile. In 1973, a U.S backed military coup created a political and economic crisis that made Chile become a county of emigration. During that period, more than 500 Chileans voluntary left or were forced to flee for countries such as Argentina, Australia, Canada, Venezuela, France and Sweden. Currently, the number of Chilean emigrants has surpassed that of immigrants in the country. Approximately 860,000 Chileans live outside the country with Argentina hosting more than 429,000 Chilean migrants, being the largest Chilean community abroad. The US follows closely with approximately 113, 394 migrants.¹³²

However, the migrant situation between Peru and Chile is different with Peru being the recipient and Peru the sending State. Peruvians make the largest immigrant population in Chile with approximately 83,352 residents. A major characteristic of Peruvian immigration to Chile is that it is a fairly recent phenomenon without strong historical precedent. Significant immigration of Peruvians into Chile did not occur until the early 1990s after ushering in liberal economic

¹³⁰ BBC News, "Peru-Chile border defined by UN Court at the Hague" <<http://www.bbc.com/news/world-europe-25911867>> accessed 4 October 2016

¹³¹ Gideon Long, "Chile-Peru: Moving on from the Past" BBC News <<http://www.bbc.com/news/world-latin-america-25924381>> accessed 4 October 2016

¹³² Cristian Dona Reveco, Amanda Levinson "The Chilean State and the search for a new migration policy" <<http://www.ignire.cl/index.php/articulos2/129-the-chilean-state-and-the-search-for-a-new-migration-policy>> accessed 26 October 2015

reforms by the host State.¹³³ Immigrants from Peru work primarily in retail, health care and domestic employment.

The move by Chile to enter into bilateral trade agreements began in 1990 when it sought to enter into a bilateral trade agreement with U.S. By 1992 when NAFTA negotiations were well underway between US, Canada and Mexico, Chile was informed that it would have to wait until after the conclusion of the NAFTA negotiations to discuss a Free Trade Agreement with the US. A further attempt to include Chile in 1994 also failed.¹³⁴ The non-inclusion of Chile as a member of North America Free Trade Agreement (NAFTA) during the 1994 Miami Summit emboldened its move to opt for bilateral trade agreements with various trade partners carrying with it an agenda for inclusion of labour standards in trade agreements. Chile entered into various trade agreements with Canada, Argentina, Brazil, Peru, Ecuador, Mexico, US and European Union among others.¹³⁵

Whether as a migrant receiving or sending State, Chile has endeavoured to initiate and develop a trade policy that not only focuses on traditional aspects of trade liberalization and market access, but traverses various and broad aspects of international integration. They encompass adoption of standards and norms not only in trade of goods and services but also health and security standards, trade restrictions, government procurement, foreign investment and capital flows, business services and visits, financial services, intellectual property rights, labour market

¹³³ Silke Staab & Kristen Hill Maher, "The Dual Discourse About Peruvian Domestic Workers in Santiago De Chile: Class, Race, and a Nationalist Project" <<[http://web4.uwindsor.ca/units/socialjustice/main.nsf/982f0e5f06b5c9a285256d6e006cff78/a9fee0f9ae7e1026852573d40063d1e5/\\$FILE/peruvians%20in%20chile.pdf](http://web4.uwindsor.ca/units/socialjustice/main.nsf/982f0e5f06b5c9a285256d6e006cff78/a9fee0f9ae7e1026852573d40063d1e5/$FILE/peruvians%20in%20chile.pdf)> accessed 26 October 2015

¹³⁴ Kevin M. Jordan, "Intellectual Property under NAFTA: Is Chile upto the challenge?" 2 *Tulsa J. Comp & Int'l L.* 367 (1994) Pg. 367

¹³⁵ *Ibid*

regulation, environment protection and conflict resolution.¹³⁶ The incorporation of these broad effects in their bilateral trade agreements has led to tremendous growth in trade with simultaneous positive welfare effects.

The best practices would be limited to significant bilateral agreements that have so far been signed by Chile successfully incorporating the labour standards. The select agreements to which best practices and standards would be drawn include:

- (a) Canada-Chile Agreement on labour co-operation;
- (b) Free trade agreement US-Chile;
- (c) Chile-Peru Memorandum of Understanding on labour and migration cooperation

4.2.1 Canada-Chile Agreement on Labour co-operation (CCALC)

After Brazil, Chile is the second most popular destination in South America for Canadian exporters. Canada exported 1,759 products to Chile in 2011 up from 848 in 1996. Similarly, the number of products Canada imported from Chile tripled from 454 in 1996 to 1,210 products in 2011.¹³⁷

As regards Chilean migrant population in Canada, the movement of Chileans to Canada began in 1970s. Canada shifted its policy towards Chileans in 1973 when a program '1973-Operation-Chile' was launched with granted Chileans the right to emigrate to Canada under relaxed criteria.

¹³⁶Central bank of Chile Working Paper No. 264, "Chile's Free Trade Agreements: How Big is the Deal?" www.bcentral.cl/estudios/documentos-trabajo/pdf/dtbc264.pdf Accessed 26th October 2015

¹³⁷ Foreign Affairs and International Trade Canada, "The Economic Impact of The Canada-Chile Free Trade Agreement" < http://www.international.gc.ca/economist-economiste/assets/pdfs/research/canada_chile-canada_chili-eng.pdf>

The 1981 Canadian Census reported that there were about 15,330 Chileans in Canada.¹³⁸ A census conducted in 2006 indicated that a total of 26,505 Chileans were living and working in Canada. The 2016 Census report has not yet been released.¹³⁹

CCALC was the first labour agreement concluded by Chile within the context of trade agreements. The agreement was concluded on February 6, 1997 alongside the Canada-Chile Free Trade Agreement and both of these agreements came into operation on July 5, 1997.¹⁴⁰ It was concluded by the parties and embedded in a text that was separate from but related to the Free Trade Agreement. The preamble to the agreement states the desire of the parties to create new employment opportunities and improve working conditions and living standards within their territories. State parties also undertake to protect, enhance and enforce basic workers' rights.

Article 1 of the agreement provides seven key objectives of CCALC. These include improving working conditions and living standards in each party's territory; promote labour principles as set out in the agreement; encourage publication and exchange of information to enhance mutual beneficial understanding of the laws and institutions governing labour in each party's territory; pursue cooperative labour-related activities on the basis of mutual benefit; foster transparency with, and effective enforcement of each party of its labour law among others. Article 2 thereof provides for general commitment by parties to ensure that its labour laws and regulations provide for high labour standards.¹⁴¹

¹³⁸ Wei Wei Da, "Chileans in Canada: Contexts of Departures and Arrival"
<<http://www.yorku.ca/cohesion/LARG/PDF/Chile-WWD-2002.pdf>> accessed 4 October 2016

¹³⁹ <<http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo24a-eng.htm>> accessed 4 October 2016

¹⁴⁰ <http://www.labour.gc.ca/eng/rerelations/international/agreements/lca_chile.shtml> accessed 4 October 2016

¹⁴¹ See the full text of the agreement at
<http://www.labour.gc.ca/eng/rerelations/international/agreements/lca_chile.shtml>

The agreement provides for a work plan for co-operation between the two States.¹⁴² It requires that members exchange information and knowledge and provides for extensive co-operation in labour matters with the respective ministries in charge of labour and trade. This could be done through conferences, seminars, workshops, research, production of comparable data, exchange of experience and information in the field of labour relations, employment standards, health and safety at work, work training and social security.¹⁴³ The work plans developed with the framework of the agreement have been successive and have achieved tremendous improvement in labour standards in respective states. The agreement has narrowed down on the co-operative features without relying on sanctions.

Through the agreement, intensive dialogue between the two States have been encouraged by exchange of information between and amongst governments, businesses and trade unions. The information exchanged includes working relations, labour standards, health, safety and all other related matters. This concept of exchange information while seeking various points of convergence between States regarding the subject of discussions, has led to growth and confidence leading to strong institutional links.¹⁴⁴ Within the context of this agreement, a number of workshops and conferences have been held, on information sharing and research into the implementation of labour standards. For example, a three-year review of the agreement

¹⁴² Article 8

¹⁴³ Article 11

¹⁴⁴ ILO, "Labour Provisions in trade arrangements: current trends and perspectives" <https://www.researchgate.net/publication/263734653_Labour_provisions_in_trade_arrangements_current_trends_and_perspectives> accessed 5 June 2016

conducted in 2002 proposed, among other things, to render the activities more practical and to link them more strongly with the ILO.¹⁴⁵

Parties have made a commitment at Annex 1 of the agreement to respect the labour laws of partner state under the principle of sovereignty. The principal dispute resolution mechanisms adopted by the CCALC is consultations. Article 25 provides that either party may request in writing regarding whether there has been a persistent pattern of failure of the other party to effectively to enforce such standards. In such consultations, parties are required to make every effort to arrive at a mutually satisfactory resolution of the matter.

The best practice adopted has clearly shown that investments by States on dialogue mechanisms through a defined institutional and legal framework, is an important avenue to achieve convergence on the issues revolving around migrant labour rights. Even though the agreement provides for a complaint and conflict resolution procedures, no formal complaint has so far been received in relation violation of labour rights of migrants. This is because the informal contacts between the structures created pursuant to the agreement has facilitated the resolution of such disputes¹⁴⁶

4.2.2 Free Trade Agreement US-Chile

The relations between US and Chile improved in the late 1980s at a time when Chile began adopting democratic practices with the election of Patricio Aylwin as President to replace Mr.

¹⁴⁵Ibid

¹⁴⁶Ibid

Augusto Pinochet. The US applauded the rebirth despite the fact it practically aided subsequent military regimes in Chile from 1973.¹⁴⁷

Chile adopted a trade openness policy and has so far achieved greater economic growth and integration. The US-Chile Free Trade Agreements is a perfect case study of how labour standards provisions can be included within the text of the trade agreements. The FTA was concluded on 6th June 2003 and came into effect on 1st January 2004. It contains extensive provisions to safeguard labour rights without impeding trade.¹⁴⁸ The agreement is worded precisely and addresses key contentious issues or concerns that normally attends to incorporation of labour standards within the framework of trade agreements.

Chapter 18 of the FTA on labour issues is very extensive in scope and deals with varied aspects including establishment of arbitration panel; incorporation of ILO standards without compromising trade; consultations and avoidance of disputes; participation of civil societies in the implementation process and other related aspects. The shared commitment of the parties that remains the thread and core of the thesis herein is expressed at Article 18.2 (2) as follows:

'The parties recognize that it is inappropriate to encourage trade and investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each party shall strive to ensure it does not waive or otherwise derogate from, or offer to waive or derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights referred to in Article 18.8..'

¹⁴⁷ Country Studies, "Chile-Relations with United States" < <http://countrystudies.us/chile/111.htm> > accessed 5 October 2016

¹⁴⁸See the full text at www.ustr.gov

Parties hence encourage observance of the labor rights in their respective territories without materially affecting trade between the parties.¹⁴⁹ The agreement further provides for procedural guarantees of access to justice wherein proceedings for enforcement are fair equitable and transparent.¹⁵⁰

The key enforcement mechanisms encouraged the agreement is through co-operative consultations between the parties. It provides that a party may request consultations with the other party regarding any matter arising by delivering a written request to the point of contact of the other party as provided for in the agreement. Parties are required to make every attempt to arrive at a mutually satisfactory resolution of the matter and in the process, are encouraged to seek advice or assistance from any other person or body they deem appropriate to resolve the issue.¹⁵¹

The agreement also provides for a Labour Affairs Council comprising cabinet-level or equivalent representative of the parties.¹⁵² If a dispute is not resolved through consultations, either party may request the Council to convene and consider the matter. Upon receipt of the request, the Council shall promptly convene and shall endeavour to resolve the matter, including, where appropriate, by consulting outside experts, good offices, conciliation or mediation.

4.2.3 Chile-Peru Memorandum of Understanding on labour and migration cooperation

The vast majority of immigrants in Chile are from the neighbouring States with Peruvian migrants accounting for 37% of the migrant population. According to national estimates, about

¹⁴⁹ Article 18.2

¹⁵⁰ Article 18.3

¹⁵¹ Article 18.6

¹⁵² Article 18.4

18,000 immigrants are in an irregular situation with a vast majority from Peru(72%)¹⁵³ Many of the migrants from Peru to Chile come from informal settlements in urban settings with feminization of migration being a unique characteristic to this flow. It is estimated that young women of working age constitutes 60 per cent of the Peruvian immigrants with 70 per cent of those concentrated mainly in domestic service sectors.¹⁵⁴ Poor economic conditions in Peru is a key push factor influencing migration outflow from Peru.¹⁵⁵

The Free Trade Agreement (FTA) between Chile and Peru entered into force in 2009. It replaced the text, annexes and protocols of Economic Complementation Agreement which entered into force on 1st July 1998. Alongside the FTA, parties also signed a memorandum of understanding on labour and migratory co-operation¹⁵⁶ The Peruvian government has signed a similar labour co-operation agreements with Mexico and Ecuador with the aim to promote exchange of information and protection of the rights of migrant workers. Migrants of Peruvian origin face various forms of discrimination as they attempt to access the labour market of Chile among other labour rights violations.¹⁵⁷

The Memorandum covers not just labour matters but also extends to the specific rights of migrant workers who are Peruvian origin residing and working for gain in Chile. The substantive issues affecting the migrant workers subject of co-operation between the parties includes decent

¹⁵³ OECD, "Recent changes in Migration Movements and Policies,"
<<https://www.oecd.org/migration/48343565.pdf>> Accessed 3 October 2016

¹⁵⁴ Lindsay Adams, "Peruvian Migration to Chile: Cultural crossroads and social incorporation in the Andes,"
<lanic.utexas.edu/project/etext/llilas/ilassa/.../adams.pdf> accessed 3 October 2016

¹⁵⁵ Ibid

¹⁵⁶ <<http://en.reingex.com/Chile-Peru-FTA.shtml>> accessed 3 October 2016

¹⁵⁷ Claudia Mora, "Radicalization of Immigrants at Work: Labour Mobility and Segmentation of Peruvian Migrants in Chile" 3 SLAS, Vol.32 Pg. 294

work, rights of migrant workers and programmes for retraining workers. The other key aspects addressed by the Memorandum include regularization of the status of migrant workers and establishment of minimum standards of rights for migrant workers.

The agreement provides for the establishment of a Joint Committee on Labour and Migratory Co-operation tasked with setting up co-operation programmes on issues affecting migrant workers. In addition, it represents a channel of dialogue and making proposals to the relevant authorities. The committee comprises representatives of the Ministries of Foreign Affairs, Interior and Labour of the respective States who meet annually to set up a co-operation programme.¹⁵⁸

4.2.4 Lessons from Chile experience with trade agreements and labour standards

Unlike US, Chile does not have a long history as regards the move towards incorporation of labour standards in trade agreements. However, it has taken a deliberate stride in its application of various models of incorporation that has conveniently linked trade to the issues of migrant labour rights protection while avoiding the likely pitfalls. Chile has managed to sign bilateral agreements with both developing and developed countries and has not wavered in its desire to incorporate the issue in their trade relationships.

Chile's approach on the issue is a good example of how a developing country can easily balance trade liberalization whether bilateral or multilateral with a concern for the migrant or citizen rights without hampering or substantially affecting the other. In majority of bilateral trade agreements entered into by Chile, the same has been accompanied by a labour co-operation agreement either within the text of the agreement or a separate but related document.

¹⁵⁸Ibid

It can also be observed that Chile navigates towards establishment of strong legal institutions within the agreements charged with advancing the socio-economic goals of the parties. Specific tasks include promotion of consultations, exchange of information and knowledge and other co-operative practices. The emphasis on co-operation and consultation has rendered dispute resolution mechanisms embedded in those agreements redundant. Therein lies an element of good practice. States can easily avoid invocation of dispute resolution mechanisms by heavy investments in the legal institutions created within the labour cooperation agreements geared towards consultations and exchange of information. This would encourage informal resolution of disputes without necessarily resorting to formal dispute resolution mechanisms. Even though Chile has negotiated a host of bilateral trade agreements with countries of different or diverse socio-economic structure, there has been no need for the partner States to invoke the formal dispute resolution mechanisms to resolve disputes between the parties.

Secondly, it will be easily noted that in all bilateral trade agreements with social agreements embedded, Chile has effectively sought to balance the need for respect of sovereignty rights and space with the protection of the rights of the migrants within the respective States. The text of the Free Trade Agreement between US and Chile contains a provision requiring the State Parties to reaffirm their commitments to ILO and confirm their undertakings to ensure that they are recognized and protected by the national legislations. It further provides that these standards are still subject to consultations without prejudice to the application of ILO standards.

While there exist labour laws within UAE that offends the ILO provisions, Kenya can easily navigate the sovereignty issues by having the UAE make commitments to minimum ILO standards while still subjecting specific offensive labour laws or practices to consultations between the parties. This is a better way to balance the thorny issue of sovereignty with respect

for labour and migrant rights. The Chilean experience represents a process wherein confidence and strengthening of institutions created within the trade agreements for co-operation and consultations can easily protect the rights of migrant workers.

Similarly, under Article 43 of the Chile-European Union agreement, parties have resolved to avoid discrimination in treatment of citizens of one country legally resident in the territory of the other party. Article 44 on the other hand provides that parties have opted to give priority to the respect of fundamental social rights. These provisions represent a direct resolve aimed at prioritizing the rights and interests of migrant workers in the mutual States.

The various enforcement mechanisms proposed within the text and which has been employed by Chile appears subtle but very effective. Parties have resolved to form a Joint Consultative Committee and further hold periodic meetings of representatives of the civil society from either sides. The aim of the meeting is to enable the civil society to be informed and grants them the opportunity to make suggestions concerning improvement and application of the agreement. The gist of the agreement which serves as a best practice is to prioritize the labour rights and enhance mechanisms of enforcement through consultations and co-operation without necessarily a resort to sanction measures or any other measures that may hamper trade and good diplomatic relationship between the parties.

Thirdly, the US-Chile agreement shows how labour standards clauses can be incorporated within the text of the bilateral trade agreement complete with all the commitments, institutions and enforcement mechanisms. Kenya can easily draw lessons from this move in their bilateral trade negotiations with UAE.

The clauses should be carefully worded to incorporate the specific labour rights due regard being to the identified legal weaknesses in the practice of enforcement of labour laws in UAE that directly affects Kenyan migrant workers. Shared commitments can be weaved into the text off the bilateral trade agreement complete with the enforcement mechanisms that puts strong emphasis on alternative dispute resolution mechanisms.

4.3 Philippines Experience with Trade Agreements and Labour Standards

By the year 2009, Japan was Philippines' second largest trading partner, next to United States with a total trade amounting to \$15.28 billion. Previously in 2005, exports were valued at \$ 7.21 billion while payment for imports was valued at \$8.07 billion, or a \$865.01 deficit.¹⁵⁹ Fast forward to the year 2014, Japan became the country's top trading partner with a total trade worth \$ 19.154 billion or 15.0 per cent of the country's total trade. Exports to Japan totalled \$13.901 billion while imports were valued at \$5.252, posting a trade surplus of \$ 8.649 billion.¹⁶⁰

The labour market of Philippines on the other is also characterized by a fast growing labour force. The labour force totalled 41 million in 2013, a sizeable increase of 4.2 million since 2008. The pressure on the economy to create jobs is enormous and reflected by a sizeable number of Filipinos leaving for work abroad. It is estimated that 1.8 million people left the country to work abroad.¹⁶¹ The unemployment challenge is primarily a youth phenomenon as 1.4 million young people account for almost one half of the total unemployed with vulnerable employment rate of

¹⁵⁹Maragtas S.V. Amante, Labor Dimension of the Philippine Economic Partnership Agreement (JPEPA), No. 429 Sep 2007

¹⁶⁰Philippines Statistics Authority: Foreign Trade Statistics of the Philippines 2014 <<https://psa.gov.ph/content/foreign-trade-statistics-philippines-2014>> accessed 26th October 2015

¹⁶¹ILO, "Philippine: Employment Trends 2015-Accelerating inclusive growth through decent jobs" <www.ilo.org> accessed 26 October 2015

29.7 per cent in 2013.¹⁶² Japan is one of the leading destinations for overseas Filipinos with an estimate of 350,957 migrants by 2014 up from 195,113 in 2006.¹⁶³

4.3.1 Japan-Philippines Economic Partnership Agreement (JPEPA)

JPEPA is a comprehensive bilateral trade agreement entered into between Japan and Philippines principally to increase trade and investment opportunities between the two states. The formal negotiations commenced in February 2006 with the agreement being signed on 9th September 2006 and formally entered into force on 11th December 2008.

JPEPA agreement contains extensive provisions addressing various issue *inter-alia* trade in goods, rules of origin, customs procedures, paperless trading, trade in services, investment, intellectual property and movement of natural person. The agreement is hence not limited to removal of tariff and no-tariff barriers but includes provisions covering a wide range of economic benefits and incorporates social aspects of trade.

Chapter 9 of the agreement incorporates extensive provisions relating to movement of natural persons. According to Article 110 of the agreement, member States have made specific commitments relating to the movement of the following persons:

- (a) Short term business visitors;
- (b) Intra-corporate transferees;
- (c) Natural persons who engage in professional services;
- (d) Natural persons who engage in supplying services, which require technology or knowledge at an advanced level or which require specialized skills belonging to

¹⁶²Ibid

¹⁶³ Philippine Statistics Authority '2014 Survey on Overseas Filipinos' <www.psa.gov.ph> accessed 26 October 2015

particular fields of industry, on the basis of a contract with public or private organizations;

- (e) Natural persons who engage in supplying services as nurses or certified care workers or related activities, on the basis of a contract with public or private organizations or on the basis of admission to a public or private training facilities.

The agreement provides that these persons shall be granted entry and temporary stay and neither party shall impose or maintain any quantitative restrictions on the number of natural persons to be granted entry and temporary stay. This is without prejudice to any right of either party to regulate the entry and temporary stay of the persons specified.

Article 111 on the other hand obligates all parties to establish and make publicly available requirements and procedures for renewal of the period of temporary stay, change of status or the issuance of work permits. Further, parties undertake to simplify the requirements and facilitate the procedures relating to movement of the labour migrants.

Article 112 provides that in order to facilitate smooth movement of these persons, parties may recognize the education or experience obtained, requirements met, licenses or certifications granted in the other party for the purposes of fulfilment of the standards or requirements of the other party for authorization, licensing or certification of the labour migrants.

Lastly, Article 114 provides that no measures should be applied in a manner which would constitute arbitrary or unjustifiable discrimination against migrant workers of the other party, or a disguised restriction of movement of migrant workers between the parties.

As regards institutional framework aspects, JPEPA stipulates the creation of a Joint Committee composed of representatives of Japan and the Philippines. The principal function is to review the

implementation and operation of JPEPA. To support the work of the Joint Committee, the agreement provides for creation of sub-committees composed of representatives of governments of both parties to cover all aspects or themes of the agreement. To this end, Article 113 creates a sub-committee on the movement of natural persons. The function of the sub-committee inter-alia include:

- (a) Reviewing the scope of commitments including examining the possibilities of making other commitments on supplying service not included in the agreement;
- (b) Discussing any issue relating to the implementation of the provisions relating to the movement of natural persons; and
- (c) Reporting the findings of sub-committee to the Joint Committee.

Article 116 provides for a review of the implementation and operation of, scope of commitments under, any issues related to movement of natural persons, taking into account reports if the sub-committee. Such a review shall be undertaken every five years from the date of entry of the agreement.

4.3.2 Lessons from Philippine's experience with trade agreements and labour standards

The incorporation and implementation of the labour provisions provides a classic example of how trade agreements may 'soften' unfavourable immigration laws and policies in favour of a party. A case in point is the restrictions that accompanies qualifications for various professions in Japan. It's immigration policy provides strict regulations regulating admission as a nurse in the country. Immigration Control and Refugee Recognition Act provides that a foreigner must be qualified by passing a Japanese National exam and can only work up to 7 years. However, under

JPEPA, qualified nurses and caregivers from Philippines are treated differently from other foreign nurses by being granted residence status which can be renewed without limitations.¹⁶⁴

The preference created by a bilateral agreement can go an extra mile in enhancing the status, rights and conditions of migrant workers. This justifies the call for Kenya to negotiate an appropriate bilateral trade agreement tailored to specifically addressing the actual plight of Kenyan migrant workers in UAE. The restrictive laws and regulations earlier highlighted can be further negotiated and have them applied in a favourable manner when it comes to Kenyan migrant worker.

Secondly, the Philippine labour situation mirrors Kenya in many respects. Both labour markets are characterized by a fast growing labour force riddled with youth unemployment. As earlier stated, youth unemployment in Philippines account for almost half of unemployed persons. As at 2013, World Bank estimated that Kenyan youths aged 15-24 years accounted for 17.1% to the share of the labour force.¹⁶⁵ The study has also highlighted the various trade opportunities existing between Kenya/UAE and Japan/Philippines. The execution of JPEPA was hence a timely decision for the Philippines in an attempt to bridge the gap between trade gains and overall human development while managing unemployment.

Thirdly, the highlighted increase of trade volumes and the ability of Philippines economy to clear its trade deficit within the period of operationalization of the JPEPA agreement is relevant. It

¹⁶⁴ Yoshiko Naiki, "Migration of Health Workers under the Japan-Philippines and Japan-Indonesia Economic Partnership Agreements: Challenges and Implications of the Japanese Training Framework" <<https://www.gfmd.org/migration-health-workers-under-japan-philippines-and-japan-indonesia-economic-partnership-agreements>> accessed 26 June 2016

¹⁶⁵ <http://data.worldbank.org/indicator/SL.UEM.1524.ZS> accessed 26 October 2015

partly demonstrates the fact that trade and labour migration management can co-exist in one instrument without negatively affecting each other.

Fourthly, the structures for implementing the agreement or resolving any dispute between the parties appear flexible and pragmatic. As earlier stated, a Joint Committee has an overarching role to review the implementation and operation of JPEPA. To support this work, sub-committees are formed to keenly monitor actions and issues relating to various commitments on migrant workers within the borders of the parties' nations. As of 2009, 5 of the 12 sub-committees had been convened and 9 working groups under JPEPA's Chapter on Co-operation were submitted for consideration including on Movement of Natural persons.¹⁶⁶

4.4 Conclusions

The Chile and Philippine's experiences have clearly shown that it is possible to exploit the opportunities created by trade relations to create viable structures to manage labour migration between States. Incorporating tailor made labour provisions within or alongside bilateral trade agreements has the effect of mitigating the rigid national labour and immigration regulations that negatively affect migrant workers in destination States. Such incorporation is premised on the theory of distributive justice that provides that the benefits of trade and economic relations ought to be widely enjoyed by all persons across borders.

The structures created within the bilateral trade agreements for migrant labour management are majorly solution based as opposed to being sanction oriented. In case of disputes, the concerned States bind themselves to pursue alternative dispute settlement procedures whose aim is to settle

¹⁶⁶ Erlinda M. Medalla, "Japan-Philippines Economic Partnership Agreement: Towards a Framework for Regional Integration", Phillipines Institute for Development Studies, Discussion Paper Series No. 2010-19 <www.dirp4.pids.gov.ph> accessed on 26th October 2015

emerging disputes in labour management side without materially affecting trade relations upon which the labour provisions are principally based.

CHAPTER FIVE

5.0 CONCLUSIONS AND RECCOMENDATIONS

5.1 Conclusions

This research paper set out to examine the efficacy of the existing national and bilateral mechanisms between Kenya and UAE in protecting the interests and rights of Kenyan labour migrants in UAE. Related to the study was the question of protection of the rights and interests of migrant workers within the framework of trade. It also set out to investigate the practice adopted by other States in terms of inclusion of such labour standards in their bilateral/free trade agreements for the protection of migrant workers' rights. Finally, the study was to identify and recommend measures that can be adopted so as to safeguard the Kenyan migrant worker in the UAE and to improve the trade relations between Kenya and the UAE.

There were questions that this research paper sought to find answers to. These include: First, what is the adequacy of the existing national and bilateral mechanisms between Kenya and UAE in promoting the interests of the migrant workers? Secondly, what is the efficacy of inclusion of migrant worker's rights in bilateral trade agreements? Finally, what are some of the State practices in terms of inclusion of such labour standards in their bilateral/free trade agreements for the protection of migrant workers' rights and the effect therein?

The study also set the hypothesis that was to be tested using the methodology set out in Chapter One of the study. The hypothesis set out was that the existing national laws and measures addressing Kenyan migrants moving to the UAE are inadequate and do not fully address the key concerns of the migrant workers. However, the practice of including minimum labour standards in bilateral trade agreements for the protection of the rights of migrant workers has been adopted

by various States and this has had the effect of protecting migrant workers, promoting trade and improving relations among States that have entered such agreements.

In addressing these questions, Chapter two set out to contextualize the study. It set out to define the concepts of study and gives a historical background to migrant workers in UAE. It would be apparent that various pull factors influenced the proliferation of migrant workers in UAE with the oil and construction boom being the key factors. Since the economy of UAE heavily relies on oil exports, it would still depend on migrant workers into the foreseeable future. The study also examined various factors that would lead to constant demand for migrant workers in UAE. The 2030 roadmap for the Emirate of Abu Dhabi announced in April 2009 demonstrates the fact that UAE would still need migrants as part and parcel of their existence and to ensure the economy is sustained. The constant nature of the pull factors in the UAE gives the impetus for Kenya and UAE to adopt sustainable and effective measures aimed at protecting the rights and interests of Kenyan migrants in UAE.

The status of migrants in UAE was examined. This was important in effectively answering the question on the efficacy of the unilateral and existing bilateral measures aimed at safeguarding the rights of Kenyan migrants in UAE. In conclusion, it is clear that there exists various practices and laws that violates migrant workers' labour rights. Kenyans are directly affected by these unfavourable laws and policies. The study has demonstrated that indeed UAE has been a favourite destination for Kenyans seeking work. There exists approximately 40,000 Kenyan migrant workers in UAE majorly recruited as domestic workers, construction labourers, cleaners, hospitality servers, security officers, and taxi drivers. However, there are no comprehensive data on the actual number of Kenyan working in UAE. The study has proceeded and documented various instances of violations of the labour rights of Kenya migrant workers in UAE and with

the huge number of workers, there ought to be specific and deliberate steps taken by the mutual States to ensure that Kenyan migrant workers are specifically protected.

The legislative and policy framework examined in the Chapter demonstrates that the laws are principally fashioned to protect the labour rights of nationals as opposed to the migrant workers within UAE, Kenyan nationals included. The enforcement of these laws have been demonstrated to be sporadic and discriminatory. In conclusion, the relevant laws, policies and practices existing in UAE are not adequate to protect the rights and interests of Kenyan migrant workers and Kenya needs to exploit other relevant mutual intervention mechanisms to ensure effective protection of the rights and interests of its migrants in UAE.

The study shifted to examination of legislative, policy and institutional frameworks governing pre-departure of Kenyan migrant workers to UAE. On the legislative front, the study examined the provisions of Employment Act which regulates foreign contracts of service. Even though it contains noble provisions aimed at regulating the flow of migrants to UAE, the study has identified three key weaknesses that makes it ineffective in effective governance of pre-departure process.

As regards policies and institutional frameworks, the study has proceeded to examine the recently enacted Kenya Foreign Diaspora Policy. One of the key objectives of the policy relevant to the study is the desire to develop measures to enhance protection of Kenyans abroad. However, the issue of enhancing protection of migrants through bilateral trade context is not amongst the mechanisms proposed under the policy. The recent move by the government to regulate recruitment agencies in Kenya is welcome. However, as the study has indicated, it is more likely to address the pre-departure issues but not aimed at mechanisms to improve the

situation of Kenyan migrant workers while in the UAE. In conclusion, the policy and legislative mechanisms established in Kenya, while noble, is not sufficient or effective to fully address the plight of Kenyan migrant workers in the UAE.

At the outset, Chapter three sets out to establish a link between migration and trade. The link is important in advancing the distributive justice theory advanced in the study. It seeks to establish what framework is ideal to harness trade between Kenya and UAE in order to achieve a more preferable system that protects and promotes the rights and interests of migrant workers who are direct products of migration. The mechanisms created through trade ought to be harnessed and designed to maximize the welfare of the migrant workers. It is the conclusion of the study that indeed trade provides an efficient fulcrum for maximizing the mutual economic benefits of migration while addressing its burdens. The study has proceeded to examine how Kenya benefits from remittances of migrant workers with the aim of establishing that the issue of migrants cannot be solely confined to political and social spheres, but is an economic issue or burden as well.

Having established the link, the study proceeded to examine the role of WTO and ILO, being the supra-national institutions which ought to embrace and advance the principle of distributive justice as far as trade and protection of the rights of migrant workers is concerned. As regards WTO, the study has concluded that member States have constantly opposed any attempts at substantive incorporation of social clauses in trade principally aimed at protecting the rights of migrant workers within the context of trade. The study believes that the situation is a worrying trend since WTO remains to be the only supra-national institutions guided by the rules based system and effective dispute resolution system and having majority of States as members.

However, the study concludes that despite the WTO and ILO limitations, there exists wider consensus that advocates for the inclusion of social clauses in bilateral trade and free trade agreements. The study notes that deeper commitments can be achieved through bilateralism and agreements reached faster without prejudice to the respective multilateral commitments and sovereignty of the States concerned. Further, the principle of distributive justice can be easily applied to specific and unique issues affecting the relevant States. The result would be a more comprehensive social clause within the context of trade with commitments that go beyond the multilateral commitments to include issues that have not yet been addressed by the WTO.

The study advanced the inclusion of social clauses specifically in trade and investment agreement between Kenya and UAE. Trade between Kenya and UAE was analyzed and the existing bilateral agreements examined. The study concluded that the existing bilateral agreements between Kenya and UAE do not have any social clause aimed at the protection of the rights and interests of Kenyan migrant workers in UAE.

Chapter Four explores the best practices of incorporation of labour provisions in trade agreements. Chile and Philippines were selected owing to their success in the incorporation of labour standards in bilateral trade with other States. In conclusion, Chile's approach on the issue is a good example of how a developing country can easily balance trade liberalization whether bilateral or multilateral with a concern for the migrant or citizen rights without hampering or substantially affecting the other.

Philippines was selected as a case study since its labour market is characterized by a fast growing labour force and hence pressure to create more jobs for its citizens. The study has focused on JPEPA as it provides a convenient model of how a labour surplus nation can negotiate a trade

agreement that contains provisions aimed at protection of the rights of its migrant populations in the recipient States. In conclusion, the experience of Philippines has demonstrated how a social clause in a bilateral agreement can create preferential treatment of migrant workers from a partner State.

5.2 Recommendations

5.2.1 Census and Mapping of Kenyan Migrant Workers in UAE

The actual or precise number of Kenyan migrants working in UAE is currently unknown in the official circles. Scattered reports as utilized in this study gives an approximate number of 40,000 migrant workers. Large gap of knowledge on actual status of migrants is due to lack of basic and reliable data on the actual number of Kenyan migrants in UAE and their actual place of residence within UAE. It is important to accurately map Kenyan migrant population and explore settlement patterns and concentration of Kenyan migrant population in UAE whether regular or irregular. Relevant data tools can be used to comprehensively map their actual status and the level of intervention, either immediate or long term required. The data will inform the understanding of both Kenya and UAE on the flow of Kenyan migrant workers in UAE and appropriate social clause model necessary to address their actual situations. Kenya can collaborate with IOM with the aim of commissioning mapping surveys and analysis of the survey results.

5.2.2 Review of Kenyan Diaspora Policy

Clause 2.4.5 of the policy addresses the measures the government of Kenya intends to undertake to enhance mechanisms for protection of Kenyans abroad. The policy has majorly concentrated on mechanisms that revolves around pre-departure protection which is principally unilateral in nature. While the policy recognize the need for signing bilateral agreements with host countries,

there ought to be amended by adding the words or mechanism of 'negotiation for inclusion of relevant social clauses in bilateral trade agreements.'

5.2.3 Review or amendment of existing bilateral agreements between Kenya and UAE

At the conclusion to this study, it was evident that Kenya has not incorporated any social clause in the bilateral agreements it has with UAE. Several or varied mechanisms have been proposed using the experience of Chile and Philippines which can be applied to design a social clause relevant to the Kenyan and UAE situations. Upon negotiation of the clause with UAE, parties should proceed and amend by either including the clause in the text of the agreements or by a separate agreement but annexed to the agreement. Indeed, Article 39 of the Vienna Convention on the Law of Treaties provide that a treaty may be amended by an agreement of the parties. The social clause agreed upon may also act as a template for any other future bilateral trade agreement between Kenya and UAE.

5.2.4 Capacity Building

The experience of Chile and Philippines on social clauses demonstrates that it requires high level of human resources at all stages of the agreement key being monitoring, implementation and conflict resolution. For example; with regards to JPEPA, a Joint Committee is with an overarching role to review the implementation and operation of the agreement is required. To support this work, sub-committees are formed to keenly monitor actions and issues relating to various commitments on migrant workers within the borders of the party nations. The key reason for success of social clauses in majority of the bilateral trade agreements revolves around settlement of any issue between the parties through dialogue, exchange of information, co-operative consultations and negotiations. Kenya needs to develop capacity to be able to ensure

full co-operation with UAE on any matter touching on the migrant workers within UAE while at the same time achieving high volumes of trade between and amongst themselves.

5.2.5 Amendment of Employment Act

This study has examined the provisions of Employment Act on the issue of Foreign Contracts of Service and found that the Part is deficient to fully protect migrants enroute to UAE and other destinations. Its supervisory mechanisms on recruitment of migrant workers and penalties for violation of the prescribed procedures are relatively weak and requires legal reform.

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