

**TRADE TECHNOLOGY & THE LAW: INVESTIGATION OF THE LEGAL  
CHALLENGES OBSTACLES AND OPPORTUNITIES IN IMPLEMENTING THE  
INFORMATION TECHNOLOGY AGREEMENT IN KENYA**

**ISHMAEL NYARIBO**

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**SUPERVISOR: DR. PETER GITAHU MUNYI**

*A research project paper submitted in partial fulfilment of the requirements for the award of  
the degree of Master of Laws in International Trade Law of the University of Nairobi*

## **DECLARATION**

I Nyaribo Ishmael Nyang'ara, the undersigned hereby declare that this is my original work and that it has not been presented in any other university or institution. Where other works have been used, references have been provided accordingly. In this regard it is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in International Trade Law of the University of Nairobi.

Signature: .....

Date: .....

Nyaribo Ishmael Nyang'ara

This thesis has been submitted with my approval as the University of Nairobi supervisor.

Signature: .....

Date: .....

Dr. Peter Gitahi Munyi,

Lecturer,

University of Nairobi, School of Law,

Nairobi

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## LIST OF ABBREVIATIONS

ACP	African Caribbean and Pacific
AGOA	African Growth Opportunity Act
AU	African Union
BRIC	The countries of Brazil, Russia, India and China
CAK	Communication Authority of Kenya (Defunct)
CBD	Convention on biological diversity
CDCE	Convention on the Protection and Promotion of the Diversity of Cultural Expressions
CET	Common external tariff
CIF	Cost insured freight
COMESA	Common Market for Eastern and Southern Africa
CUP	Customs unions protocol
DSB	Dispute settlement body
DSB	Dispute Settlement Body
DSL	Digital subscriber line
EAC	East African Community
EACC	Ethics and anti-corruption commission
EPAs	Economic partnership agreements
ERS	Economic recovery strategy
EU	European Union
FAO	Food and agriculture organization
GATS	General agreement on trade in services
GATT	General Agreement on tariffs and trade
HS	Harmonised system
IAAS	Infrastructure as a service
ICT	Information communication technology
IDF	Import declaration fee
IT	Information technology
ITA	Information Technology Agreement
ITPGRFA	International treaty on plant genetic resources for food and agriculture
KRA	Kenya Revenue Authority

LAPSSET	Lamu Port & Lamu - Southern Sudan - Ethiopia Transport
MDG	Millennium development goals
MFN	Most favoured nation
MTP	Medium term plan
NHIF	National hospital insurance fund
NSSF	National social security fund
PAAS	Platform as a service
PWD	Person with disability
SAAS	Software as a service
SDG	Sustainable development goals
TPP	Trans-Pacific Partnership
TRIMS	Trade related invested measures
TRIPS	Trade-related aspects of intellectual property rights
TTIP	Transatlantic Trade and Investment Partnership
UPOV	International union of protection of new plant varieties
US	United States of America
VAT	Value added tax
WTO	World trade organisation

## CHAPTER ONE

### LEGAL HISTORY AND BACKGROUND OF INFORMATION TECHNOLOGY AGREEMENT

#### 1.0 Introduction

Immediately after the formation of the World Trade Organisation in 1995, the ITA was the first agreement to be drafted and signed by the acceding WTO member states at that time.<sup>1</sup> In global trade, goods often cross borders many times before they reach the consumer market. The WTO plays a role in regulation of global trade, while the ITA regulates the trade in IT products globally under the WTO. The ITA aims at eliminating tariffs on a wide range of IT products and has become a landmark agreement because it has helped to support and enhance growth of trade in the IT sector in participating member states as will be extensively covered in this paper. All participants to the ITA progressively eliminated import duties on key goods for the IT sector. ITA therefore has been lauded as a model project of the WTO core mandate. It has been embraced by majority of WTO members who deal in its products. The study of the ITA in this chapter and indeed under this paper will be to study the origin, background and the legal basis of the ITA.

#### 1.1 Background of the study

International business standards continue to change and so does the law relating to information technology. The General Agreement on Trade and Tariffs (GATT) was promulgated in 1948 to help in making international trade become easier.<sup>2</sup> The function and purpose of the GATT

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<sup>1</sup> Tang, X. and Lascari, R. (n.d.). *20 Years of the Information Technology Agreement*.

<sup>2</sup> *General Agreement on Trade and Tariffs* (1947)



was to minimize barriers in international trade by creation of rules that eliminate and reduce quotas, tariffs and subsidies while preserving significant regulations in the member countries.

Later, UNCITRAL was formed by the general assembly of the United Nations to undertake regulation of the international trade.<sup>3</sup> In making the commission, the assembly noted that there were disparities in national laws governing international trade. The purpose of UNCITRAL was to pursue the progressive harmonization and modernization of the law of international trade. This was intended to be achieved by employing the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law. This was part of the legal framework of the UNCITRAL targeted at regulating international business.

All these steps were meant to free trade globally through internationally agreed set rules. In 1995, the WTO came into being. The WTO is an international organisation which promotes free trade.<sup>4</sup> It does this via three approaches. First, it establishes and maintains existing multilateral trade agreements. Each member of the WTO receives Most Favored Nation Trading Status. That means they receive lowered tariffs for specific exports covered by the WTO. Second, the WTO settles trade disputes. Trade disputes occur when one member breaches an agreement or treaty with regard to international trade between the members. The WTO settles the disputes through its established disputes resolution mechanism.<sup>5</sup> Third, the WTO since inception, manages research and negotiations for trade agreements.

Soon after inception, the WTO members agitated for the formation of the ITA to regulate trade in IT products.<sup>6</sup> It is the first international agreement to be drafted by the WTO, and signed by the accepting members states at the time. It aims at eliminating tariffs on a wide range of IT

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<sup>3</sup> United Nations, *United Nations Commission on International Trade Law*, (1966)

<sup>4</sup> The Marrakesh Agreement Establishing the World Trade Organisation (“WTO Agreement”) of 15 April 1994, 1867 UNTS 154, Preamble, para. 1 and 2.

<sup>5</sup> World Trade Organisation, ‘A handbook on the WTO Dispute Settlement System’ 2<sup>nd</sup> Ed. P. 13.

<sup>6</sup> *infra*

products ever since it entered into force in July 1997.<sup>7</sup> The agreement is plurilateral and meant to protect participants as well as create opportunities in trade amongst WTO members. The ITA was expanded later on in 2015 after negotiations between the WTO member states. An agreement was reached to expand the products covered by the ITA by eliminating tariffs on an additional list of 201 products.<sup>8</sup> In common WTO reference, the initial ITA refers to the ITA that was signed by the member states in 1996 which was replete with a product list of the covered IT products. The expansion list refers to the additional list that was agreed to by the member states and adopted in the Nairobi Ministerial Conference in 2015.

The ITA is an IT based multilateral agreement in that the tariff elimination affects the technological components and assembled products such as scanners, computers, software, semiconductors and semiconductor manufacturing equipment, scientific equipment, parts and accessories which it covers.<sup>9</sup> Under the ITA 1997 system the ITA covered products segmented into two lists, A and B, under the heading ‘Harmonized system’. List A serializes section 1 and 2 which deal with IT products, semi-conductor manufacturing and testing equipment.<sup>10</sup> List B lists specific products whenever they are to be classified under the heading HS.<sup>11</sup>

Two hundred and three products in all, have been listed and captured under the above segments of the ITA product list. It was anticipated by the WTO at the formation of the plurilateral ITA that the tariff in all the two hundred and three products, shall be zero rated as soon as is practicable by the signatories.<sup>12</sup> After the formation and ratification by the member states, the tariffs in the two hundred and three products were reduced to zero among the member states.

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<sup>7</sup> Information Technology Agreement 1997 WT/MIN (96)/16 at p.1

<sup>8</sup> WTO Committee (2015)” Committee of Participants on the expansion of Trade in information Technology products, Status of implementation (Note by the secretariat)” G/IT/1/REV.54 (5 October 2015)

<sup>9</sup> *Ibid* at p.3

<sup>10</sup> *Ibid* List A of the ITA product list.

<sup>11</sup> *Ibid* List B of the ITA product list.

<sup>12</sup> World Trade Organisation, ‘*An introduction to the Information Technology Agreement*’, Retrieved 4<sup>th</sup> August 2017.

In summary, ITA 1997 is a trade-based document dealing with WTO rules of cutting tariffs on specific IT listed items.

Whether this agreement has been adopted and implemented fairly among member states shall receive attention in this paper. Why this agreement has not been adopted in Kenya shall also receive the attention of the research building to the benefits that would accrue from its implantation.

The history of ITA in the WTO is traced back to the WTO Singapore Ministerial Conference in December 1996. The ITA was concluded by 29 participants though since then, the number of participants has grown to 82, representing about 97% of world trade in IT products.<sup>13</sup> The participants are committed to completely eliminating tariffs on IT products covered by the Agreement.<sup>14</sup> In December 2015 at the Nairobi Ministerial Conference, over 50 members concluded the expansion of the Agreement, which now covers an additional 201 products valued at over \$1.3 trillion per year.<sup>15</sup> The ITA aims at lowering all the taxes and tariffs of IT products to zero by the signatories.<sup>16</sup> The agreement introduces itself with explicit wording-

*Considering the key role of trade in information technology products in the development of information industries and in the dynamic expansion of the world economy,*

*Recognizing the goals of raising standards of living and expanding the production of and trade in goods;*

*Desiring to achieve maximum freedom of world trade in information technology products;*

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<sup>13</sup> World Trade Organisation, *Information Technology Agreement*, [www.wto.org/english/tratop\\_e/inftec\\_e/inftec\\_e.htm](http://www.wto.org/english/tratop_e/inftec_e/inftec_e.htm) Retrieved 10<sup>th</sup> May 2016

<sup>12</sup> *ibid*

<sup>15</sup> World Trade Organisation, *10<sup>th</sup> Ministerial Conference Nairobi, 2015*, Retrieved 10<sup>th</sup> May 2016

<sup>16</sup> *ibid*

*Desiring to encourage the continued technological development of the information technology industry on a world-wide basis;*

*Mindful of the positive contribution information technology makes to global economic growth and welfare;*

*Having agreed to put into effect the results of these negotiations which involve concessions additional to those included in the Schedules attached to the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994, and*

*Recognizing that the results of these negotiations also involve some concessions offered in negotiations leading to the establishment of Schedules annexed to the Marrakesh Protocol,*

*Declare as follows:*

*1. Each party's trade regime should evolve in a manner that enhances market access opportunities for information technology products.*

*2. Pursuant to the modalities set forth in the Annex to this Declaration, each party shall bind and eliminate customs duties and other duties and charges of any kind, within the meaning of Article II: 1(b) of the General Agreement on Tariffs and Trade 1994, with respect to the following:*

*(a) All products classified (or classifiable) with Harmonized System (1996) ("HS") headings listed in Attachment A to the Annex to this Declaration; and*

*(b) All products specified in Attachment B to the Annex to this Declaration, whether or not they are included in Attachment A; through equal rate reductions of customs duties beginning in 1997 and concluding in 2000, recognizing that extended staging of reductions and, before implementation, expansion of product coverage may be necessary in limited circumstances.*

3. Ministers express satisfaction about the large product coverage outlined in the Attachments to the Annex to this Declaration. They instruct their respective officials to make good faith efforts to finalize plurilateral technical discussions in Geneva on the basis of these modalities, and instruct these officials to complete this work by 31 January 1997, so as to ensure the implementation of this Declaration by the largest number of participants.

4. Ministers invite the Ministers of other Members of the WTO, and States or separate customs territories in the process of acceding to the WTO, to provide similar instructions to their respective officials, so that they may participate in the technical discussions referred to in paragraph 3 above and participate fully in the expansion of world trade in information technology products.<sup>17</sup>

The agreement's opening statement in the text itself captures its importance globally. ITA has led to tremendous growth in the economies that are deeply involved. A study conducted by a researcher about "expanding the Information Technology Agreement: new products, new Countries" indicated that seventy-three countries participated in the agreement.<sup>18</sup> China, Hong Kong, Germany, Singapore and Japan to mention but a few in addition to the United States, were the top import markets for ITA products in 2008. Signatories accounted for approximately 94% of global trade in ITA products covered by the agreement. According to U.S. industry, the agreement has contributed to innovation and productivity, and has enabled businesses to become more competitive and make greater use of global supply chains. The researcher<sup>19</sup> cited the U.S. Trade Representative Ron Kirk's letter of Feb. 10 to U.S. technology companies, which described the ITA as a flexible platform that can "promote U.S. trade, support U.S. jobs

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<sup>17</sup> World Trade Organisation, *Information Technology Agreement* (96-5438) (WT/MIN (96)/16) 13 December 1996

<sup>18</sup> Monahan, K. "Expanding the Information Technology Agreement: New Products, New Countries. (2011)

<sup>19</sup> *ibid*

and spur economic growth, while lowering prices for consumers.<sup>20</sup> This is very essential for any economy to grow and Kenya is not an exception.<sup>21</sup>

African countries are developing. Some African countries may be considered fast growing while others due to several challenges are considered less developed.<sup>22</sup> For developing countries, the experience with ITA has not been progressive. However, imports that previously came from world markets now come from other ITA members. Fox,<sup>23</sup> cited the study of Schiff<sup>24</sup>, who provided a compelling justification for this view. He argued that the increase in trade between ITA members has typically come from import substitution in new products, typically trade-diverting, and not from more efficient production of the products already being made in the member countries. United Nations Secretary-General (former) Kofi Annan underlines the role ICT can play in furthering and enhancing sustainable development. ‘Everywhere in the developing world, especially in Africa, governments are launching ambitious ICT infrastructure initiatives, radically changing their communications policy frameworks and situating ICT at the heart of their self-reliance movement as a strategy.’<sup>25</sup> These translate that ICT has become an indispensable tool in the fight against poverty in Africa; it provides developing nations with an unprecedented opportunity to meet vital development goals such as poverty reduction, basic healthcare, and education, far more effectively than before.

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<sup>20</sup> *ibid*

<sup>21</sup> Mutai Japheth Kirui, ‘Impact of Trade Agreements Adopted By Kenya Within The East African Region on its Trade volumes: The case of manufacturing firms.’

<sup>22</sup> Sachs, J.D. and Warner, A. M. Sources of Slow Growth in African Economies. *Journal of African Economies*, Volume 6, Number. 3, p. 335-376. (December 1997).

<sup>23</sup> Fox, J. W. *An Evaluation of Trade Capacity Building Programs Regional Trade Agreements: A Tool for Development?* (2004)

<sup>24</sup> Schiff, M. “Regional Integration and Development in Small States.” *Development Research Group Working Paper 2797*. Washington, DC: World Bank. [http://econ.worldbank.org/files/12292\\_wps2797.pdf](http://econ.worldbank.org/files/12292_wps2797.pdf) (2002).

<sup>25</sup> Nirmala, M., Karthikeyan, K., Appalabotla, S. and Patharaj, J. “The Role of ICT in the Economic Development of North East Africa: Eritrea.” *Journal of Emerging Trends in Computing and Information Sciences*, VOL. 3, NO. 3, March 2012.

Vision 2030 of Kenya's policy envisages growth and improved quality life for Kenya citizens by 2030. Technology and technology trade are primary to achieving vision 2030. The policy alone is not sufficient to achieve this. A look into signing and implementing the ITA could be vital. The researcher aims to study information technology nexus in vision 2030 and ITA in the paper.

Kenya is among the first countries that signed membership to WTO.<sup>26</sup> However, Kenya did not become a signatory of the ITA signed in 1996. The country always moved swiftly to meet its international obligations espoused under the WTO framework, but declined from signing the ITA. Kenya has built its name as a regional technology hub by opening up its economy to open market policy, acquiring technology-based goods and services and by and large cutting taxes on certain goods and services. It was Kenya that removed tariffs on computers to zero rated as far back as 2004.<sup>27</sup>

In addition, the availability of trained manpower in information technology has increased and this plays an important role as a resource towards ITA's implementation in the country. A study report prepared by Export Processing Zones Authority<sup>28</sup> on the Kenya's Information technology sector indicates that, the Kenyan government has recognized ICT by introducing computer education in schools and other learning institutions, while the private sector has responded to the demand of skilled computer operators by setting up commercial computer training colleges in major urban centers all over the country.

In the year 2001, over 150,000 Kenyans passed through basic computer skills training colleges and since 1980s, Kenyans who have undergone computer skills training in the country, stands at an estimated 1.1 million people. Today the number of computer trained staff in the country

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<sup>26</sup> The Marrakesh Agreement Establishing the World Trade Organisation ("WTO Agreement") of 15 April 1994, 1867 UNTS 154, Preamble, para. 1 and 2.

<sup>27</sup> Ministry of Industry, Trade and Cooperatives, *Export Processing Zones Authority Report*, 2005

<sup>28</sup> *ibid.*

is way over the 2005 1.1 million mark<sup>29</sup>. What the above shows is that Kenya has adopted an ICT based learning approach that would make relevance of the ITA products in the market. This researcher developed an interest in what benefits would accrue if Kenya implemented the provisions of the ITA.

## **1.2 Statement of the problem**

Kenya has not signed the Information Technology Agreement. Despite being a member of the WTO, the country has not started the journey to domesticate it.<sup>30</sup> This means that Kenya has either considered its pros and cons and settled that it is not beneficial to the state as an exporter or an importer. Opportunities have been missed because the legal regime to support the ITA products has not been clearly set out in Kenya. This begs the question, why is ITA still a strange document to Kenya? Could there have been better growth if Kenya embraced the agreement?

The IT sector has been one of the fastest growing sectors in world trade. Today, trade in these products accounts for approximately 10 per cent of global merchandise exports. Kenya has realized that ICT can be a primary instrument for realizing economic growth<sup>31</sup>. The government is aware of the need to ratify & domesticate International agreements touching on ICT trade. This is so because trade in IT now offers attractive incentives and presents various investment opportunities for potential investors as the nation prepares to leverage ICT in its national priorities of growth and poverty reduction.<sup>32</sup>

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<sup>29</sup> Mutong'wa, Esau, Ogenda, Tenge and Nasiuma, B. Investigation of Information Communication Technology in Kenyan Primary Education Sector. *Journal of Emerging Trends in Computing and Information Sciences*, Vol. 5, No. 7 July 2014 ISSN 2079-8407. (2014)

<sup>30</sup> Tang, X. and Lascari, R. (n.d.). *20 Years of the Information Technology Agreement*. [online] Wto.org. Available at: [https://www.wto.org/english/res\\_e/booksp\\_e/ita20years\\_2017\\_chap1\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/ita20years_2017_chap1_e.pdf) [Accessed 1 Sep. 2019].

<sup>31</sup> Ministry of industry, Trade and Cooperatives, Export Processing

<sup>32</sup> Monahan, K. *Expanding the Information Technology Agreement: New Products, New Countries*. (2011)



This research looks into the legal aspects hindering Kenya from embracing the ITA as a member of the WTO. The study will also seek to discuss the opportunities available under the ITA framework and the legal challenges facing adoption globally.

### **1.3 Theoretical Framework**

The theoretical framework informing this research is based on two theories. These are the theory of mercantilism and that of absolute advantage. Mercantilism is an economic advancement for the creation of an affluent and powerful state.<sup>33</sup> David Ricardo defined the mercantile system to show the system of political economy which aims to create wealth in a country by decreasing imports and increasing exports.<sup>34</sup> The aim of mercantilism policies was to achieve a trade balance in terms of receiving and also to keep domestic employment. Mercantilist policies were an extension of development of the relationship between governments at an international level and their business associations. The business association will pay taxes and levies to maintain the government, and in return the business association uses their influence to make governments establish laws and policies that are protectionist in nature. This is to protect their business interests from foreign competition.

There are policies that form the mercantilist ideology in Kenya. Firstly, the government plays a large role in helping local businesses. The government establishes policies to aid companies by providing capital through loans and also through exclusions from taxes.<sup>35</sup> Besides these policies, the government acting on the basis of mercantilism forms policies regarding setting up monopolies over local markets.<sup>36</sup> In trade policies, the government plays a role to aid local

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<sup>33</sup> Tong-söng Cho, Hwi-ch'ang Mun, 'From Adam Smith to Michael Porter: Evolution of Competitiveness Theory' (2013)

<sup>34</sup> David Ricardo, 'The Principles of Political Economy and Taxation', (1817)

<sup>35</sup> Constituencies Development Fund Act No. 30 of 2013, Section 3

<sup>36</sup> Competition Act No. 12 of 2010.

and small medium industries by setting tariffs, quotas and prohibitions on import of goods that have direct competition with local manufacturers.<sup>37</sup>

The theory of absolute advantage was introduced by Adam Smith.<sup>38</sup> It states that if a country produces a commodity more efficiently than another country and is less efficient in producing a second commodity than the other country, then each country can benefit by specializing in the commodity that it produces more efficiently.<sup>39</sup> Hence, specialization is applied by both countries in the products which they produce efficiently. Smith argues that the total production of traded product increases by double in both countries due to this specialization. Consequently, international trade increases the total amount of product by specialization of production between the countries.<sup>40</sup>

The theories of mercantilism and that of absolute advantage are evident in Kenya as seen in the above laws that are enacted by the state. These laws are protectionist in nature and intended to preserve the local business community. Further the Constituencies Development Fund Act, Competition Act and the Tax Procedures Act have been cited as a representation of the entire legal regime regarding trade in IT products. The laws are in force in Kenya alongside other local statutes and the regional treaties recognized by Kenya.

#### **1.4 Justification of the study**

The study is significant because it gives insight into the benefits that are unexploited under the ITA. On the other hand, it will help the locals as well as the international actors in trade to find the way forward and the right legal interventions for sustainable trade by making use of the ITA. This study questions the legality of being a member of the WTO but not acceding to the

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<sup>37</sup> Tax Procedures Act No. 29 of 2015

<sup>38</sup> Adam Smith, 'The Wealth of Nations', (1776)

<sup>39</sup> Douglas A. Irwin, A Brief History of International Trade Policy (*Library of Economics and Liberty 2001*)

<sup>40</sup> *ibid*

ITA. It also looks at the relevance of the legal framework of regional trade agreements in contrast with WTO obligations. Finally, the study is beneficial to inform policy makers and other researchers who may intend to carry out similar legal studies.

### **1.5 Objectives of the study**

- i. To examine the legal impact of ITA on trade in Kenya.
- ii. To explore the extent to which applicable international trade law in IT products are effective in Kenya.
- iii. To determine the Implementation Challenges facing the domestication of ITA in Kenya.

### **1.6 Research questions**

- i. Does the law on ICT and IT products favour or bar ITA in Kenya?
- ii. How does Kenya implement international agreements?
- iii. To what extent has Kenya adopted the WTO trade rules?
- iv. What are the legal challenges facing ITA adoption and implementation in Kenya?

### **1.7 Limitation of the study**

The study was carried out in Nairobi, Kenya. Kenya has been chosen because it represents one of the potentially upcoming trade hubs in Africa. It is also the country of residence of the researcher hence more accessible for the study as government material and records are within reach whenever the necessary information is required. The study covers selected IT based technology products. Three variables will be focused in the current study; government initiatives, IT adoption effectiveness and the challenges in ITA implementation. The researcher

shall analyze data from the ministry of foreign affairs trade & industry, the finance ministry (more specifically the KRA and the CAK) to assess the extent to which the country has assisted in working with the rules of the ITA or none of it with a view to laying a basis for future research in this area.

### **1.8 Literature review**

Mann and Liu stated that from theory or practical experience reduction of tariffs directly leads to more trade and that trade should grow more for countries that lower tariffs the most. However they went ahead to explain that the impact of the ITA through use of ITA empirical evidence has been hard to ascertain.<sup>41</sup> This is because the tariff reductions took place at the height of changes in global IT trade in the run up to the millennium and the subsequent faltering of the market, thus making it difficult to note the changes in trade due to tariffs alone.<sup>42</sup>

Bora and Liu had results that showed that all factors considered at par, an ITA member would import at least Seven Percent more in ITA products than a non-member.<sup>43</sup> This they tout as the trade creation effect of the ITA. Further if the importer is a member of the WTO but does not participate in the ITA then it would import at least six percent less in ITA products according to the research data. This is touted as the trade diversion effect of the ITA. The result of the research is that it is indicative that participation in the ITA will increase the value of bilateral trade.

Portugal-Perez, Reyes and Wilson agree that the expansion in trade of electronic goods have contributed in a major way to productivity, growth human welfare and societal change.<sup>44</sup>

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<sup>41</sup> Mann, Catherine and Liu, Xuepeng “The Information Technology Agreement: Sui generis or model stepping stone?” Richard Baldwin and Patrick Low (Eds.), *multilateralizing regionalism*, Cambridge, Cambridge University Press, P. 182-216. (2008)

<sup>42</sup> Ibid

<sup>43</sup> Bora, B. and Liu, X. (2010). Evaluating the Impact of the WTO Information Technology Agreement. *Light the Lamp*, p..13-38.

<sup>44</sup> Portugal-Perez, A., Reyes, J. and Wilson, J. (2010). Beyond the Information Technology Agreement: Harmonisation of Standards and Trade in Electronics. *The World Economy*, 33(12), p..1870-1897.

However, the researchers opine that despite the growth in global trade of IT and related technological equipment there exists a challenge with the global standards of such products. It is agreed that shortly after signing of the ITA the members started having discussions on the standards of products on the list. Despite the ITA, exporters have a perspective that they may impose additional costs in the production process to adopt products to such standards in the importing country. In addition, certification rules aiming to confirm import compliance can generate additional costs to importers. The writer sees it that this may then increase the value of products imported under the ITA and may be seen as a trade hindrance.

Shin-Yi Peng has critically reviewed the litigation brought by the US and other complainants against the European Union.<sup>45</sup> The European Commission had classified some goods supposedly covered under the ITA under tariff codes that are not covered by the ITA subsequently subjecting them to a fourteen percent duty. Thus, the question before the WTO dispute panel is whether or not the European Commission is entitled to make the exclusion. Peng affirms that indeed there exists a nexus between innovation, competition and hi-tech imports. It is therefore indicative from these works and the dispute at the WTO that avenues may be sought by mischievous parties to bypass the ITA provisions in order to create non-trade barriers to exporting signatories.

According to the WTO survey, Kenyan participants felt that the current tariffs imposed on the ICT products were unreasonable especially because nearly all ICT products were imported making them expensive for both business and consumers.<sup>46</sup> The participants wanted the government to remove or reduce tariffs further noting that Kenya's participation in the EAC

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<sup>45</sup> Shin-Yi Peng, Taxing Innovation? — The Evolving Coverage of the Information Technology Agreement, *The Tax Lawyer*, Vol. 64, No. 1 (FALL 2010), p. 79-96

<sup>46</sup> Tang, X. and Lascari, R. (n.d.). *20 Years of the Information Technology Agreement*. [online] Wto.org. Available at: [https://www.wto.org/english/res\\_e/booksp\\_e/ita20years\\_2017\\_chap1\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/ita20years_2017_chap1_e.pdf) [Accessed 1 Sep. 2019].

may be affecting her capacity to join the ITA.<sup>47</sup> Kenya is involved in several international initiatives that affect the manner in which trade transactions are undertaken. These include: the World Trade Organization, Trade-Related Aspects of Intellectual Property Rights Agreement; Convention on Biological Diversity, International Union of Protection of New Plant Varieties, Food and Agriculture Organization, International Treaty on Plant Genetic Resources for Food and Agriculture, the Economic Partnership Agreements between the European Union and the African Caribbean and Pacific countries, the Common Market for Eastern and Southern Africa, the East African Community Customs Union Protocol, and the African Growth Opportunity Act among others.

These conventions are implemented by different Ministries and Parastatals. In some instances, implementation is done through different legislation or policies leading to weak coordination<sup>48</sup>. As an entry point to the regional market and a communications and financial hub for the region, Kenya also offers potential investors a wide market for their products and services in the utilization of ICT<sup>49</sup>.

Another study conducted by Mutong'wa, Esau, Ogenda, Tenge and Nasiuma recommended that there should be continual assessment of whether ICTs can produce efficiencies and increase effectiveness in mainstream development co-operation; particularly where there are scarce resources and ICTs may create savings.<sup>50</sup> The research recommendations, tremendous growth reported from the use of ICT in trade demands and commissions the current study.

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<sup>47</sup> *ibid*

<sup>48</sup> Institute of economic affairs, *Trade Notes*, issue 23 at p.1 (2009)

<sup>49</sup> *Ibid.*

<sup>50</sup> Mutong'wa, Esau, Ogenda, Tenge and Nasiuma, B. Investigation of Information Communication Technology in Kenyan Primary Education Sector. *Journal of Emerging Trends in Computing and Information Sciences*, Vol. 5, No. 7 July 2014 ISSN 2079-8407. (2014)

Makasi makes a case for protectionist legal regimes in his discussion on the legal regime surrounding investments.<sup>51</sup> He states that low tariffs create huge trade imbalances against Kenya leading to cheap and low-quality products in the market. He states that the legal regime for international trade and investments is wanting and thin on protecting Kenya's economic interests. He states that trade and investment legal regimes are not only complimentary but also amount to a symbiotic relationship.

Makasi proceeds to state that under international law, trade and investments are treated separately and that international law can be used to create a balance between trade and investment. He states that any legal regime that does not support a trade policy framework which is not functional is problematic. He argues that trade liberalization led to import surges in Kenya and that developing countries need a level of protection. The ITA would then be viewed in this perspective to, in order to protect the local market, require the implementation of protectionist legal framework for trade.

Sungura argues that Kenya is engaged with the EU through the African Caribbean Pacific countries EU relations.<sup>52</sup> She states that Kenya Negotiated with the EU under the EAC for the relations in June 2010 in Daresalaam among other EAC states. She stated that there was loss of revenue through elimination of tariffs. This shows that even under the negotiations for ITA with the WTO, Kenya has to engage other EAC member states. This argument was supported with that of Mutai where he observed that Kenya and other EAC members came together with the aim of increasing interactions and transactions to achieve a higher economic growth rate. He however states that in as much as Kenya is a trading partner within the EAC, together with other EAC members they face challenges with border tariffs and transport costs.

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<sup>51</sup> Simiyu Ben Makasi, 'Foreign and Domestic Investments in Kenya: Case for a protectionist trade legal regime'

<sup>52</sup> Sungura Beatrice, 'Implication of the EU-ACP Economic Partnership Agreements on the Realisation of Socio Economic Rights In Kenya'

Further, Simiyu conducted a study on the rules dealing with comparative advantage enjoyed by goods.<sup>53</sup> He proceeded to argue that there are two trading principles by the WTO being the National Treatment and the MFN. His study enhanced the concept that trade rules look into inter alia tariff classification and nature and quality of goods to make any distinctions. This goes a long way into the explanation of the relevance of ITA product lists which both have classification under the HS in order to identify the goods that benefit from the reduced tariffs of the ITA.

M'mbetsa in her research found that the WTO allows members to customs union and free trade areas as an exception to the fundamental principle of non-discrimination.<sup>54</sup> She further found that due to the regionally administered EAC CU and trade policy, the EAC CU is moderate to investors as it provides a more predictable economic environment for investment. This study found that the EAC CU members have eliminated all internal tariffs and now apply a common external tariff. This study supports the provisions of the EAC treaty that the member states shall negotiate as a bloc in matters trade. This then means that for EAC member states to join the ITA, engagement with member states is a prerequisite.

Musyoki in his paper studied the formation of a common trade policy with regard to tariffs.<sup>55</sup> He states that one country cannot realistically apply two different external tariffs. He further indicated that EAC states honour tariff engagements in COMESA and WTO. He noted that because traders in member states operate within a number of trade regimes each with its own tariff rates, the risk of trade deflection is greatly increased. The study concluded that it is technically difficult for COMESA, SADC FTAs to co-exist and that it will be impossible for a

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<sup>53</sup> Simiyu Albert Murambi, 'Introducing the Green Helmet Concept: - Lessons for WTO from North American Free Trade Area'

<sup>54</sup> M'mbetsa Jessica Njeri, 'The East African Community Participating as a Bloc in WTO Negotiations; prospects and challenges' 2015

<sup>55</sup> Musyoki Kimanthi, 'The challenge of multiple memberships in regional trade arrangements: the Eastern and Southern Africa Case' 2005



member state to belong to one regime. This is if the RTA adopts a CET and Customs union. However, a member state can be party to more than one RTA if all are bound by a common CU and CET.

Henn and Arevik analysed the impact of the WTO MFN rule on a global scale with a focus on the ITA.<sup>56</sup> The first finding that they made was that tariff elimination results in large additional trade gains. Further, it was noted that commitment to durable tariff elimination through WTO bindings boosts both imports and exports of ITA members. The researchers noted that Passive signatories joined the ITA and this was part of the discovery that the ITA has instituted the MFN rule on a near global basis because of the inclusion.

Henn and Arevik noted further that The ITA benefitted a large group of developing countries who joined it as a pursuit of a larger policy objective. Despite the benefit, tariffs remain at high levels in developing countries such as Kenya. Tariff elimination under the ITA had large trade effects because it was instituted in a non-discriminatory and durable fashion. In conclusion, the study also noted that nondiscriminatory policies, such as the ITA in this instance, are studied less than discriminatory policies partly because identifying trade effects on nondiscriminatory policies is more challenging than that of discriminatory policies.

In their research, Henn and Arevik also noted that the ITA has six characteristics. First, they state that the ITA liberalized tariffs on a broad set of products. The ITA also eliminated tariffs completely allowing for the study of the effects of the elimination. They further noted that the ITA made it easier to study the trade policy related to the increase in trade in IT products. The researchers also coined the phrase ‘critical mass agreement’ which refers to the ITA critical number that was required for ratification of the document at inception in 1996. From the critical mass agreement, the researchers noted that trade diversion among the member states was

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<sup>56</sup> Arevik Gnutzmann – Mkrtyanab, Christian Henn, ‘Peeling Away The Layers: Impacts Of Durable Tariff Elimination’

narrowly a concern. The researchers finally stated that the last characteristic of the ITA was that reversal of pre-ITA trade diversion was not an issue.

## **1.9 Research hypothesis**

The researcher opines that there is an unfilled gap in Kenya's trade market as a result of Kenya not implementing the ITA. Being a member of the World trade organization yet not being a signatory of the ITA poses challenges in the global stage. As a result, there are challenges that Kenya Faces for being in such a precarious position. However, there may be advantages or benefits that accrue to Kenya for not being a member of the ITA. The researcher also feels that the behavior of the industrialized manufacture countries has not helped the growing economies in implementing the ITA.

Kenya did not become a signatory to the agreement in 1996 nor after. The country has continued to snub the agreement years on but showing extreme interest in its discussions and process of its implementation by member parties under the WTO structure. In July 2015, WTO members <sup>57</sup>(at a conference in Nairobi Kenya) concluded negotiations on expanding the number of products covered by the Agreement. The new list covers an additional 200 products valued at about US\$ 1 trillion in annual trade.<sup>58</sup> Kenya has on several occasions reduced to zero rate several ICT based goods including inter alia scanners meant for hospitals.

### **1.1.1 Research methodology**

In this research paper, qualitative research design was used. It is sometimes defined as interpretive research and as interpretations can be incorrect or biased, the findings may be controversial. Qualitative researchers have been interested in understanding the meaning people have constructed, that is, how people make sense of their world and the experiences

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<sup>57</sup> World Trade Organisation, *Tenth WTO Ministerial Conference, Nairobi* (2015)

<sup>58</sup> International chamber of Commerce, *World Trade Agenda*, (2015)

they have in the world.<sup>59</sup> Throughout the paper, the researcher concentrated on using library research and document reviews on trade technology and the law.

The researcher conducted an investigation of the legal challenges, obstacles and opportunities in implementing the ITA in Kenya. As part of the qualitative research process, the researcher scrutinized secondary sources in the library research. These were material such as the key statutes, articles, text books, journal articles, publications and international treaties. The material was studied in a desk analysis as part of the qualitative research methodology. From the analysis, the relevant information and sources from the material used were utilised and applied.

Further, the researcher adopted a top desk analysis of the material such as the journal articles, text books and statutes. The researcher also accessed some of the statutes using computerized electronic research method. Internet web-based research formed largely the source of data for the documents of the WTO and several international treaties. This information was useful in accessing the WTO documents that are relevant to this study on ITA.

### **1.1.2 Chapter breakdown**

#### **Chapter 1**

The introduction and Background of the ITA is analysed in this chapter. This includes the pre-WTO establishment and ratification in the member states. In this section of the paper, the foundation of the ITA is discussed together with the rationale for its creation under the WTO. Further, the paper will introduce the methods that it will use to conduct the analytical research on ITA in Kenya and form research questions. It is from the research questions that the rest of the paper will be based.

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<sup>59</sup> Merriam, S. *“Qualitative research: A guide to design and implementation.”* San Francisco, CA: Jossey-Bass, (2009)

## **Chapter 2**

Review of the ITA framework and its applicability is done in the second chapter. This will also form part of the review for ITA framework with a focus on Kenya. The intent of this section of the paper will be to find out whether ITA is applicable in Kenya or not. Once the true position of the applicability of the ITA in Kenya is discussed, the research will proceed to the next chapter to test the usefulness of ITA in Kenya.

## **Chapter 3**

Having established the position of ITA applicability in Kenya from the previous chapter, the research, under this section delves into the issue of whether ITA is effective or not in the Kenyan economy. This will factor in the relevant applicable laws and also the gaps that make the ITA more effective or less effective in Kenya. Under this section the research paper will take a view as to the effects of ITA implementation in Kenya if possible. Also, in addition to the applicable law in Kenya this research analyses the regional treaties and how they affect ITA implementation in Kenya. Finally, the position of ICT in facilitating the implementation of the ITA will be studied.

## **Chapter 4**

This chapter of the paper will scrutinize the challenges facing ITA in Kenya. It will be established under this section that with the structure of the ITA as is currently, there ought to be challenges faced in its implementation. The challenges range from those caused by the applicable laws in Kenya, the regional treaties and also the structural challenges that make ITA implementation in Kenya slow or difficult. Competing tariffs will also be viewed in order to know whether it is difficult to implement the ITA in the current tariff provision. Finally, dispute resolution under the ITA will be viewed to show how challenging it is to resolve disputes involving products under the ITA.

## **Chapter 5**

Summary of the findings conclusion and recommendation will be done with a view of implementing the ITA in Kenya in order to strategically guide changes in the applicable laws. Further the paper intends to guide the reader and the state to scrutinize the ITA to take full advantage of the positions created by the ITA.

### **1.1.3 Chapter Summary**

In Chapter 1 we have looked at the background of and creation of the ITA 1997 including reasons for lobbying before its adoption. The chapter has also looked discussed why Kenya failed to sign the document despite being a member of the WTO. The country has its binding arrangement with the other EAC members which are independent of the ITA. The lobbying before the Singapore meeting where the agreement was hatched was especially spectacular; setting out the need for countries to agree into a common vehicle to increase their economic growth and presence in the world<sup>60</sup>. The chapter has dealt with the importance of the document to spur growth in the country. In the coming chapter the researcher will be interested in looking at the impact of the ITA in the global stage and asses if the document has indeed helped spur economy in those countries implementing the it.

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<sup>60</sup> Man & Liu; *“The Information Technology Agreement: Sui generis or model stepping stone P.23*

## **CHAPTER TWO**

### **THE ITA IN WTO LEGAL FRAMEWORK**

#### **2.0 Introduction**

The previous chapter answered the question: ‘Why this study?’ It discussed the background of the study, the statement of the problem with its justification and presented the legal objectives of the study, research questions and more importantly the scope and the significance of the study. The chapter laid the legal importance and ramifications of ITA in international trade. This chapter will now review the ITA legal framework. Because the ITA is not such a lengthy agreement, under this section, the framework of the WTO and the operation of the ITA therein will be brought into fore to link it up with its parent regulator the WTO. Further, the modalities and product coverage of the ITA will be properly explained. This chapter also attempts to offer deeper look into the products covered by the ITA in the product lists A and B. The researcher will go further to comparatively discuss the harmonised system (HS) as articulated in the agreement. It is important in this research to conclusively discuss the ITA to appreciate its full impact in development of WTO law and relevance to the market. Further, the element of expansion of the ITA is discussed in order to lay a clear understanding of what the ITA entails. It is in this chapter also where the selected cases shall be discussed to test the WTO dispute resolution mechanisms.

#### **2.1 ITA in WTO legal framework.**

As discussed earlier in chapter one, the ITA was created under the WTO framework as the first agreement to be made by the international trade organisation. This therefore means that in discussing the ITA, the operations of the tax policy of the WTO is necessary. The operations and influences of the WTO tax policy started when the GATT was enforced in 1947.

Despite more than six decades of multilateral trade liberalization achieved by the GATT in 1947, protectionist policies persist in many international customs unions. Perhaps the greatest challenge regarding the design of multilateral trade rules is the concern that trade liberalization commitments with respect to one policy instrument, such as tariffs may be vitiated by other protectionist instruments unconstrained by such rules. Consequently, multilateral trade and other agreements must address a wide range of potentially protective measures, including tax measures and other tariffs imposed by the municipal laws or host countries.

Tariffs and other indirect taxes, whether levied at the border or internally, have long been subject to the binding multilateral rules embodied in the GATT.<sup>61</sup> However, in recognition of the fact that tax measures can be used as substitutes for other types of protection and government assistance or regulation, direct or indirect taxes have come under increased scrutiny at the WTO. This recognition is reflected in the agreement negotiated under the Uruguay rounds, notably containing subsidies and known as trade related investment measures (TRIMS).<sup>62</sup> The Uruguay agreement reflects the realization by national governments that multilateral rules need to play an increasingly important role in regulating the use of tax as well as non-tax measures, especially where these measures affect the international movement of goods, services, capital, technology and persons.

As a consequence of the TRIMS, the range of tax measures challenged by WTO members widened considerably beyond the more traditional trade taxes. Since 1995, taxation has been the cause of over 40 of the 500 disputes that have been initiated by members' request for consultation submitted to the WTO's dispute settlement body<sup>63</sup>, which is arguably the world's most prolific international dispute resolution system. Roughly half of these disputes have

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<sup>61</sup> 'Dispute Settlement in International Trade, Investment and Intellectual Property' United Nations Conference on Trade and Development, (2019) <<https://unctad.org/en/Pages/DITC/TNCD/Dispute-Settlement-in-International-Trade.aspx>> accessed 3 September 2019.

<sup>62</sup> <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/6726.pdf>

<sup>63</sup> [https://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm#1](https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#1)

resulted in establishment of panels and consequent rulings by the DSB. The DSBs rulings against Indonesia's national Car Program and especially against the United States concerning the latter's Foreign Sales Corporation scheme, which at the time, led to the largest retaliation award ever authorized in a dispute at the WTO, are particularly noteworthy.<sup>64</sup>

The rulings confirmed, if there were ever any doubts, that, direct as well as indirect taxes are subject to WTO rules, notwithstanding efforts by tax authorities to secure specific exemptions for certain direct tax measures in the TRIMS. The ruling also reconfirmed the traditional distinction under multilateral trade rules between direct and indirect taxes, especially with respect to how such taxes should be treated under the border tax adjustments and subsidy rules of WTO. The subsidy rules of WTO are the World Trade Organization's agreement on subsidies and countervailing measures which specifically deals with subsidies for imports in the territory of a member state.

It would not be surprising if other WTO inconsistent tax measures were identified in future, leading to further disputes among WTO members. WTO rules can therefore be expected to continue to be an important factor in shaping tax policies, as members will undoubtedly want to avoid having their tax policies successfully challenged in WTO.<sup>65</sup>

This framework of operation by the WTO has to be taken into consideration by any state intending to become a member of the ITA including Kenya. It first means that the state has to be a member of the WTO in order to become a signatory of the ITA. In the event of any challenges faced in the ITA, the mechanism that will be used to address the challenge has to be under the WTO. This then brings the issue of the tariffs of IT products captured in the ITA under the powers of the WTO mechanisms.

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<sup>64</sup> WTO's DSB No. DS 477 (WT/DS477/21/Add.3 WT/DS478/22/Add.3)

<sup>65</sup> Daly, Michael "*the WTO & direct taxation*" June 2005



## 2.2 ITA implementation

Before the ITA was drafted and acceded to, the member states of the GATT and other internationally trading business associations used to conduct their import and export business at certain agreed tariffs. Later, the member states that were signatory to the ITA at its inception then lowered their tariffs on the respective listed technological items as part of compliance to the agreement. Since then, there has been increased trade in products in the information technology sector within and among the member states as follows.

From the outset, the United States which was a member of the WTO was also part of the initial signatory state in the formation of the ITA.<sup>66</sup> There was an increase in productivity growth in the US since 1995 is attributable to the declining prices of the IT commodities.<sup>67</sup> The tariff cuts by the ITA are experienced at the eight digit level of the Harmonised System used to track commodities. A study in the US showed the average tariffs at the beginning of 1997, before the ITA was implemented, and in 2000 when it was first concluded.<sup>68</sup>

Indeed, in the US average tariffs were between 1 and 4 percent in all industries even before the ITA. This is indicative that the tariffs were low. When the ITA was implemented, further reductions were made in the tariffs. Despite the tariff cuts in the US being correspondingly small, they could be matched by equal or larger tariff cuts abroad.<sup>69</sup> Indeed, it was established that the estimated effect of the ITA on US import prices is much larger than that of direct decrease in taxes. This has led to enhanced growth and productivity in that sector.

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<sup>66</sup> World Trade Organization: Agreement On The Implementation Of The Ministerial Declaration On Trade In Information Technology Products, *American Society of International Law* , Vol. 36, No. 2 (MARCH 1997), p.. 375-395

<sup>67</sup> Robert C. Feenstra and others, 'Effects of Terms of Trade Gains and Tariff Changes on the Measurement of US Productivity Growth' (2013) 5 *American Economic Journal: Economic Policy*.

<sup>68</sup> Ibid pg. 65

<sup>69</sup> ibid

China became a signatory and member of the WTO in December 2001.<sup>70</sup> This was after the ITA had been created and implemented. China is a big participant in the world information technology business and would hugely benefit from an implementation of the ITA. In 2003, China joined the ITA as the third largest importer of ITA products as well as the fourth largest importer.<sup>71</sup> The ITA benefited China by the lowering of tariffs directly benefiting the country. This is through the increase in trade in listed ITA commodities.

In India, the situation is quite different. India joined the ITA in 1997 as part of the first participants.<sup>72</sup> India joined the ITA while it was coming up as a player in the Information Technology products. The fortunes for India have been mixed bearing in mind that despite the ITA liberalizations, they were determined by major domestic costs.<sup>73</sup> Tariff reductions in ITA products increased IT imports but failed to benefit the local industries in India.

Countries in Europe until the latest BREXIT campaign, in which the UK intends to leave the EU, have been negotiating and trading under the umbrella of the EU.<sup>74</sup> Further, under the ITA as signed on inception in 1996 the EU was represented as European Communities.<sup>75</sup> The European Communities EC title was used in reference to the EU until November 2009 for legal reasons in the WTO. This has had a similar Effect to the trade in information technology products in the EU as observed in other similar jurisdictions. Countries that have benefited from the participation of the EU in the ITA include United Kingdom, France and Germany among others. This means that EU member states accede to ITA law and fully embrace its provisions on becoming EU members.

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<sup>70</sup> 'WTO China Member Information' [https://www.wto.org/english/thewto\\_e/countries\\_e/china\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/china_e.htm)> accessed 2 September 2019.

<sup>71</sup> Dieter Ernst, "The Information Technology Agreement, Manufacturing and Innovation – China's and India's Contrasting Experiences" *East-West Center, Honolulu and Centre for International Governance Innovation, Waterloo* 9/23/16

<sup>72</sup> *Ibid.*

<sup>73</sup> *ibid*

<sup>74</sup> Harold D Clarke, Matthew J Goodwin and Paul Whiteley, *Brexit* (2017) pg. 1

<sup>75</sup> *supra n. 1*

The ITA has been acceded to by only three states in the whole of Africa being Egypt, Mauritius and Morocco.<sup>76</sup> This is despite Africa having, of its member states, fifty three countries being signatory, with seven of those as observer states being members of the WTO.<sup>77</sup> It is only Eritrea that is not member to the WTO to any extent whatsoever.<sup>78</sup> Despite the progressive advances in the legal regimes of the concerned African Countries, there has been no interest by the African WTO states to join the league of the ITA signatories. Further, this position is maintained by African States which, are in the highest need for technological advancement that may be achieved through an implementation of the ITA.

Egypt joined the ITA in 2003 and committed itself to removing tariffs on products provided for in the ITA. This was in a bid to attract foreign investments, open new markets and create employment opportunities for the IT products.<sup>79</sup> However Egypt called for the analysis of data to display the notion that some countries benefited more than others from the ITA implementation despite the increase in trade.<sup>80</sup> The research showed that indeed after joining the ITA, the resultant effect of this increase in trade in the ITA products led to the exponential increase in trade deficit in Egypt.

Kenya became a member of the WTO at the inception. However, the country has not signed the ITA thereby not having the capacity to benefit from the lower tariffs. Kenya is a party to regional trade treaties such as the COMESA and EAC. Kenya continues to tax some of the goods under the ITA using the current import laws that are for a wide variety of products even

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<sup>76</sup> 'WTO | Information Technology Agreement - ITA Participants' (World Trade Organisation) <[https://www.wto.org/english/tratop\\_e/inftec\\_e/itapart\\_e.htm](https://www.wto.org/english/tratop_e/inftec_e/itapart_e.htm)> accessed 2 September 2019.

<sup>77</sup> WTO, 'WTO Members and Observers list', (World Trade Organisation) <[https://www.wto.org/english/thewto\\_e/countries\\_e/org6\\_map\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/org6_map_e.htm)>

<sup>78</sup> *ibid*

<sup>79</sup> 'MCIT | News | Egypt Partakes in WTO Symposium On 20Th Anniversary of ITA' (Mcit.gov.eg, 2019) <[http://www.mcit.gov.eg/Media\\_Center/Latest\\_News/News/7587](http://www.mcit.gov.eg/Media_Center/Latest_News/News/7587)> accessed 2 September 2019.

<sup>80</sup> South Center, "The Information Technology Agreement (ITA); Considerations from A Development Perspective" September 2013.

beyond the ambit of the ITA. Despite Kenya not being party to the ITA, she has implemented several projects that would hugely benefit from the implementation of the ITA.

Under vision 2030 for example, Kenya intends to raise the standards of living by providing a high-quality life to all of its citizens. This, the planners intend to achieve through transforming Kenya into an industrializing middle-income country. Further per the provisions of the vision 2030 roadmap, the foundation of the pillars of the vision is buttressed on deploying world class infrastructure, facilities and services. This means that implementation of the ITA in Kenya will help make the local industry in Information Technology products to have stimulated growth. This will in turn benefit the country and help in the realization of vision 2030 through the use of information technology devices.

### **2.3 The ITA interpretation: product coverage, product lists and modalities.**

The products that are covered by the ITA are IT products which are needed in the modern day business environment. They improve technology and telecommunications in markets. Indeed, as was observed by Ikamari, the tariffs on imports relating to computers and also medical equipment and medicine would affect the right to education and the right to health.<sup>81</sup> The scholar went further to note that other WTO nonagricultural market access negotiations do not target essential commodities. This means that those commodities that are captured by the ITA are essential hence making the study of the commodities captured by the HS of the ITA necessary.

The ITA has two attachment lists under the Harmonized System (HS) as earlier noted.<sup>82</sup> List A contains the HS headings or parts thereof to be covered. For example, under list A there is the HS code 8471-70 which specifies, storage units, including central storage units, optical disk

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<sup>81</sup> Beverly Kamoti Ikamari, 'The Place of Socioeconomic Rights in International trade Law' 2013

<sup>82</sup> WTO, 'Information Technology Agreement' product List A and B

storage units, hard disk drives and magnetic tape storage units; under the HS code ex 8514-20 the inductance or dielectric furnaces and ovens for the manufacture of semiconductor devices on semiconductor wafers are covered.<sup>83</sup> Now after identifying the items on list A, one proceeds to list B with the information of the covered product under list A.

Attachment B lists specific products to be covered by ITA wherever they are classified in the HS under list A. Where parts are specified under list A, they are to be covered in accordance with HS Notes 2(b) to Section XVI and Chapter 90 of the ITA, respectively. A sample from list B is as follows- Computers: automatic data processing machines capable of 1) storing the processing program or programs and at least the data immediately necessary for the execution of the program; 2) being freely programmed in accordance with the requirements of the user; 3) performing arithmetical computations specified by the user; and 4) executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run. The agreement covers such automatic data processing machines whether or not they are able to receive and process with the assistance of central processing unit telephony signals, television signals, or other analogue or digitally processed audio or video signals. Machines performing a specific function other than data processing, or incorporating or working in conjunction with an automatic data processing machine, and not otherwise specified under Attachment A or B, are not covered by this agreement.<sup>84</sup>

In this manner, list A broadly categorizes IT products into HS headings while it is in list B that the general placement of the specific IT product is captured. The ITA is brief in nature and does not have multiple clauses. However, it does not fail to espouse the intention that the

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<sup>83</sup> The HS under the World Trade Organisation, *Information Technology Agreement* text list A

<sup>84</sup> World Trade Organisation, *Information Technology Agreement* text list B

signatories had to eliminate tariffs. The ITA has an annex titled modalities and products coverage. It is at this annex that the operationalization of the ITA is dealt with.

The introductory paragraph of the annex to the ITA states categorically that in order for a country to be part of the ongoing negotiations for the expansion of world trade ITA product lists it has to be a member of the WTO, a state or separate customs territory in the process of acceding to the WTO.<sup>85</sup> This means that membership to the WTO is a prerequisite to the ITA. The ITA has 10 modalities that govern its operations. Because the introductory paragraph captures section 8, 9 and 10 of the ITA, some of the relevant remainder sections are discussed as below.

First, the ITA dictates that a member state has to include, the measures in paragraph 2 of the ITA into its schedule to the GATT 1994 and to at either its own tariff line level or the HS 1996 6-digit level in its official tariffs used by importers and exporters.<sup>86</sup> Further, this modality states that each ITA participant that is not a Member of the WTO shall implement these measures on an autonomous basis, pending completion of its WTO accession, and shall incorporate these measures into its WTO market access schedule for goods.

Each ITA participant is required to provide all other participants a document containing the details on how duty treatment will be provided in its WTO schedule of concessions.<sup>87</sup> The ITA participant will also be required to have a list of the detailed HS headings for products in Attachment B. These documents will be processed and approved on a consensus basis. As soon as the review process is completed for any specific document, such document shall be submitted as a modification to the Schedule of the participant concerned. Further, the concessions to be proposed by each participant as modifications to its Schedule shall bind and

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<sup>85</sup> WTO, 'Information technology Agreement' Annex; Modalities and product coverage, this introductory paragraph also forms section 8, 9 and 10 of the ITA modalities.

<sup>86</sup> WTO, 'Information technology Agreement' Annex; Modalities and product coverage, section 1

<sup>87</sup> *Ibid* section 2

eliminate all customs duties and other duties and charges of any kind on information technology products.

The elimination of such customs duties shall take place through rate reductions in equal steps, except as may be otherwise agreed by the participants. Also, the modifications to its Schedule to be proposed by a participant shall in Attachment A, include creating, as needed, subdivisions in its Schedule at the national tariff line level and in the case of the products in Attachment B, by attaching an annex to its Schedule including all products which is to specify the detailed HS headings for those products at either the national tariff line level or the HS 6-digit level.

The ITA participants are required to meet periodically under the auspices of the Council on Trade in Goods to review the product coverage specified in the Attachments.<sup>88</sup> This is with a view to agreeing, whether in the light of IT developments, experience in applying tariff concessions, or changes to the HS nomenclature, that the Attachments should be modified to incorporate additional products. This periodically meeting is also for the consultation on non-tariff barriers to trade in IT products. Such discussions shall be without prejudice to rights and obligations under the WTO Agreement.

Participants of the ITA were required to meet to review the state of acceptances received and to assess the conclusions to be drawn therefrom.<sup>89</sup> The meeting was to be held no later than 1<sup>st</sup> April 1997. Participants were then required to implement the actions foreseen in the Declaration provided that participants representing approximately 90 per cent of world trade in IT products had by then notified their acceptance. This was the timeline for the critical number of the ITA membership which if it was not achieved then the provisions of the Declaration to the ITA would not have taken effect. This is what was otherwise known as the critical mass

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<sup>88</sup> *Ibid* section 3

<sup>89</sup> *Ibid* section 4

agreement. At this meeting the participants established that the membership criteria had been met and the ITA took effect.

ITA members had been initially required to meet as many times as necessary to consider any divergence among them in classifying IT products, beginning with the products specified in Attachment B.<sup>90</sup> The members had to agree on the common agenda of achieving, a common classification for these products within existing HS nomenclature, giving consideration to interpretations and rulings of the World Customs Organization. In any instance in which a divergence in classification persisted, members considered whether a joint suggestion could be made with regard to updating existing HS nomenclature or resolving dispute in interpretation of the HS nomenclature.

The signatories to the ITA were required to accept that Article XXIII of the GATT will address nullification or impairment of benefits accruing directly or indirectly to a WTO Member participant through the implementation of the ITA.<sup>91</sup> This will be the case because of the application by another WTO Member participant of any measure, whether or not that measure conflicts with the provisions of the GATT. This modality categorically provides that the provisions of the GATT are still enforceable when it comes to the benefits under the ITA. Therefore, it is conclusive that the ITA operates under the framework of GATT.

Finally, each ITA signatory is mandated to afford sympathetic consideration to any request for consultation from any other signatory concerning the undertakings set out in the ITA modalities and product coverage sections.<sup>92</sup> Such discussions, shall be without prejudice to rights and obligations under the WTO Agreement. This means that the entire scope of engagement for the

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<sup>90</sup> *Ibid* section 5

<sup>91</sup> *ibid*

<sup>92</sup> *ibid*



signatories of the ITA all fall under the WTO framework. It is these product coverage modalities that regulate the operationalization of the ITA among all the member states.

#### **2.4 IT products dispute resolution.**

Signatories of the ITA may end up in a dispute over the tariffs or tariff measures related to a certain ITA product or component. These disputes as anticipated are resolved under the provisions of the WTO dispute settlement mechanism. This is started by the aggrieved state requesting for consultations with the WTO. The WTO then establishes a panel which investigates the alleged violations. Once the panel has done conclusive investigations and hearing of the main parties and contributions from interested parties, the panel presents its finding to the dispute settlement unit. The dispute settlement unit then adopts the finding of the panel as a determination of the dispute over tariffs.

In the disputes presented to the dispute settlement unit of the WTO, the issues therein are usually multiple and complicated. This is usually because for every dispute, there may be several products affected and several clauses of the GATT and ITA violated. Indeed, in the words of the panel chairman in the dispute between the United States and European Union,<sup>93</sup> he categorically stated that the dispute before him was complex. To be specific, the Chairman of the panel informed the Dispute Settlement Board that due to the complexity of the matter, the panel would not be able to complete its work within six months from the date of the panel's composition. Part of the complexity in the dispute was because the complaint included several IT products. Therefore, this research captured, part of the decision of the panel, as regards the Flat-Panel Display Devices only. In the dispute, the United States was the complainant, the European Union was the respondent and there were several third parties.

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<sup>93</sup> United States vs European Union, WT/DS375/17, EC — IT Products, 11 July 2011

The United States requested consultations with the EU under the WTO DSU and its member States On 28 May 2008 with respect to their tariff treatment of certain information technology products.<sup>94</sup> The United States claimed that tariff treatment the EU and its member States accorded to some IT products did not adhere to commitments to provide duty-free treatment for these products under the ITA. According to the United States, the EU and its member States imposed duties on these products contrary to their scheduled duty-free tariff concessions arising from the ITA.

The complainant asserted that a number of the respondents customs classification legal instruments, alone or in combination with Council Regulation EEC No. 2658/87 on tariff and statistical identification and on the Common Customs Tariff, were inconsistent with the respondent's and its member States' obligations under Article II:1(a) and II:1(b) of the GATT 1994 and their Schedules, and therefore nullified and impaired benefits accruing to the Complainant under the GATT 1994.

The complainant also claimed that the publication of certain amended explanatory notes in the EU Official Journal after their application by its member States is inconsistent with the EU's obligations under Article X:1 and X:2 of the GATT 1994. Thailand, Japan, the Philippines, Singapore, Chinese Taipei and China requested to join the consultations. The complainant together with, Japan and Chinese Taipei, jointly and severally, requested for the establishment of a panel to hear and determine the dispute. The DSB thereafter established a panel.

The panel conducted initial fact finding in order to determine the genesis of the dispute between the members. The findings of the panel were that certain EU measures resulted in dutiable tariff treatment of flat-panel display devices. The panel concluded that in the absence of the duty suspension, the measures directed national customs authorities to classify some flat panel

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<sup>94</sup> *Ibid.*

display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, under dutiable headings. Because the concessions under the ITA and GATT call for duty-free treatment of products falling within their scope, this dutiable treatment is inconsistent with Article II:1(b) of the GATT 1994.

Given those products in dispute falling within the scope of the Flat panel display devices narrative description or within the scope of CN code 8471 60 90 and that were not covered by the duty suspension with the result that they were subject to dutiable treatment, the duty suspension did not eliminate the inconsistency with Article II:1(b) for these products and therefore this dutiable treatment was inconsistent with Article II:1(b) of the GATT 1994.

The EU failed to accord treatment no less favourable than that set forth in its Schedule to the commerce of the other WTO Members, in particular certain flat panel display devices that are capable of receiving and reproducing video images both from an automatic data-processing machine and from a source other than an automatic data-processing machine, or that have a DVI interface, whether or not they are capable of receiving signals from another source. Thus, the EU was acting inconsistent with Article II:1(a) of the GATT 1994.

In conclusion, the panel found that to the extent that the EU acted inconsistently with Articles II:1(a), II:1(b), X:1 and X:2 of the GATT 1994, it had nullified or impaired benefits accruing to the United States under that Agreement. The panel recommended that the DSB request the EU to bring the relevant measures into conformity with its obligations under the GATT 1994. This formed the summary decision of the Dispute resolution mechanism of the WTO for this particular dispute. It goes on to explain that any dispute arising under the ITA will be resolved by the WTO dispute resolution mechanism. This has to be after the aggrieved country lodges a complaint with the WTO for resolution. This also showcases the importance of ITA during

its 20 plus years of existence. Over 400 disputes have been lodged and over 40 of them have been resolved already.

## **2.5 ITA product list expansion.**

In 2015, Kenya conspicuously hosted the world trade ministerial conference in Nairobi, whose main agenda was to discuss the product list expansion.<sup>95</sup> In the run up to the 2015 meeting, it was said by the minister for foreign affairs Ms. Amina Mohammed that the country stood to benefit from the fruits of the agreement. “Even though Kenya is not yet a member of the group, it stands to benefit from the agreement along with all World Trade Organization (WTO) member states. We are a hotbed of innovation and entrepreneurship, we are going to identify how and when we can join the ITA,” said the minister. Once a country shows interest in the ITA, it attracts investment. “There are many benefits of the ITA, many technology products become zero rated. This will be good for the country since we are already far ahead of everyone else,” added the minister.<sup>96</sup>

“At long last, the effort to expand the ITA is now irreversibly bound for implementation July 1, 2016 after negotiators attending the 10th WTO Ministerial Conference in this capital city of Kenya reached final agreement on the phase-out periods for the 201 tariff lines covered by this landmark trade pact.”<sup>97</sup> This was an additional statement by president John Neuffer who was one of the attendees of the event. The statement by the leaders denote excitement and passion to take the ITA forward. Countries are involved in the process. Kenya however, is keen on involving itself but has moved on cautiously for several reasons.

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<sup>95</sup> World Trade Organisation, ‘10<sup>th</sup> Ministerial Conference’, December 2015

<sup>96</sup> Maureen Murimi, ‘Kenya Reaps Big from WTO Information Technology Agreement’, Citizen Digital

<sup>97</sup> President; CEO John Neuffer, 'Nairobi Delivers ITA Expansion!' *Semiconductor Industry Association, 2019* <<https://www.semiconductors.org/nairobi-delivers-ita-expansion/>> accessed 16 September 2019.

Under the ITA as initially ratified, the products to be covered included; computers, computer components and computer equipment; electric components like semiconductors; telecommunication equipment and analytical equipment. Under the expanded ITA list there were additional products included in the ITA. These additional products included new generation semiconductors; Geographical Positioning System navigation systems; machine tools; touch screens; consumer electronics; speakers, game consoles and medical devices.

From the expansion of the ITA in 2015 we see that there were included IT equipment and electronics which were more advanced from the initial ITA product list. This is in conformity to the provision of the ITA on recurrent meetings of the member states to discuss the products which need to be included in the list.<sup>98</sup> The meeting that took place in Nairobi showed that the members of the ITA have goodwill as regards the ITA product coverage and that the ITA is a functional agreement by the WTO. The researcher's objective was to look at the role and impact these additions will have on Kenyan law. The impact shall be assessed in the next chapter.

## **2.6 Chapter summary**

Chapter two has considered the framework of the ITA. At the international stage, the WTO regulates trade policies among the signatories. We have seen that the ITA was established under the framework of the WTO among the first agreements thereat. In order to understand what the ITA entails, this chapter conclusively addressed the content of the ITA. This is in order to open it up for analysis and comparison with the Kenyan legal framework. Understanding the ITA framework makes it easy to discuss it in the context of the Kenyan law as will be done in the next chapter.

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<sup>98</sup> WTO, 'Information technology Agreement' Annex; Modalities and product coverage, section 3

## **CHAPTER THREE**

### **ITA AND KENYA'S LEGAL FRAMEWORK**

#### **3.0 Chapter Introduction**

This chapter addresses Kenyan law on tariffs and the weighs its sync with the ITA. The issue of how well the document is appreciated under trade laws in Kenya shall be expounded, its impact and legal implications. However, it must be clear to the observers that international treaties however popular must take shape of the municipal law of the subject country.

Since 1997, when the ITA became operational, Kenya is lagged behind in adopting and domesticating the multilateral agreement. As much as Kenya was participating in round tables and contributing to its expansion as demonstrated in the Nairobi talks, the country failed to fully implement the document due to certain considerations as discussed in this paper. Hence, Kenya has not ratified the agreement. However, every other step the country has taken in IT has tended to favour the adoption of the ITA that require zero rate on IT product tariffs. Suffice it therefore to say that Kenya appears to be cautious not to annoy its neighbours by adopting the agreement single handedly away from its commitment to the regional balance through regional trade agreements including COMESA, EACC to name a few. In this chapter the legal framework governing IT products in Kenya will be highlighted in order to espouse the key role that ITA may fulfil in the development of the law on trade technology in Kenya if it were implemented in Kenya.

#### **3.1 The WTO rules applicability in Kenya**

The rules of international trade can be found within the international institutions such as the WTO. Established in 1994 and in operation since 1995, the WTO is an international body that creates rules for international trade among the member states and international business

associations.<sup>99</sup> The rules for international trade as captured by the WTO are applicable in Kenya too because Kenya is a signatory and monist state in its nature. As a result of the monism status, the WTO rules apply in Kenya and even without the implementation of the ITA these rules are in effect being applied, as will be discussed below.

Active and Passive signatories is a concept more lately brought up by Henn in his exclusive assessment of the ITA development since inception to-date.<sup>100</sup> Henn describes active signatories as the original signatories to the ITA with an already established IT sector. Further described is the passive signatories who are signatories with a much smaller ITA sector that joined the ITA after 1997. The scholar has broadly looked at the importance of bilateral and multilateral agreements which tend to accommodate the international agreements within their regions without necessarily having to sign the document. While it is not the case in Kenya, however, a close look at the East African agreement such as the East African community Customs agreement, one finds that the CET has been harmonized to reflect the common interests of the region's commerce. This has to a recognizable extent influenced business and tax law in the East African member states.

The above also follows the principle intentions of the Constitution of Kenya which provides that treaties or conventions ratified by Kenya shall form part of the Law of Kenya.<sup>101</sup> This means that in the application of the laws of Kenya, consideration shall be paid to Kenyan Law as well as International laws and treaties.

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<sup>99</sup> *Marrakesh Agreement* (1867) U.N.T.S. 154; 33 I.L.M. 1144 (1994) which provides for the establishment of the WTO

<sup>100</sup> Xiaobing Tang, Roberta Lascari, '20 Years of the Information Technology Agreement; Boosting trade, innovation and digital technology' World Trade Organisation.

<sup>101</sup> *Constitution of Kenya*, Article 2 (5) (6)

The Most Favored Nation rule is captured in the General Agreement on Trade and Tariffs.<sup>102</sup> Ratification of the GATT treaty in Kenya also makes the country a party and a signatory. MFN rule requires that the parties to the treaty accord one another most-favored-nation treatment meaning that they give one another the benefit of any trade privilege or preference they accord to any other WTO member country. Article 1 on MFN is related to that which stipulates that there shall be national treatment meaning that GATT parties do not discriminate among their reciprocating countries between domestic and imported products on the basis of import status.<sup>103</sup>

There is also provided in the GATT the rule on National treatment.<sup>104</sup> This means that GATT parties ought not to discriminate between domestic and imported products on the basis of import status. This prohibition against favoring of national goods over imported goods aids in ensuring that there is fair treatment of goods manufactured within a nation and those imported from nations that have ratified the treaty.

Kenya also implemented a policy by the African Union to levy a 0.02% levy on eligible non-African Imports to form part of the fiscal base of the African Union.<sup>105</sup> The implementation of this decision was done through the reduction of an existing levy (import declaration fee) from 2.5% to 2% the 0.2% of the AU levy is then derived from the import declaration fee. This applies to all the imports that fall within the said category. Hence, manifestation of the MFN rule is seen whereby the reduction of the existing levy is applied to all the countries importing into Kenya equally.

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<sup>102</sup> Article 1, *General Agreement on Tariffs and Trade*, Oct 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S 194

<sup>103</sup> *Ibid* article 1

<sup>104</sup> *Ibid*, article 3

<sup>105</sup> Philomena Apiko, Faten Aggad; *Analysis of the implementation of the African Union's 0.2% levy*, 2018 at pg. 7



The implementation of the reciprocity principles in treaty law in Kenya requires that the same rule is reciprocated in contracting jurisdictions. However, Kenya has not been a benefactor of the same according to a government report. It is stated in that report that the country's export products export base is narrow, as evidenced by about 5 products such as (tea, horticulture and coffee) accounting for 56 percent of total exports in 2014.<sup>106</sup> This explains the dismal share of the country's total export in total global merchandise trade, which is estimated at 0.03 percent. This may mean that Kenya may not be a benefactor of the MFN rule in the corresponding jurisdictions for other merchandise during export. What law is being applied to hinder Kenya from accessing the international market and international law practices under the WTO law regime? The researcher has attempted to discuss this issue below.

### **3.2 Treaties and ITA in Kenya**

As earlier outlined, within the current legal framework in Kenya, international law is deemed part of the law of the Republic. Kenya is a member of the African Union, COMESA and the East African Community. All these treaties that Kenya has entered into as a state have laws which regulate the operations of the states towards each other when conducting international business. These laws are the same ones that will be applicable in Kenya, and the state shall rely upon them for both regional and international obligations when it comes to trade. Kenya ratified the treaty establishing the East African Community on 18<sup>th</sup> June 1993.<sup>107</sup> Through the EAC treaty, several laws concerning the relationship between the EAC member states were established by the EAC legislative assembly.

The member states of the East African Community assented to the EAC Customs Management Act in 2004 for the administration and management of customs for the partner states.<sup>108</sup> The

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<sup>106</sup> National Trade Policy, *State Department for Trade report* 2017, pg. 34

<sup>107</sup> *Treaty Establishing the East African Community* (1993)

<sup>108</sup> East African Community Customs Management Act No. 1 of 2005

act provided for the administration of a common external tariff, enforcement of the customs law of the community and customs related negotiations.<sup>109</sup> This act was later amended in 2009 to become relevant for purposes of adjusting it to the ever changing legal regime.<sup>110</sup> It is under this act that the East African Partner states have been levying duties both regionally and internationally.

For example, under the EAC common external tariff a comparison of the tariffs on several select items that appear on the ITA with those appearing on the common external tariff shows a surprising finding.<sup>111</sup> While the ITA advocates for 0 tariffs, the EAC common external tariff also provides for the levying of tariffs at 0% for the certain specific type of goods. This is seen for magnetic resonance imaging apparatus and ultrasonic scanning apparatus which are Items 148 and 147 on the ITA product list and items 9018.13.00 and 9018.12.00 on the common external list respectively.<sup>112</sup> Again, under the EAC, there exists the Custom Union Protocol where the member states agreed an implemented policies for the elimination of internal tariffs and a common external tariff structure of 0% for raw materials, 10% for intermediate goods and 25% for finished goods.<sup>113</sup> Through such systems, the MFN rule may be easily bypassed and the competing products may end up suffering from unfavorable treatment.

However, this does not mean that the tariffs indicated by the EAC CET are the same and zero rated as those of the ITA list. In fact, the products on the EAC CET are categorized into three tariff bands: 0 percent for meritorious goods, raw materials, and capital goods; 10 percent for intermediate goods; and 25 percent for consumer goods.<sup>114</sup> It is from this categorization that

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<sup>109</sup> *Ibid* Art 4(1).

<sup>110</sup> *East African Community Customs Management (Amendment) Act 2009*

<sup>111</sup> *Protocol to the establishment of the East African Community*, annex 1 – Common External Tariff (2017 version)

<sup>112</sup> *Ibid* (Cross compare the provisions of the EAC CET and that of the ITA in list A)

<sup>113</sup> Ministry of East African Community and Regional Development Report, *report available at* <http://meac.go.ke/eac-achievements/>

<sup>114</sup> Meredith A. McIntyre, *IMF Working Paper- African Department*, ‘Trade Integration in the East African Community: An Assessment for Kenya’, (July 2005)

the EAC determines which tariff rates are to be applied to certain goods.<sup>115</sup> Placing reliance on this regime entirely means that some ITA goods which are not covered by the zero tariff of the EAC CET will have tariffs rated at 25% thereby discouraging trade of IT products in Kenya.

The East African Trade Negotiations Act<sup>116</sup> was to inter alia provide for the joint trade negotiations for the entire East African Community partner states. The trade negotiations act provided for the unified negotiations of the partner states of the EAC as a block.<sup>117</sup> The act further provides for the negotiation of the partner states in bilateral, regional and multilateral trade jointly.<sup>118</sup> This means that a partner state may not negotiate without seeking the indulgence of the rest of the member states.

Under the COMESA treaty, there is in the field of trade liberalization plans to establish a customs union, abolish all non-tariff barriers to trade among themselves, and establish a common external tariff and to cooperate in customs procedures and activities.<sup>119</sup> The treaty provided for the progressive establishment of a customs union among the member states within a period of 10 years from the establishment of the treaty.<sup>120</sup> Further, the member states were to further reduce and ultimately eliminate by 2020 customs and duties and charges of other charges of equivalent effect.<sup>121</sup> Under the COMESA treaty, we see that the partner states have some concession to negotiate as a block in the lowering of tariffs and in having of a common external tariff.

The COMESA CET treaty also has tariff bands that are similar to those of the EAC CET. The tariff bands under COMESA are the categorization of products into the three bands of the tariff

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<sup>115</sup> A 1999 report adopted by the EAC Secretariat had recommended that EAC countries adopt the Uganda tariff structure (of 0, 7, 15)

<sup>116</sup> *East African Trade Negotiations Act* (2008)

<sup>117</sup> *Ibid* Section 3(2)

<sup>118</sup> *Ibid* Section 2(a)

<sup>119</sup> Treaty for the establishment of the Common Market of Eastern and Southern Africa, (2009) Article 4(1)(a)

<sup>120</sup> *Ibid* Art 45

<sup>121</sup> *Ibid* Art 46

structure (0%, 10%, and 25%).<sup>122</sup> This means that not all IT products as categorized under the ITA and agreed to be included in the list from time to time may have the zero tariffs protected by the COMESA CET. It further explains that in order to enjoy the zero tariffs under the ITA a state such as Kenya ought to ratify the ITA.

Kenya is a member of the African Union through the ratification of the constitutive Act of the African Union.<sup>123</sup> The AU was established to unite the member states of the African Continent for the emancipation of the African Peoples and for a united strong Africa.<sup>124</sup> The agenda of the AU has been advanced ever since with the formulation of various policies and strategies that have influenced member states operations. This influence extends to the realm of trade.<sup>125</sup>

The AU member states at a meeting in Addis Ababa on March 2018 came up with the agreement to establish African Continental Free Trade Area (AfCFTA).<sup>126</sup> Having been signed earlier, the AfCFTA came into force on the 30<sup>th</sup> May 2019. It instantaneously became the largest free trade agreement as recognized under the WTO. Already at its inception, the AfCFTA had goodwill from the member states and it is geared to be applied in line with the existing custom regimes of the relevant member states. However, the coming into force of the AfCFTA means that some time has to pass before a common AfCFTA under the auspices of the AU comes up with a CET. Therefore, under this agreement, Kenya may not enjoy the zero tariffs of the ITA products as a single nation.

The AfCFTA is an intra-continental agreement which governs the member states when dealing with commodities that have an origin within the member states. If it turns out that any member state gets involved in the production of information technology products, being countries such

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<sup>122</sup> *Ibid* COMESA CET.

<sup>123</sup> *Constitutive Act of the African Union*, (2000)

<sup>124</sup> Organization of African Unity (OAU), *Constitutive Act of the African Union*, 1 July 2000

<sup>125</sup> *Ibid* article 13

<sup>126</sup> *Agreement Establishing The African Continental Free Trade Area*, 'Treaties On Trade, Economic Integration & Development' *African Union*, 2018 <[https://au.int/sites/default/files/treaties/36437-treaty-consolidated\\_text\\_on\\_cfta\\_-\\_en.pdf](https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf)> accessed 17 September 2019.

as South Africa, then those specific products shall not be charged any duties or tariffs. This then shows that the ITA even when not acceded to by Kenya, does not influence the levying of customs and duties payable from the member states on ITA listed products.

### **3.3 Kenya law and ITA**

The researcher went out to study on what Kenya can do to influence the regional blocks to co-opt the ITA into all the regional agreements Kenya has signed. The Kenyan Constitution states that all international treaties ratified by Kenya form part of the law of Kenya.<sup>127</sup> In Kenya, besides the Constitution, there are laws enacted by the national Assembly (parliament) which are used to domesticate International Law in Kenya. One such legislation is the Treaty Making Act.<sup>128</sup> Before the enactment of the Constitution of Kenya 2010, Kenya ratified its international obligations through a dualistic approach where the International treaties were adopted depending on the specific provisions of the subject agreement as well as looking at the Kenyan domestic law touching on the subject. This is true of International crimes under ICC-3 for example.<sup>129</sup>

As said before, Kenya adopted a monism approach to its international obligations under the 2010 Constitution. Prior to the 2010 Constitution of Kenya, the sources of law were the constitution, acts of parliament, some specified United Kingdom statutes where no written law existed, the substance of common law doctrine of equity and statutes of general application in force in England on 12 August 1897 and the customary law.<sup>130</sup> The year 2010 Constitution of Kenya therefore created a last resort source of law known as “all international treaties ratified by Kenya”.<sup>131</sup> Clearly this means that International law has now become a source of law

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<sup>127</sup> Republic of Kenya, *Constitution of Kenya*, Article 2(6)

<sup>128</sup> Treaty Making and Ratification Act No. 45 of 2012

<sup>129</sup> Kenya National Assembly Official Record (Hansard) 14 Nov 2001

<sup>130</sup> Section 3 (I) (c) of the *Judicature Act*.

<sup>131</sup> *Constitution of Kenya* article 260

directly without the necessity of being enacted under municipal legislation. The above position was not obtaining prior to 2010. The courts had held that any legal principles outside the purview of the Judicature Act would be considered as a source of law. In *Okunda vs Republic*<sup>132</sup> it was found that the International law did not form part of the Kenyan law unless that specific law had been domesticated by the municipal law of Kenya. In this theory was based the British principle of state sovereignty and supreme role of parliament.

Kenya adopted the dualist approach for a long time until the 2010 constitution came in to change the status quo. Maurice Oduor<sup>133</sup> cites the court of appeal decision and sums up his view of the International Law in Kenya. “The Court of Appeal in the case of *Rono v Rono*<sup>134</sup> appreciated that ‘the current thinking on the common law theory [that is, dualism] is that both international customary law and treaty law can be applied by State Courts where there is no conflict with existing state law, even in the absence of implementing legislation.’ Taking up this gauntlet, Justice Rawal in the *Lerionka ole Ntutu*<sup>135</sup> case observed that courts in Kenya could ‘have regard to international obligations’ that Kenya had undertaken for purposes of removing ambiguities. Kenyan courts seem to have had challenges domesticating the International law prior to the Constitution of Kenya 2010 as each case had to be looked at based on its merit.

### **3.4 Legality of Kenya’s tax regime and ITA**

Kenya is largely a market economy heavily dependent on market forces with almost nil government intervention. The customs law on taxes and tariffs is controlled by these factors. According to Kenya Bureau of Statistics 2014 report, imports grew by 2.8 % mainly due to

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<sup>132</sup> *Okunda vs Republic* (1970) EA 453

<sup>133</sup> Maurice Oduor, *The Status of International Law in Kenya*, (2015)

<sup>134</sup> *Rono vs Rono* (2005) 1 KLR

<sup>135</sup> *Estate of Lerionka ole Ntutu* Succ. No.1263 OF 2000 1 KLR

purchases of petroleum products, capital goods, food products and chemical fertilizers, which accounted for 58.4% of the total import bill.<sup>136</sup>

High taxes form the number one barrier to global trade. Attempts have been made to interrogate the tax policy regimes through personal contacts of select officers of KRA. What has been revealed is that there is concerted effort to use national values and the philosophy of protectionism approach to taxes than the WTO based principles of zero rate tax on ITA-products & global trade. The KRA customs service department is established by an act of parliament Cap 472 of 1978 and has the mandate of customs and excise management. It administers the customs services through the East African Customs Management Act of 2004.<sup>137</sup>

To import any commodity into Kenya, one has to enlist the services of a clearing agent who will process the import documentation through Kenya Customs electronically on Simba 2005 system. The system captures both the product and its tax rate for clearance.<sup>138</sup> An import declaration Fee of 2.25% of the CIF value subject to a minimum of Ksh. 5,000/= is payable. Customs will assess duty payable depending on the value of the item(s) and the duty rate applicable. All these rates are inherently captured in the said 'Simba' system per the provisions of the East African Community Customs Management Act<sup>139</sup> and the Value Added Tax Act.<sup>140</sup>

Kenya applies tariffs based on the international harmonized system of product classification where every import may be levied differently for instance the tariff equipment and plants for generation of electricity, borehole drilling machinery received a duty granted to the importers since 2003 and this evidences diversity in the tax system. Existing data does not show that the

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<sup>136</sup> World Business Report, *Ease of Doing Business in Kenya*, (2014)

<sup>137</sup> The *East African Customs Management Act*, (2004)

<sup>138</sup> Republic of Kenya, Kenya Revenue Authority Website, accessed at [www.kra.go.ke/notices/noticesimbatraining241005.htm](http://www.kra.go.ke/notices/noticesimbatraining241005.htm)

<sup>139</sup> The *East African Customs Management Act*, (2004)

<sup>140</sup> *Value Added Tax Act* No. 35 of 2013

Simba system has captured the specific ITA products in detail as ITA products but the products exist in the system anyway.<sup>141</sup> Documents available at the KRA registry indicate that ITA goods are treated just like any other products and are taxed in accordance with the tax law.<sup>142</sup> This is because as earlier mentioned, the CET by COMESA and EAC apply a three band tariff on products based on importance. Therefore, this position does not direct Kenya to categorize all the imported commodities in its system under the ITA because it is not a signatory.

Indeed, Kenya applies tariffs based on international harmonized system of product classification and applies duties and tariffs of the East African Community common External Tariff. In general, custom duty is levied at rates between 0% and 100%, with an average of 25%. Imports into Kenya are subject to a standard VAT rate of 16%, levied on the sum of the CIF value, duty, and other applicable taxes.<sup>143</sup>

The KRA Simba system captures all the taxable goods which stakeholders use to pay the taxes. A close look at this system shows that most ITA based products have not been zero rated to date. The position taken by the country is that Kenya young and developing. It is also surrounded by neighbours who have formed into regional agreements. Hence, a feeling amongst governance leaders in Kenya that protectionist approach to tax matters is the only way to cushion and support the young economy from overbearing developed nations is inevitable.<sup>144</sup>

### **3.5 Law and ITA domestication.**

It is common experience of life that in order to use a product one has to interact with it. The product list of the ITA contains several products and many of them not yet known or well used by the Kenyan market. Use of computers has grown with time, so has technology acceptance.

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<sup>141</sup> Appendix A and B of the ITA product list attached hereto

<sup>142</sup> *Kenya Technical Report* (2014)

<sup>143</sup> *Ibid*

<sup>144</sup> Pickel, D., *Import policies, tariffs and restrictions*, (2004) available at <https://prezi.com/v6wimbq192lh/import-policies-tariffs-and-restrictions/August-2014>



Kenyan rate of excitement and use of technology was largely aided by the inception of good ICT policies by the government as far back as 1997 when internet started becoming permissively liberalized in Kenya.<sup>145</sup>

ICT plays a major role in developing and developed economies in job creation and diversification of economic and social activities in different sectors. A study conducted in Ghana by Agboh, (2015) cited the work of Pavic, Koh, Simpson and Padmore (2007) who opined that the literature shows that the desire for lower costs, improved productivity, higher product quality, higher customer satisfaction, and ability to focus on core areas are some of the key drivers of ICT adoption.

The literature further shows that research in the adoption of ICTs by organizations is growing.<sup>146</sup> The advancement in ICTs has a major influence on globalization, and rapid revolutions in information and knowledge base. Overall, the main drivers that have repeatedly appeared in the literature in both developing and developed nations are perceived benefits, increased sale<sup>147</sup>, and improved customer services.<sup>148</sup> With ICT use, businesses can interact more efficiently and become digitally networked.<sup>149</sup>

The Kenyan law broadly recognizes the above trend. Government Policy on facilitation of the ICT growth in Kenya through use of computers and all related information technology equipment is developing. As recently as July 2016, Kenya's parliamentary majority leader filed a bill on Information Communication Technology.<sup>150</sup> The said law has broadly been opposed

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<sup>145</sup> Republic of Kenya, Ministry of Information and Communications, '*National Information & Communications Technology (ICT) Policy*', January 2006 p. 3

<sup>146</sup> Pavic, S., Koh, S.C.L., Simpson, M. and Padmore, J. "Could e-business create a competitive advantage in UK SMEs?" *Benchmarking: An International Journal*, Volume 14, No. 3, (2007). Pages. 320-51

<sup>147</sup> Dubelaar, C., A. Sohal, "Benefits, impediments and critical success factors in B2C" *E-business adoption. Technovation* Volume 25, Number 11, (2005) Pages 1251-1262.

<sup>148</sup> Scupola, A. "SMEs' e-commerce adoption: perspectives from Denmark and Australia", *Journal of Enterprise Information Management*, Volume 22, Numbers ½, (2009) Pages 152-166.

<sup>149</sup> Buhalis, D. "Airlines: strategic and tactical use of ICTs in the airline industry", *Journal of Information and Management*, Volume 41, (2003) Pages 805-825.

<sup>150</sup> *Information Communication Technology Bill* (2016).

by the industry players for being exclusive and non-participatory. However, the significance of that development alone is that Kenya has been doing what it needs to do to promote use of IT to its people as a means of growing their trade & trade awareness.

ITA relies on the government and private sector understanding of the ICT environment as a way of fully implementing the ITA agreement for Kenya. The East African Community Customs Management ACT 2004, the Excise duty, among other Customs related legislations such as the community appropriation Acts, all form part of the desktop analysis of the impact law and policy have made to the implementation of the ITA in Kenya.

### **3.6 Kenya's position on international trade and implementation policy**

Kenya's development agenda is guided by clearly defined long term and medium development strategies. Preceding the Kenya Vision 2030, are a number of development strategies that not only shaped development planning, but also laid the premise for guided implementation of Kenya's development agenda. Two of these worth mentioning are: The Sessional Paper No. 10 of 1965, "African Socialism and Its Application to Planning in Kenya" credited for being the first well thought out planning policy document for the Government as well as putting an end to the era of pursuing economic development through party manifesto declarations; the second is the "Economic Recovery Strategy for Wealth and Employment Creation (ERS) 2003 – 2007" credited for putting back Kenya's economy on a growth path. Successful implementation of the ERS policies enabled Kenya's Gross Domestic Product to grow from a low of 0.6 % in 2002 to a record 7.1 % in 2007 with all other economic and social indicators improving.<sup>151</sup>

Currently, Kenya's development agenda is guided by the Kenya Vision 2030 and its five-year medium-term plans; the Jubilee Manifesto 2017; the "Big Four" Immediate priorities and

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<sup>151</sup> Kenya, *Economic Recovery Strategy For Wealth And Employment Creation 2003 – 2007*, Ministry of Planning and Development, June 2003

actions; the East African Community Vision 2050; the United Nations development agenda as contained in the Sustainable Development Goals and the Africa Union Agenda 2063<sup>152</sup>, as well as other regional, continental and global treaties and conventions.

The EAC Vision provides a catalyst for the region to enhance transformation for growth and development and move the community to a higher income cohort and subsequently achieve an upper middle-income status within a secure and politically united East Africa based on the principles of inclusiveness and accountability. Similarly, the AU Agenda 2063 envisages a peaceful, secure, globally influential United Africa with strong governance systems where the rule of law thrives and a strong growing economy able to afford the African people good life.<sup>153</sup>

The SDGs build on the successes and lessons learnt in the implementation of the Millennium Development Goals (MDGs) and put forward targets to be pursued by all nations to develop their countries to afford their citizens a decent life where the economic and social needs can easily be met. These are indeed the same aspirations of the Kenya Vision 2030 being pursued by the government through its implementing agencies, the Ministry of Foreign Affairs included.

The overriding goal of the Kenya Vision 2030 is to transform Kenya into a newly industrializing middle-income country providing a high quality of life to all its citizens by the year 2030. The policies and strategies outlined in the Vision aim to address the economic, social and political challenges facing the country categorized in three pillars as such. Similarly, the Ministry's programs and activities focus on reducing poverty levels, employment creation, sustainable development and economic transformation, peace, security and stability.

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<sup>152</sup> *Agenda 2063* (African Union Commission 2015).

<sup>153</sup> *Ibid* pg. 1

Through the five pillars of the Kenya Foreign Policy, the Ministry focuses on promotion of trade, foreign direct investment, regional and international cooperation; promotion of peace, security and stability and conflict resolution as a precursor to economic prosperity; sustainable management of natural resources and combating contemporary environmental issues; preservation and promotion of our cultural heritage; promoting and safeguarding Kenya's interests abroad and enhancement of Diaspora engagement and participation in national development.<sup>154</sup> The mandate of the Ministry therefore cuts across the three pillars of the Vision and therefore addresses itself to these same objectives as the Vision.<sup>155</sup>

To date, the country has implemented two five-year medium plans of the Kenya Vision 2030 and the implementation of the Third Medium Term Plan will commence in July 2018. Over their periods of implementation, the first two MTPs isolated priorities to be implemented by the Ministry of Foreign Affairs which have enabled the Ministry to make great strides towards contributing to the realization of the Kenya Vision 2030 aspirations.

Key among these programs are: Development of Kenya Missions Abroad; Promotion of Nairobi as a Hub for multilateral diplomacy; Restructuring of the Kenya Foreign Service Institute; Realigning Kenya's foreign policy with the nation's economic cooperation and international trade objectives; developing and implementing Kenya Diaspora policy and implementing the thirty percent public procurement preference, access to Government Procurement opportunities policy for youth, women and PWDs.

A number of these programs have been rolled over to the next MTP period since they are continuous. The Ministry priorities during the Third Medium Term Plan are elaborated in section 2.1.2. These are backed up by the Jubilee Government's "Big Four" Agenda by the year 2022 for economic development which focuses on increased manufacturing, food and

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<sup>154</sup> 'Kenya Vision 2030' (2008) <<https://vision2030.go.ke/about-vision-2030/>> accessed 3 September 2019.

<sup>155</sup> *ibid*

nutrition security, universal healthcare and affordable housing whose outcome is a healthy public with reduced poverty.<sup>156</sup>

The above ministry of foreign affairs & International Trade analysis depicts a picture of Kenya engrossed on implementing other international and regional treaties and agreements and is not focused for now on the ITA implementation. This research continues to look at the how it would benefit the country if the ITA were implemented fully.

### **3.7 (a) E Government initiative**

Kenyan Government has adopted the use of electronic communication devices, computers and the internet to provide public services to citizens and other persons in a country or region. The National e-Governance initiative provides an operational component of the e governance infrastructure and full e commerce facilities that allow secure online payments (e-Payments). The e-payments gateway supports multiple acquiring banks and will operate as a critical shared service within the governance architecture master plan.<sup>157</sup>

The state-of-the-art e payment solution supports the delivery of e services of the public sector and assists the private sectors move into ecommerce. The e-payments gateway enables efficient electronic transactions in Kenya and simplifies the processing of payment transactions for electronic services within the country.<sup>158</sup>

### **3.7 (b) Cloud computing initiative**

I cloud computing is a central initiative provided by the ITA to set the infrastructure needed to build e services and, ultimately, the e government of Kenya. The cloud computing aims mainly to: provide shared infrastructure to government entities to host their infrastructure, platform

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<sup>156</sup> Republic of Kenya, *Ministry of foreign affairs and international trade strategic plan 2015*, at p. 24-27

<sup>157</sup> Republic of Kenya Ministry of Trade, *National Trade Policy*, (2009)

<sup>158</sup> *ibid*

applications and services, ensure the automatic, dynamic provisioning of resources to government entities, share knowledge on open source development to Kenya employees.<sup>159</sup>

The cloud computing provides many services within four main levels, which are: Infrastructure as a service: provides storage, networks and other fundamental computing resources to the government entities to deploy and run arbitrary software, which can include operating systems and applications. The Platform as a service: enables the government entities to deploy acquired applications created using services and tools supported by the provider and software as a service: assists the government entities in using the provider applications running on a cloud infrastructure.<sup>160</sup>

### **3.7 (c) iHub initiative**

iHub was founded in March 2010 in Nairobi Kenya. iHub is an open platform for techies, tech companies and investors alike. The iHub in essence, is a technological collaboration facility that aims to bring together new and inexperienced entrepreneurs, mobile software programmers, researchers, tech designers etc. The iHub is not only a business incubator but it is also a vector for investors and an open community workspace. It is part of an open community workspace, an attraction for investors and venture capitalists. The iHub, being an innovation space is essentially meant to help start-up businesses innovate and to fast track initial growth. The iHub is the first of its kind to operate in Africa in that it allows technologies to progress from idea stage to real product. The Key to iHub effectiveness is one of open innovation where both internal and external ideas are shared as well as internal and external paths to market and to advance the development of new technologies. The iHub has high speed

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<sup>159</sup> Republic of Kenya, Communication Authority of Kenya, *Kenya's Mobile Penetration Hits 88 percent* available at <http://www.ca.go.ke/index.php/what-we-do/94-news/366-kenya-s-mobile-penetration-hits-88-percent>

<sup>160</sup> Republic of Kenya, *Communication Authority of Kenya Report* (2016)

internet connectivity that is often perceived a core part in accelerating start-ups communications and sharing digital information.

### **3.7 (d) iTax initiative**

The Kenya Revenue Authority launched iTax which is a fully integrated automated solution for the administration of domestic taxes. The web supported platform provides internet based tax payer registration, filing and status inquiries with real time monitoring of accounts.<sup>161</sup> The Kenyan government launched an e procurement system which is expected to strengthen relationships with suppliers by providing easy access to documentation and simplifying of the bidding process while providing clear audit trails and identification of the originator of all transactions.<sup>162</sup>

### **3.7 (e) Huduma Kenya**

The government's Huduma Centers provide services and information from one stop shops through integrated technology platforms. The public is able to get birth certificates, national identity cards, passports, registration of business names, application for marriage certificates, drivers' licenses, police abstracts, EACC clearance certificate, NHIF registration, NSSF member statements, registration of welfare groups, status of pension claims, student loan applications and may more other services.<sup>163</sup>

This was mooted and immediately implemented, to harmonise the delivery of government services to the citizens.<sup>164</sup> The Huduma initiative is more IT development oriented which is in

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<sup>161</sup> Republic of Kenya, *Kenya revenue Authority*, web page available at [itax.kra.go.ke/KRA-Portal/](http://itax.kra.go.ke/KRA-Portal/). Retrieved November 12<sup>th</sup> 2016

<sup>162</sup> Republic of Kenya, The National Treasury, *Ifmis e-procurement rolled out throughout the country to enhance service delivery to the public* <http://treasury.go.ke/news-updates/224-ifmis-e-procurement-rolled-out-throughout-the-country-to-enhance-service-delivery-to-the-public>. Retrieved 12<sup>th</sup> November 2016.

<sup>163</sup> Republic of Kenya, *Huduma Services*, available online at <https://www.hudumakenya.go.ke/services.html>. Retrieved 12<sup>th</sup> November 2016

<sup>164</sup> National Council for Law Reporting, 'Establishment Of Governance Structure For Huduma Kenya Service Delivery Programme' *The Kenya Gazette* (Government Printer 2014). Pg. 2177

line with the agenda of the government of the day. Eventually, because of such a development-oriented government, it is plausible that the ITA will be of huge benefit if implemented in Kenya.

### **3.7 (f) Konza technology park**

The Konza technology park is another initiative that shows that the government is keen on technology adoption. The technology city will be on a 5000-acre site and it will host a business process outsourcing park, Science Park, convention Center, mega malls, hotels, international schools, world class hospitals, champions' golf course, financial district, High Speed Mass Transportation and integrated infrastructure. The Park's main objective is to promote the acquisition and usage of ICT and promote good ICT governance.<sup>165</sup> To enhance security, the government of Kenya embarked on installation of surveillance cameras in Nairobi and Mombasa. The project has led to setting up of a central command center, laying of a network infrastructure and installation of 1800 CCTV cameras, 7600 new police phones and 600 vehicle mounted systems.<sup>166</sup>

### **3.7 (g) Education and technology initiative**

Under the Ministry of Education, the government launched various initiatives to enhance service delivery in the provision of quality education. Key among them is the laptop project which seeks to introduce laptops as a teaching and learning tool in the public primary school system. The projects involve issuance of laptops to all class one pupils, digitizing the school curricular and training teachers on the new curricular. Through the project, the government seeks to incorporate ICT to support and enhance the attainment of curricular objectives,

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<sup>165</sup> Republic of Kenya, Ministry of Information Communication Technology, *A Brief On The Konza Techno City*, available at <http://www.ict.go.ke/a-brief-on-the-konza-techno-city/>

<sup>166</sup> Mulligan (2011).



enhance the appropriate competencies including skills, knowledge, attitudes and values, and manage education effectively and efficiently at all levels. The aim is to come up with an educational system that is strongly oriented towards producing citizens who are comfortable and productive in a high-tech world.<sup>167</sup>

In the health sector, the government has partnered with various institutions to roll out initiatives which improve access to health care. It has for instance partnered with Merck and kicked off e diagnostic and consultation at Kenyatta National Hospital and Machakos level 5 hospital. The e health platform will allow patients and health care providers in remote areas through using the power of IP and video conferencing to interact with specialists at Kenyatta National Hospital to extend the reach of healthcare into remote areas.<sup>168</sup>

### **3.8 Further analysis of the ICT factors**

The law relating to Information technology development in Kenya is the Kenya Communications Act.<sup>169</sup> Kenya enacted the act to help steer technology trade further. Currently Kenya is one of Africa's fastest growing ICT markets where ICTs have increased productivity in all spheres of production process and enabled expansion of skills, contributing to improved standards of living for Kenyans. The Economic survey report provides an overview of the ICT sector performance and development trends in mobile telephony service<sup>170</sup>, fixed telephony service, internet/data service, registered domains, broadcasting, postal and courier service and tariffs.

The licensed internet service providers increased further in 2015. The estimated internet users also expanded by 35.9 per cent to 35.6 million users over the same period. Total wireless

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<sup>167</sup> Denvir (2014)

<sup>168</sup> Ogara Odhiambo Otieno (2003)

<sup>169</sup> Kenya Information and Communications Act No. 2 of 1998

<sup>170</sup> The Kenya National Bureau of Statistics, *Economic Survey Report 2016* available at <https://www.knbs.or.ke/download/economic-survey-2016/> (2016)

internet subscriptions increased by 45.4 per cent to 23.8 million with the terrestrial mobile data subscribers having the largest share. Total wired internet subscriptions increased by 20.2 percent to 115,111 with fixed fiber optic data accounting for 96.7 per cent of the total wired subscriptions in 2015.

Fixed fiber optic data grew by 37.1 per cent to 111, 35412 subscriptions in 2015. However, fixed digital subscriber Line data reduced significantly from 14,512 subscriptions in 2014 to 3,732 subscriptions in 2015.<sup>171</sup> It can be realized from table 4.1 that fixed mobile telephone charges in the year 2015, led to stable telephone services installation and subscription fees at Ksh. 3,394 and Ksh. 580/= per month. Respectively, during the period, the average cell cost per minute of fixed to fixed local calls decreased from Ksh. 4.50 to Ksh. 3.00 while that of fixed to mobile remained unchanged at Ksh. 9.00. The average call cost per minute of mobile to mobile decreased from Ksh. 3.10 in 2014 to Ksh. 3.08 in 2018 while that of mobile to fixed remained unchanged at Ksh. 3.25; however, the average price of SMS went up from Ksh.1.00 to Ksh. 1.25.

The domain total number grew by 33.8 per cent to 51,543 in 2015. The number of “.co.ke” domains increased by 35.5 per cent to account for 92.7 per cent of the total registered domains in 2015. The growth in the number of registered Kenyan based domains was mainly attributed to the reduction in renewal and average annual fees from Ksh. 2,320 to Ksh. 580 and Ksh 2,300 to Ksh. 650, respectively.<sup>172</sup>

The Economic survey Report also brought into light the media frequencies and subscriptions which indicated an increase in the number of Frequency Modulation (FM) for radio to 608 while television frequencies rose to 302 in 2015.<sup>173</sup> The number of digital signal distributors in

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<sup>171</sup> *ibid*

<sup>172</sup> *Ibid*

<sup>173</sup> *Communications Authority of Kenya Report (2016)*

the country increased to five due to the entry of self-provisioning and common carrier signal distributors in the market. The number of digital TV stations increased to 62 due to the migration from analogue to digital platform. The terrestrial television (STBs) subscriptions more than tripled to Ksh. 3.7 million in 2015 while cable TV and direct to home satellite subscriptions increased by 44.6 per cent and 18.3 per cent respectively. The number of radio stations increased by four to 139 stations in 2015.<sup>174</sup>

In the year 2015, ICT penetration rate improved for all categories except that of the fixed line, which declined from 0.52 in 2014 to 0.19 in 2015. The improvement in the uptake of the ICT was partly attributed to the affordability of mobile phones in the market; cheaper internet bundles offered by mobile operators and finalization of phase one of laying the fiber optic cables across the country.<sup>175</sup> The internet penetration stood at 54.2 percent in 2015 with that of wireless internet increasing to 53.9 per cent. Total broadband penetration increased to 16.4 per cent in 2015 from 9.9 per cent in 2014. The bits per second per capita (Bps/person) increased by 66.9 per cent to 20,293.0 in 2015. The mobile penetration stood at 94.0 per cent while internet penetration stood at 59.6 per cent in 2015 Broadband subscriptions increased to 18.1 per cent in 2015 from 10.9 per cent in 2014.<sup>176</sup>

The above ICT services suggest that there is equivalent Information Technology software run on a hardware gadget used to increase trade in Information Technology within Kenya. Some of these items are the same as those in the ITA product list.<sup>177</sup>

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<sup>174</sup> *Ibid*

<sup>175</sup> The Kenya National Bureau of Statistics, *Economic Survey Report 2016* available at <https://www.knbs.or.ke/download/economic-survey-2016/> (2016)

<sup>176</sup> Republic of Kenya, *Communications Commission of Kenya report* (2005) at p. 53

<sup>177</sup> *Information Technology Agreement* text WT/MIN (96)/16 Attachment A section 1.

### **3.9 Chapter Summary**

This chapter has brought out the strong role played by the Information Communications Technologies in international trade law and its interplay with the municipal law. The final authority to allow domestication of international documents is placed in the host nation. Kenya's role in implementing international documents has been notable in its history with its friendly nations. ITA as an economic power document is yet to be adopted and domesticated due to international agreements such as the EAC which bind the Kenyan promise to remove tariffs as a block as opposed to a single state amongst the members. This view is captured by the tax laws which levy between 0% to 35% tax. The ITA envisages zero tariffs on all its listed products. The EAC and COMESA CETs also already provided the zero tariffs on select products. However, this selectiveness means that other products under the ITA will face levying of tariffs and import duties. From this chapter, we find that Kenya does not benefit from the complete coverage of the ITA products in any of its regional treaties. We find further that even though the ITA tariffs were to be implemented, they have to be implemented within the confines of the host country. Clearly, therefore Kenya shall be willing or ready to adopt the ITA once its internal as well as regional pacts have been properly legislated to allow for inclusion of the ITA products properly.

## CHAPTER FOUR

### CHALLENGES FACING ITA IMPLEMENTATION IN KENYA

#### 4.0 Chapter introduction

As noted under chapter 2, the 2015 ministerial conference on the ITA product expansion underscored that ITA is an important and integral part of the economies without exception to Kenya. If adopted the agreement would heighten Kenya's international trade status to a notch higher as a developing nation. According to the government representatives during the conference, Kenya was moving closer to embracing the document finally.<sup>178</sup> Like any other international multilateral agreement ratification process, Kenya faces diverse challenges when embarking to adopt and implement the ITA. Such challenges may arise prior to the adoption of the ITA and at the implementation stage itself. These challenges may be viewed as the shortcomings of the failure to adopt the ITA meaning that the challenges arise out of the failure to take advantage of the ITA. In another case, the challenges may arise after the adoption of the ITA. In either case, these are still challenges which must be tackled by Kenya if it has to successfully take advantage of the agreement.

The ITA operationalization challenges are related to the legal framework of the WTO. The major challenges facing the implementation as noted throughout the development of this paper range from basic knowledge & understanding of the ITA up to its complex products appreciation and classification. There are challenges that arise from the WTO law as it is understood internationally, regionally and locally. Such challenges may be conflicting of laws affecting the import and export of goods in the host or original country. There may be a challenge after adoption such as the conflicting of regional treaties with the ITA. Such challenges shall be viewed herein under the ambits of global, regional and national challenges.

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<sup>178</sup> WTO Committee (2015)" Committee of Participants on the expansion of Trade in information Technology products, Status of implementation (Note by the secretariat)" G/IT/1/REV.54 (5 October 2015)

## 4.1 Global challenges

International law as a unit of diverse and divergent rules is a complex system to grasp in a simple understandable system of trade rules. The global system poses serious challenges to national development, especially for resource scarce developing countries like Kenya.<sup>179</sup> The effects of globalization including unfair competition and dumping continue to deprive the economy of potential capital, investment flows and tourists. Slow economic growth in major international players such as the USA, BRIC countries and Eurozone economies, which Kenya relies on for its agricultural exports and tourists affects the growth of the Kenya economy.

While international legal and regulatory frameworks help to create harmony and coherence in the global system, some of them are discriminatory and pose challenges for instance on issues of international labour market. The changing geo-political alignments and resultant bilateral and multilateral adjustments are issues that the Ministry will give attention especially in relation to foreign aid and investment flows. Many countries are looking east for foreign aid and investment and this seems to generate negative perceptions from traditional sources of foreign aid and investment. In addition, fluctuating international foreign exchange rates affect prices of key imports and exports with potential to affect national development, planning and budgetary processes”<sup>180</sup>

As observed, International trade is regulated for most entities and states through the WTO. Indeed, the WTO has about 163 members including Kenya and several observers.<sup>181</sup> From these member states, international trade is conducted in regular world economy parlance. The

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<sup>179</sup> World Bank, '*Kenya Country Partnership Strategy*' (2018) <http://documents.worldbank.org/curated/en/173431468284364640/pdf/889400CAS0P1440Kenya0CPS000Volume02.pdf> accessed 20 September 2019.

<sup>180</sup> Republic of Kenya, *Ministry of foreign affairs and international trade strategic plan* (2018/19 – 2022/23) at p.24

<sup>181</sup> WTO, '*WTO Members and Observers*' (Wto.org, 2019) [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) accessed 20 September 2019.

conduct of this international business is done by the rules established by the WTO. However, the WTO rules are prone to several challenges. In the global scope, the delays in concluding the World Trade Organization's development agenda continue to encourage protectionism through proliferation of tariffs and non-tariffs barriers.<sup>182</sup>

The WTO wields a lot of power over international trade because its member states control over 80% of the world trade. Further, the WTO has a dispute resolution mechanism that is intended to resolve disputes between the member states. This means that in the instance where the member states fail to adhere to the agreements acceded to such as the ITA list, they may opt for the dispute resolution mechanism. However, the dispute resolution mechanism has failed to meet the efficiency levels that is required to level in all the members of the ITA. This is as seen in the China-US trade wars. Both of these countries, despite being members of the WTO and acceding the ITA decided to square it out among themselves. This was done by increasing tariffs of products from their partner-brother jurisdiction in order to restrain their export capability. This shows a clear failure of the WTO dispute resolution mechanism to rein in the big brothers.

There are existential non-tariff barriers to the WTO. Non-tariff barriers include technicalities on import licensing, rules for valuation of goods, pre-shipment inspection and rules of origin. Import licensing is a challenge because under the ITA there is no express provision on import licensing as it is implied from the WTO rules. The WTO has an agreement on import licensing<sup>183</sup> that states that import licensing procedures should be simple transparent and predictable. However, this is not explicit under the ITA hence the ITA products may face this barrier rendering the acceding to the ITA meaningless.

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<sup>182</sup> World Trade Organisation, *Status of WTO Instruments*, 2019

<sup>183</sup> World Trade Organisation, *Agreement on Import Licensing Procedures*

The other barrier is the rules for the valuation of goods. There is no standard for the valuation of goods under the ITA. Under a related Uruguay Round ministerial decision gives customs administrations the right to request further information in cases where they have reason to doubt the accuracy of the declared value of imported goods. There are set procedures in the GATT that have to be followed in ascertaining the value of goods. However, under the ITA, there are no such set standards hence reliance on the ITA alone would make goods subject to valuation that becomes a hindrance to importation. This is seen under the Kenyan law where the value of goods to benefit the public investments has to exceed 200 million. If valuation is skewed, then the goods may not be imported into the country for instance.

There is also a challenge with the pre-shipment inspection of the goods. this rule requires that the goods be checked prior to shipment into the recipient country by the relevant agents. The WTO agreement on pre shipment<sup>184</sup> measures requires that GATT principles and obligations apply to the activities of pre-shipment inspection agencies mandated by governments. The obligations placed on governments which use pre-shipment inspections should include non-discrimination, transparency, avoiding unreasonable delay and avoiding conflicts of interest by the inspection agencies. However, the ITA does not have these measures hence this it becomes challenging to rely on the ITA without a crucial measure such as this one.

Finally, the rules of origin maybe a challenge to a developing country. The rules of origin agreement<sup>185</sup> dictates that WTO members to ensure that their rules of origin are transparent; that they do not have restricting, distorting or disruptive effects on international trade; that they are administered in a consistent, uniform, impartial and reasonable manner; and that they are based on a positive standard (in other words, they should state what does confer origin rather

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<sup>184</sup> World Trade Organisation, *Agreement on Pre-Shipment Measures*.

<sup>185</sup> World Trade Organisation, *Agreement on Rules of Origin*



than what does not). In this sense, reliance is placed on this WTO law instead of reliance on the ITA. Hence reliance on the ITA may be inadequate to cure the rules of origin challenge.

#### **4.2 Regional challenges; regional treaties and how they affect ITA in Kenya**

Regional stability is key to Kenya's development goals. Kenya is situated within the conflict prone region of the Great Lakes and Horn of Africa. The spill over effects of instability in the region affect Kenya in many ways such as influx of refugees, proliferation of small arms and light weapons thereby escalating the insecurity situation in the country. Further, conflict situations perpetuate human rights abuses in the form of sex and gender-based violence that disproportionately affects women, children and other vulnerable groups.<sup>186</sup>

The East African Community Customs Management Act<sup>187</sup> is perhaps the tool that levies tax and tariffs on the imports to the country. What this act says is primary to the HS forms which must be filled at the port of entry. It is sound to repeat that each country implements its tax and tariff law at its own pace. The Act is rigid. Its baby offshoot the CET is a further harmonization of the rigidity legislation of the East African states. No, this Act does not seem to readily embrace zero tariffs on ITA products despite the recent progress made in terms of the expansion of covered categories of IT products.

Further, the ongoing negotiations on Economic Partnership Agreements involving the East African Countries and the European Union has introduced new challenges of reciprocity with developed countries in the trading regime.<sup>188</sup> Emerging mega trading blocs such as Trans-Pacific Partnership and Transatlantic Trade and Investment Partnership that could lead to

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<sup>186</sup> The East African, 'The Changing Face of Terrorism in East Africa, The Horn' (2019) <<https://www.theeastafrikan.co.ke/news/ea/The-changing-face-of-terrorism-in-East-Africa/4552908-4941824-566xsb/index.html>> accessed 20 September 2019.

<sup>187</sup> *East African Community Customs Management Act*, 2004

<sup>188</sup> *East African Community, Common External Tariff*, (2017)

fragmentation of the WTO Multilateral Trading System. The uncertainty around Brexit could also affect trade, financing, investment and other forms of cooperation with UK.

Poor infrastructure in the region negatively impacts on intra-regional trade, investment and free movement of goods and services. This is coupled with overlapping membership to regional economic blocs leading to slow implementation of commitments.<sup>189</sup> There is also lack of diversification and specialization in industrial and service sectors as well as inadequate human capital capacity and low investment in technology. These factors are key for rapid and sustainable development yet the region has not developed a mechanism for identifying its priorities.

Kenya has been in the forefront in championing for regional integration, especially the East Africa Community. This is key in opening up consumer markets for intra-regional markets for products services and capital. However, this has been slow mainly due to real or perceived historical ideological orientations. The Ministry plays a critical role of marketing regional trade and investment opportunities like the Lamu Port & Lamu - Southern Sudan - Ethiopia Transport corridor, the Kenya Uganda railway, and other regional development initiatives to the international investors. In addition, the Ministry will initiate negotiations at regional level for application of comparative advantage in production and marketing of goods and services”.<sup>190</sup>

The AfCFTA is a trade agreement affecting almost all countries in the entire African continent.<sup>191</sup> This agreement intends to harmonise the trade in goods and services offered within Africa. Indeed, the main intent of the signatory heads of state is to enhance trade in commodities and services whose origin is from Africa entirely. However, this target is set to

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<sup>189</sup> *East African Community, Common External Tariff, Treaty Establishing the Common Market for Eastern and Southern Africa, Agreement Establishing the African Continental Free Trade Area*

<sup>190</sup> *Supra n. 97*

<sup>191</sup> *Agreement Establishing the African Continental Free Trade Area*

be met with challenges in the case whereby components and parts that may make up the final products may be sourced from abroad and the assembly is done in any African state signatory to the AfCFTA. The final product will then be traded under the lowered tariffs of the AfCFTA. From this theoretical perspective, we have a classical challenge on the effect of the regional treaties on the possibility of the implementation of the ITA.

Because of these challenges with the regional treaties, it is entirely difficult for Kenya as an independent state to negotiate and ratify the ITA. Under the laws of the EAC as earlier enunciated, Kenya may not negotiate alone in matters international trade as she has obligations. These obligations under the EAC require for the negotiation of such agreements as the ITA as a block within the EAC. The same goes for COMESA and the AfCFTA. Hence by virtue of the regional treaties that Kenya is a signatory to, Kenya does not have capacity to freely negotiate and enter into the ITA.

#### **4.3 The national challenges**

In the WTO ministerial conference in Nairobi in 2015, ambassador Ndirangu of the ministry of Foreign Affairs made a presentation at the “Regional Dialogue Conference on WTO Accessions for the Greater Horn of Africa”. In his presentation he stated that Kenya despite being a member of the WTO, faced several challenges.<sup>192</sup> These challenges as he mentioned included; hindered development of local industries due to Trade liberalization, Some of the commitments like tariff commitments constrain our Policy Space, Inadequate capacity in negotiations and implementation of the Agreements, Parallel negotiations where Kenya is engaged in negotiating at the WTO, AfCFTA, EPAs, EAC, Coordination challenges at national and county levels and the expansion of WTO agenda.

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<sup>192</sup> Amb. Nelson Ndirangu, *'Kenya's Experience at the WTO'* (2017).

There are Coordination challenges at national and county levels. The Constitution fundamentally changed how the country is governed leading to introduction of two levels of government: National and County Governments.<sup>193</sup> This has widened the scope of activities of the Ministry to include supporting County Governments. However, it becomes challenging for the National Government to independently negotiate internationally without considering the input of the counties. This is despite the provision that the National Government has responsibility for foreign policies and international trade.<sup>194</sup> It is important to note that both levels of government must deal independently and interdependently hence a possibility for conflict.<sup>195</sup>

Inadequate capacity in negotiations and implementation of the Agreements from the WTO is also another challenge faced in Kenya. The capacity that Kenya lack may be that of skilled experts, financial capacity or even technological capacity. Poverty, unemployment and inequality are challenges that the government must address in order to effectively achieve the middle-income country status with a high quality of life for its citizens. In spite of the progress made through the implementation of poverty reduction strategies, the Economic Recovery Strategy for Wealth and Employment Creation and subsequently the MDGs, the above remain top on Kenya's development agenda.<sup>196</sup> Addressing these will require resources, both financial, technical and human that are currently and continue to be in short supply.

A further challenge comes from regionalism, which is the increasing negotiations and conclusion of regional trade agreements, which contain important chapters on digital or information Technology products.<sup>197</sup> Parallel negotiations where Kenya is engaged in

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<sup>193</sup> Constitution of Kenya, Article 6

<sup>194</sup> Ibid article Articles 185(2), 186(1) and 187(2), and the 4<sup>th</sup> Schedule.

<sup>195</sup> John Mutakha Kangu, "*Constitutional Law of Kenya on Devolution*" (1st edn, Strathmore University Press 2015)

<sup>196</sup> Republic of Kenya, *Economic Recovery Strategy for Wealth and Employment Creation* (2003 –2007)

<sup>197</sup> Ministry of industry, trade and cooperatives, *Export Processing zones Authority Report*..

negotiating at the WTO, AfCFTA, EPAs, and EAC are all hampering the sole focus on the WTO and specifically the ITA. The country cannot therefore freely negotiate on the implementation of the ITA without having to engage all the stakeholders in the earlier mentioned agreements which Kenya is a member.

There is a challenge of hindered development of local industries due to Trade liberalization. In this case, high tariffs on ICT parts and products simply compel ICT firms to bypass the countries with high tariffs entirely in their global supply chains and manufacture and assemble elsewhere.<sup>198</sup> Evidence demonstrates the misguided logic of high tariffs on ICT goods. The world Trade organization has found that, on average, signatories to the initial ITA increased exports by 8.5 per cent and increased imports by 9 to 10 percent.

Importantly, this finding suggests that many ITA signatories were able to tap into cheaper intermediate goods import to grow their ICT industries, leading to cheaper and greater quantities of final goods for exports. It's no surprise that the top 10 ICT exporters are also the top 10 importers as global production networks, meaning that different countries contribute components that come together to create the final good.<sup>199</sup> This has extended the challenge where local manufacturing firms fail to have capacity to compete with the products imported cheaply. This has essentially killed the local manufacturing industry. Essentially, this may be the main deterrent to the implementation of the ITA in Kenya according to the Foreign Affairs Ambassador.

Further, there is evidence that many developing countries such as Kenya continue to see tariffs as a way to pursue misguided state-directed industrial development policies, instead of focusing

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<sup>198</sup> Weber, Rolf H, "Digital trade and E-Commerce challenges and opportunities of the Asia-pacific Regionalism" *Asian journal of WTO & International Health Law and policy* 10(2) p, 321-347, (2015)

<sup>199</sup> Weber, Rolf H. and Burri, Mira "Classification of services in the digital economy" *Heidelberg, Springer*, (2013)

on measures that raise across-the-board productivity growth.<sup>200</sup> Lamentably, Kenya continues to see tariffs as a tool to protect domestic manufacturers, applying an average tariff of more than 13 percent on technology goods, including new 10-percent tariffs on some ITA products, in contravention of the initial agreement. Some of the commitments like tariff commitments constrain Kenya's policy space. Kenya cannot freely engage in ITA negotiations or ratifications without factoring in other parties. Kenya cannot negotiate without engaging other member states in the EAC through the EAC CET.

There is also the challenge of understanding the WTO agenda in Kenya. There are few experts in Kenya to deal with matters international trade law and also to advise the government accordingly. The government may therefore fail to participate in the ITA because there is no knowledge on the ITA or its benefits in the country. Indeed, at all the WTO conferences that Kenya attended and hosted, none of the representatives touched on the subject of the ITA. This is indicative that this particular insufficiency has made Kenya unable to ratify the ITA.

If ratified, the ITA Agreement in Kenya will face serious challenges in terms of customs classification against the backdrop of rapid technological evolution of the IT sector and a general trend towards greater convergence in the global economy. The convergence of economic products in general including both goods and services, also has important implications for the "Culture and trade debate" as exemplified by the legal relations between the WTO covered agreements and the UNESCO Convention on the protection and promotion of the diversity of cultural expressions and the question of establishing a coherent regulatory framework for international trade in the era of an emerging creative economy.<sup>201</sup>

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<sup>200</sup> Murray D. Bryce, *Policies and Methods for Industrial Development* 1965

<sup>201</sup> Richieri Hanania, Lilian "The UNESCO Convention on the diversity of cultural expressions as a coordination framework to promote Regulatory coherence in the creative Economy" *The international journal of cultural policy*, (2015), P. 1-20

The challenges include notably the classification and distinction of various information Technology products as either specific cultural or ordinary economic products and the question of their separate or joint regulation.<sup>202</sup>

The above Kenya ministry of foreign affairs observations on challenges of implementing international agreements is essentially true of the challenges impeding the possible domestication of ITA in Kenya can be felt based on the customs policies and the tax system currently in use. Like any other international Commercial agreements, the municipal law is always the primary culprit in implementation process. Peoples' law encompasses their aspirations cultures, lifestyles, beliefs, fears expectation values among other objectives. As pointed out earlier on, Kenya now follows monism approach to adoption of the international law.<sup>203</sup> Just as law is a challenge, so is the people's knowledge, education, attitude global trends, among other things.

#### **4.4 The challenge of non-compliance & enforceability**

From research, it has been noted that developing countries tend to be suspicious of developed nation's concepts.<sup>204</sup> The urge by the developing countries to emancipate themselves is high. This leads to making noncompliance attractive. Also, the fact that there lacks a proper enforcement approach by the WTO may make things easy for non-implementation of the ITA document.

For Developing countries, if the policy objective of imposing high tariffs on ICT products is to incentivize domestic ICT production (i.e. to promote import substitution industrialization), however doing so tends to produce the opposite result. In large part, it is because the

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<sup>202</sup> Guevremont, Veronique, "*Le renouvellement de l'exception Culturelle a l'ere du numerique*" (22 October 2015)

<sup>203</sup> Republic of Kenya, *Ministry of foreign affairs and international trade strategic plan 2015*, at p. 24-27

<sup>204</sup> Low and Gleeson (2011)

globalization of ICT supply chains means that ICT products often move across several countries in their production process with key components added at various steps in the process before final assembly occurs.

The Kenya government policy on competition & Compliance in information Technology products<sup>205</sup> cannot be ignored in trying to understand the government's role in domesticating this important sector. The government of Kenya has full control on the kinds of gadgets which enter Kenya. Including the ITA items in the product list. Almost all gadgets used in information Technology sector is imported and sourced from outside Kenya.<sup>206</sup> In this regard it appears that the state tries to ensure that it's Citizens, Consumers and local Industry is protected from various defects, malpractice or standard of the goods entering the local market.

Kenya like other developing nations is aware of the Lessons drawn from the India sub-continent experiences over fully ratifying the ITA.<sup>207</sup> Compared to Kenya, India is far more developed infrastructure wise and in ICT. The Indian subcontinent went quite slow in implementing the zero tariff because it feared it could lock out its people from the competition if it were to juxtapose itself with countries like Brazil, US, Australia, Austria, UK, Denmark among other countries which have advanced technologically. The developed nations are happy to export their commodities to Africa and other developing economics like Kenya at their pleasure. There is a feeling that their main concern is not to grow global trade but to make profits.

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<sup>205</sup> Communications Authority of Kenya, *Policy on Competition and Compliance* available at <http://www.ca.go.ke/images/downloads>

<sup>206</sup> Encyclopedia Article on Technological Imports into Kenya available at <http://www.nationsencyclopedia.com/economics/Africa/Kenya-international-trade.html>

<sup>207</sup> Dieter Ernst, "The Information Technology Agreement, Manufacturing and Innovation – China's and India's Contrasting Experiences" *East-West Center, Honolulu and Centre for International Governance Innovation, Waterloo* 9/23/16



#### **4.5 Chapter summary**

The chapter demonstrates the theme developed throughout the paper- the emerging challenges of implementing the agreement. Notable is the challenge of time. Times change fast for trade and tend to bring up and introduce new trade solutions to the global stage. The law on trade under the WTO has also evolved along with time. However, with the technology becoming increasingly the central component of commerce, it might be premature to assert that information technology or trade can indeed be obsolete.

The ways in which the challenges faced will be handled might be the common denominator. However, the global regional and national challenges to trade appear to be the same challenges faced by the country in implementing the ITA document. Perhaps the most revealing challenge is the challenge of knowledge. Technology goes hand in hand with knowledge. It is therefore important that the education on technology law and trade continues to reach industry stakeholders and general markets as a means of readiness for implementation and usage of technology products.

## CHAPTER FIVE

### SUMMARY OF THE FINDINGS, CONCLUSION AND RECOMMENDATIONS

#### 5.0 Chapter introduction

This is an extremely exciting research. The researcher embarked on looking at the available opportunities and challenges in implementation of a multilateral agreement of WTO members. The nature of multilateral agreements is such that the members must be willing to adopt and implement any such agreement. It would appear clear by now that the host country's municipal law indeed forms the backbone of implementation of any international agreement; more particularly the international Trade agreements. I have also observed as a learner that detailed attention to the local laws by all stakeholders involved is paramount in implementation in any particular country be it developed or developing one. Due regard to the fact that different economies present dynamic and different opportunities and set of difficulties is critical to proper understanding of the difficulties involved in implementing the international law within target country.

The aspect of Fairness in implementation process has also come up. Developed nations are powerful financially, resource wise, human capital, and their approach to implementing agreements which they prefer to be implemented is far more careless than the agreements desired by the less developed nations. This is insightful for the WTO. Agreements agreed on by multilateral parties must involve and embrace the less developed nations. ITA would move faster and its implementation acceded to by WTO members and observers faster when all the nations' fears and concerns are addressed.

The superior nature of International relations in municipal law has been developed through the discussions of the creation and adoption of the ITA in this paper. It has also become apparent that WTO is in full control of global trade and its rules affect world economies and their trade

rules. This effect is felt all over the world even among non-members. The space covered by the WTO is huge, larger and powerful and at times extending to forceful. The rules affect not only commerce but the national laws of many nations.

ITA was among the first set of multilateral agreements negotiated and crafted by the participants upon immediate creation of the WTO. This places ITA in the center of the WTO operations since GATT<sup>208</sup> & UNCITRAL<sup>209</sup> in the 1948 & 1965 respectively. It is clear to the researcher's mind that agreement is no doubt a critical component of the WTO mandate as an international business and law regulator.

The agreement grew fast and popular. Its slow pace at acceptance and implementation has been largely linked to suspicion among participants who in pursuit of the MFN rule, embarked on implementing the provisions of the ITA through passive involvement in the respective regional agreements. My observations are further that the fact that it is a technical agreement dealing with technical products of technical innovations, make many nations shy away from it on account that it is not properly understood. Coupled with suspicion and the usual lack of morale to accept new inventions, the ITA continues to meet unnecessary resistance. In my humble recommendations, Kenya should not be here. Kenya should implement this agreement to the letter and explain its neighbors. Adoption is quite inevitable and it will be a matter of short time, perhaps 10 more years before Kenya influences the regional partners to implement the agreement in totality in their respective local tariffs.

As Discussed above the government of Kenya initiated several approaches to adopt and domesticate the use of IT products in Kenya. The ITA document and the schedule needs to be placed where the public can easily access it. Merely including some products in the EAC CET is not enough. Action in implementing the ITA involves access to it so that all can know its

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<sup>208</sup> *General Agreement on Trade and Tariffs* (1947)

<sup>209</sup> United Nations, *United Nations Commission on International Trade Law*, (1966)

value importance in trade. There need to be more education & knowledge-based discussions on ITA.

### **5.1 Benefits of ITA implementation**

According to Stephen J. Ezell 2012, in his article “The Benefits of ITA Expansion for Developing Countries” there are about 5 benefits to developing countries arising from implementation running through ICT to business economics.<sup>210</sup> The benefits of ITA implementation include lower ICT product costs. This facilitates diffusion and adoption of affordable ICT products and services which boosts productivity and thus enhances economic growth. There will also be, by lowering the price of key inputs, the burgeoning of ICT software and services industries in many developing countries such as Kenya as a result of the ITA.

Further, there will be the boosting of exports of ICT products and services. This means that whenever Kenya manages to acquire the capacity to develop the various products required in the ITA, she will enjoy increased exports. The increased number of exports as earlier seen in this paper, in the economies that implemented the ITA, will also be experienced here locally. This will mean increased foreign exchange which is the revenue that the state requires to run its agenda.

The speed with which the Asian tiger economies grew during the 1970’s has not escaped Kenya’s attention. It is alleged that countries like Malaysia Hong Kong and others were at par with Kenya in development but as those countries embraced technology growth among other incentives, they grew tremendously fast ahead of Kenya. It is therefore worth noting that implementation of technology-based trade agreements such as the ITA will be a great benefit to the country.

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<sup>210</sup> Stephen J. Ezell, “*The Benefits of ITA Expansion for Developing Countries*” (2012)

Stephen also noted that the ITA will contribute to the competitiveness of developing countries manufacturers. The increase in trade at an international level will place the manufacturers from the local industries at a global stage. This will mean that manufacturers from Kenya making the ITA products will gain experience in developing products hence making themselves more marketable at the global stage. Finally, he concluded by noting that the accession to the ITA will promote innovation in developing countries' ICT sectors.

## **5.2 The risks**

Full implementation will not come without its fair share of disadvantages. Dr. Adede outlines the approaches to domestication of the international obligations.<sup>211</sup> The outlines showcase advantages in nature of international appreciation and recognition while they also present disadvantages in the nature of complexity of laws and conflicts of laws arising from the nature of international agreements. This also true of the ITA. ITA does not reassure countries that more powerful nations will not dump their highly sophisticated technology products in Kenya. It is possible that Kenya wouldn't realize sooner if the goods are being dumped or exported under the reciprocal rules as the highly advanced technology goods would be usable with ease.

It has emerged during my reading that countries that are more developed in less developed nations have an ego and national pride to deal with. South Africa for example is a big economic giant. It has complex law systems that highly favor their environments. This level of self-confidence cannot be said about Kenya. The national ego for Kenya appears to be based on what neighbours want to do and the existing regional trade agreements.

Global trade rules and business environment is continuously changing. Reviews and comments by the masses is gaining ground every day. The advent of social media also helps this fact.

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<sup>211</sup> Dr. A. O. Adede, 'Domestication of international obligations', 2001

Trade laws will likely develop along these lines. The more friendly and less suspicious an international agreement is the more the agreement is closer to being implemented.

### **5.3 Comments on legal issues**

It has been my observation that each country in the globe has its own set of rules jealously guarded by its citizens. World constitutions as seen through the India, Philippines, USA and now Kenya many more countries adopt international law directly in their constitutions. This is the case even for African Countries with advanced democratic systems such as South Africa.<sup>212</sup> It should not be difficult therefore to domesticate an international agreement locally. With a level of aggression by the powerful economies which tend to dominate the world scene by dictating policies countries especially the emerging economies and developing countries should all within their powers to protect both the consumer and the local industry. The level of such protectionist approach is common knowledge for many learners, researchers and policy makers. In the Asia markets for example, the economic policies are geared towards protecting the local consumer. It appears that this is the reason why countries like India, Malaysia, China, Japan, Singapore, Hong Kong to name but a few have moved upwards with speed compared to other world economies.

The people's access to information in above stated model countries these countries is vast and fast. Comparatively, Kenya, among African countries seems to be quite ahead in information processing with the constitution guaranteeing access to information.<sup>213</sup> There is however outcry from the public on how Kenya government allows the citizens to access useful economic information for their use and consumption. The public feels that the government tends to cover up important economic stories and data meant to benefit the general public.<sup>214</sup>

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<sup>212</sup> *Constitution of the Republic of South Africa* Articles 231, 232, 233

<sup>213</sup> *Constitution of Kenya*, Article 35

<sup>214</sup> *Access to information Act*, 2016

The assessment of the ITA is the same. Kenya did not do enough to popularize the agreement to its people so that the people can utilize its benefits. Not many people know about this document. A further enquiry of this document at the Kenya Revenue Authority's customs offices showed that its awareness among staff was meagre. The researcher found that the same situation was obtaining at the ministry of foreign affairs. There seemed to be lack of availability of data and relevant information on the subject agreement. The same situation greeted the researcher at the Attorney General offices and at the investments promotion authority.

This is also true at the stated institutions' websites that did not even mention the agreement in their main web icons. It is my considered view that all institutions involved in trade advancement in Kenya need to stock all information relating to international documents which are relevant to the trade involved.<sup>215</sup> In this regard, the ministry of trade, communication, foreign affairs, treasury, among key stake holders like the attorney general of Kenya and the customs department ought to have as the basic minimum the data related to trade. The ITA is one such document that should not only be easily available to all relevant staff but every other staff should know how to point to researchers, learners and seekers alike such information in their departments.<sup>216</sup>

There is also the feeling that the government in Kenya hoards information for no good reasons but for the few government officers to share it with their relatives, friends, family and other cartel cronies for purpose of availing this information only to such groups for selfish ends. To stop this trend the government must device methods of sharing information as recognized under the Constitution for better economic opportunities for all.<sup>217</sup>

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<sup>215</sup> A result of Kenya being a member of the WTO but not acceding to the ITA

<sup>216</sup> *Constitution of Kenya*, article 35

<sup>217</sup> *ibid*

How countries relate with the WTO in order to implement international trade agreement needs a better approach. The WTO should be a people tool. It is common knowledge that in some countries governments do not give full access to WTO benefits to its people but to a few friends of government officers more so in African countries. The WTO therefore must do more to educate and empower the global citizens of its policies and projects beyond the government boardrooms. When the citizens will be better equipped with the relevant information on the ITA, then the WTO will find it quite smooth to implement its international policies and documents within the local jurisdictions.

While the role played by the WTO in facilitating trade is unmatched by any other body, there seems to be a gap on enforceability of the ITA due to lack of clear definitive penalties against the countries that fail to implement the subject agreement. It must be remembered that there are several political and other reasons why it would be convenient for some countries to implement this agreement while others will conveniently avoid the implementation. Time is ripe to put sanctions and embargos on WTO countries that fail to domesticate their international obligations. The WTO should also demand a DSB model system in Kenya and all member countries to help resolve ITA disputes that would be resolved locally.

#### **5.4 Comments on implementation challenges**

In my main objectives of this study I wanted to discover the government initiatives which may help in ITA implementation. What has become apparent at the end of this study is that the efforts are claimed to exist by Minister Mohammed. However, as it is, Kenya is not a member of the ITA nor at all. With lack of proper information on ITA implementation will be a challenge. Research has shown that Kenya has interest to fulfil its international obligation under WTO terms. The following recommendations are critical in full ITA implementation: -



Public Participation should be initiated on ITA products. The public must fully be engaged before the product makes it to the list. This will ensure that all countries have been given the benefit of presenting their products or products of their choice.

Tax holidays on all ITA products brought into Kenya by youths. The State must consider the challenges facing the youth of the globe particularly those developing economies. It is the youth who are moving the technology aspects more. Kenya must therefore ensure that proper tax exemptions are given to all products used by the youth to encourage them to do better innovations.

The challenge of education and knowledge is real. There is a saying that the most learned are not necessarily the most helpful. Academics and class education is one thing but proper use of information is paramount in domesticating the ITA. The researcher recommends a system where practical knowledge is continuously being imparted and such knowledge be put to use in practical terms through web-based knowledge to minimize of time taken to process specific information.

## **5.5 Chapter Summary**

This chapter has made several observations on the whole research knowledge acquired and disseminated in the discussions herein. Kenya must rise to the occasion and take up its international space. It must take advantage of the emerging regional groupings and assert its position by influencing its neighbors to fully domesticating the ITA. Indeed, Kenya is a regional hub for international trade and commerce. This is evident from her high-stake participation in the formation of international treaties. Kenya has been at the forefront in the formulation of policies that affect regional trade and also in those high-level meetings whereby the policies are acceded to by contracting state parties. A Kenyan was once the head of United Nations trade commission demonstrating Kenya's central role and partnership with the rest of

the world.<sup>218</sup> When it comes to the ITA, Kenya became a silent member of the WTO and did not move fast to implement the agreement. This should not be.

This paper has proposed the solution for the implementation of the ITA in Kenya. Kenya has either to accede to the ITA to enjoy its benefits or to come up with a harmonized system of managing tariffs in order to have a modern taxation regime that factors in the necessary technological goods relevant for the country. Whichever way Kenya looks at it, ITA implementation appears to be the only best approach.

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<sup>218</sup> Mukhisa Kituyi, 'UNCTAD Secretary General' (2013) available at <https://unctad.org>

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