UNIVERSITY OF NAIROBI

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FOREIGN AND DOMESTIC INVESTMENTS IN KENYA: CASE FOR A PROTECTIONIST TRADE LEGAL REGIME?

SIMIYU BEN MAKASI

REG No: G62/67476/2013

SUPERVISOR:

ALOSA SAMSON ONYANGO

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Declaration:

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

Name:……………………………………………………………………………………………….

Signature……………………………………………………………………………………...

Date………………………………………………………………………………………………….

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

Supervisor' Name:……………………………………………………… ……………………..

Signature ……………………………………………………………………………………

Date…………..…………………………………………………………………………………

Dedication

This thesis is dedicated to first, my wife, Lydia Miati Kusina, daughter, Germaine Nyakoa Simiyu and all family members. I cherish you all, for standing with me, even during the most challenging times.

Acknowledgement

"My people are destroyed for lack of knowledge". These words by the little known Prophet of God, Hosea, are very threatening indeed. (Hosea 4:6; NIV Study Bible, 10th Edn. Zondevern, 1995). Every time I read those words, my knowledge inadequacy seemed more real. It is this threat, I must confess, that drove me to seriously consider embarking on a journey to broaden my knowledge further. The idea to enrol for the master of laws (LLM) programme was thus born. It is an idea that will never be regretted.

Conceiving the idea, commencing, carrying out and concluding this thesis was very challenging. It meant juggling between caring for my young family, part time ministry work at the Friends Church (Quakers), Buruburu, and managing a law firm. Successfully maintaining focus on my studies was only possible through the grace of God. Accomplishing the task was therefore not by my own might or power but through help from the Lord. (Zachariah 4:6; NIV Study Bible, 10th Edn. Zondevern, 1995).

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List of Abbreviations and Acronyms

ACP	- African Caribbean Pacific
ADB	- African Development Bank
AGOA	- African Growth and Opportunity Act
AIPO	- Africa Intellectual Property Organization
ARIPO	- Africa Regional Intellectual Property Organization
ASEAN	- Association of South East Nations
ATIA	- African Trade Insurance Agency
BITS	- Bilateral Investment Treaties
BOP	- Balance of Payments
BRICS	- Brazil, Russia, India, China and South Africa
CBK	- Central Bank of Kenya
COMESA	- Common Market for East and Central Africa
CPSC	- Consumer Production Safety Commission
CU	- Customs Union
EAC	- East African Community
EPA	- Economic Partnership Agreement
EU	- European Union
FATF	- Financial Action Task Force
FDA	- Food and Drug Administration
FDI	- Direct Foreign Investments
FE	- Far East
FIPA	- Foreign Investments Protection Act
FRC	- Financial Reporting Centre
FTA	- Free Trade Area
GATS	- General Agreement on Trade in Services
GATT	- General Agreement on Tariffs and Trade

GDP	- Gross Domestic Product
ICC	- International Criminal Court
ICSID	- International Centre for Settlement of Investment Disputes
IIA	- International Investments Agreements
IMF	- International Monetary Fund
IPA	- Investment Promotion Act
IPC	- Investment Promotion Centre
IPR	- Intellectual Property Rights
ITO	- International Trade Organisation
KCB	- Kenya Copyright Board
KEBS	- Kenya Bureau of Standards
KIA	- Kenya Investment Authority
KRA	- Kenya Revenue Authority
MDG	- Millennium Development Goals
ME	- Middle East
MFN	- Most Favoured Nation
MIGA	- Multilateral Investment Guarantee Agency
MMC	- Mitsubishi Motor Corporation
MPAC	- Monetary Policy Advisory Committee
NIC	- Newly Industrialized Countries
PTA	- Preferential Trade Area
R & D	- Research and Development
RIVATEX	- Rift Valley Textile Mills
SAP	- Structural Adjustment Programmes
TIFA	- Trade and Investment Framework Agreement
UK	- United Kingdom
USA	- United States of America
WB	- World Bank

WIPO	- World Intellectual Property Organization
WTO	- World Trade Organization

List of Statutes - Kenya

Anti – Counterfeit Act, Cap 130 A.

Banking Act, Cap 488

Biosafety Act, Cap 321A.

Central Bank of Kenya, Cap 490.

Companies Act, Cap 486.

Competition Act, Cap 504.

Copyright Act, Cap 130.

Export Processing Zones Act, Cap 517.

Foreign Investments Protection Act, Cap 518.

Industrial Property Act, Cap 509

Insurance Act, Cap 487.

Investment Promotion Act, No. 6 of 2004.

Partnership Act, Cap 29.

Proceeds of Crime and Anti – Money Laundering Act, Cap 59A.

Promotion and Protection of Investment Bill, 2013

Sacco Societies Act, Cap 490B.

Seeds and Plant Varieties Act, Cap 326

Trademarks Act, Cap 506.

List of Foreign Statutes

African Growth and Opportunity Act

Agriculture Adjustment Act, USA (1933)

Fordney – McCumber Act, USA (1922)

Smoot – Hawley Tariff Act

United States Tariff Act, USA (1930)

International Conventions

ICSID Convention, 1966.

List of Cases

Monsanto vs. Schmeiser, Supreme Court of Canada, Judgment of 21st May 2004. SCC 34.

SPP vs. Egypt, Award of 1992 in ICSID Case No. ARB/84/3.

Antoine Goetze vs. Republic of Burundi – (2000) 15, ICSID Review – FILJ 457.

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Abstract

This study explored the negative impact of blindly pursuing liberal trade policies on Kenya's quest for sustainable economic development. The thesis is divided into five chapters. The first chapter is a presentation of statement of the problem, justification of the study, objectives, research questions, hypothesis, theoretical framework, research methodology, literature review, limitations, assumptions and disseminations. The second chapter assesses Kenya's investment and trade legal regime and it shows the multiplicity of instruments that form the legal and policy framework. The third chapter explores protectionist measures in other jurisdictions and it shows how other countries have benefited from protectionist policies. The fourth chapter makes a case for adoption of a positive protectionist legal regime in Kenya just as the developed countries have done. The chapter highlights the growing middle class in Kenya that can drive consumption of local products. The final chapter in this paper provides the conclusions and recommendations of this paper. Based on analysis done, the study recommends that Kenya considers taking the route South Africa has taken by practically caring about its domestic economic agenda.

CHAPTER ONE:

INTRODUCTION

1.1 Background to the Study

Foreign investments in Kenya, from various destinations, have grown tremendously over many years.[1] Investors from the United States of America (USA), European Union (EU), Middle East (ME) and Far East (FE) continue to flock the country looking for trading opportunities.[2] For instance, Chinese investments in the country's infrastructure, automobile industry, food, beverage and electronics among other sectors have lately risen rapidly.[3] This development has not been without many challenges. The challenges include increased importation of cheap and or low quality products, counterfeit goods, flawed business practices such as unfair competition and poor environmental as well as labour practices, not to mention the huge trade imbalances against Kenya. A poor human rights record by some of the foreign investors, translated as a threat to democracy and the rule of law, is often viewed by many,[4] to be a major challenge. However, will reliance on foreign investments, at the exclusion of well-nurtured domestic investments catapult Kenya to an economic powerhouse, or even an emerging economy, anytime soon?

One of the key laws that govern foreign investments in Kenya is the Foreign Investments Protection Act (FIPA).[5] The Investment Promotion Act (IPA)[6] governs both foreign and domestic investments. The common threads that run through both of these key Statutes are the aspects of promotion and protection of foreign investments.

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[1] Daniel O. Abala, Foreign Direct Investment and Economic Growth; an Empirical Analysis of Kenyan Data, DBA, Africa Management Review, Vol. 4. No. 1, 63.
[2] Ibid.
[3] Mugendi, Florence Karimi, *Kenya – Sino Economic Relations: Impact of Chinese Investment in Kenya's Transport Sector* (2011) 1 (also available at http://erepository.uonbi.ac.ke:8080/handle/123456789/3277).
[4] Michael Chege, Economic Relations between Kenya and China, 1963-2007. (2008). (accessed at http://csis.og/files/media/csis/pubs/080603 on 01 November 2013).
[5] Cap 518 of the laws of Kenya.
[6] No. 6 of 2004.

The legal regime is very wanting and or thin on protecting Kenya's economic, political and social interests and particularly domestic investments. The legislations do not come out strongly in support of the aspect of protecting Kenyan citizens' interests when it comes to matters of investments. For example, the main reason why FIPA was promulgated is to protect foreign investments and matters incidental thereto.[7] Similarly, whereas the IPA strongly roots for investments in Kenya, the aspect of specifically and boldly protecting Kenya's indigenous investments is missing.[8]

At the WTO's 1996 Singapore Ministerial Conference, the Director-General stated, "in today's economy, trade and investment are not merely increasingly complementary, but also increasingly inseparable as two sides of the coin of the process of globalization." [9] Trade and investments legal regimes are therefore not only complementary, but also amount to a symbiotic relationship.[10] A discussion of investment matters will more often than not lead one to issues pertaining to trade. Some commentators have remarked that as far as global business is concerned, international trade and investments are very much tied together in a close relationship. This is because companies trade in order to supply their foreign investments. Similarly, companies invest in order to facilitate as well as diversify their trade portfolio.[11] The more Kenya openly participates in international trade, the more investments are likely to come its way. On the other side of the coin, the more investments Kenya seeks to attract, the higher the volumes of trade, especially free trade, at the international level.

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[7] Preamble to Cap 518.

[8] A reading of the whole Act No. 6 of 2004 confirms that its main concern is about the free flow of investments into the Kenya regardless of the impact on the domestic investments.

[9] WTO Press Release No. *PRESS/42,* Foreign Direct Investment Seen as Primary Motor of Globalization, Says WTO Director-General (Feb. 13, 1996), *at* <http://www.wto.org/english/ news_e/news_e.htm#archives> (accessed on 17/11/2014).

[10] Arwel Davies, scoping the boundary between the trade law and investment law regimes: when does a measure relate to investment? Journal of International Economic Law, 15 (3), 793-822, 794.

[11] Nicholas DiMascio and J. Pauwelyn, *Non – Discrimination in Trade and Investment Treaties; Worlds Apart is Two Sides of the Same Coin?,* 102 American Journal of International Law, 48 (2008), 49-50.

This study is concerned with the negative impact of blindly pursuing liberal trade policies on Kenya's quest for sustainable economic development. In dealing with this subject, it is appreciated that under international law, trade and investment are treated separately.[12] Multilateral instruments have guided the conduct of trade for many years.[13] On the other hand, Foreign Direct Investments (FDIs) are regulated mainly through numerous Bilateral Treaties (BITs).[14] However, due to the complementary nature and symbiotic relationship between the subjects of trade and investments, this thesis treated them very closely. The USA, EU and even some Asian as well as African countries have protected key sectors of their domestic investments prior to their economic take off. This is notwithstanding the liberal economic policies as espoused in various international instruments such as the General Agreement on Tariffs and Trade (GATT) and World Trade Organization (WTO).

The research concludes that the apparent bias in Kenya's investment law and policy in relation to foreign direct investments (FDI's) against domestic investments occasioned by the desire to conform to the general world standards is not appropriate. The problem should be addressed through adoption of positive protectionism measures. These measures refer to a mutual co-existence of both liberal and protectionism trade policies for the sake of the best interests of Kenya. Foreign investments and trade are very important to a country such as Kenya. However, over reliance on the same solely and or largely to the exclusion of promoting domestic investments and trade is not good in the long term. This is because any disruption of the foreign terrain where supply of trade and investments come from will adversely affect the country. Similarly, domestic trade and investments ought to be given a chance to systematically grow, not just locally, but beyond the borders. To achieve this, the law can be used to create the right balance.

[12] Ibid, note 11, 48.
[13] These include the General Agreement on Tariffs and Trade (GATT) of 1947 as well as the World Trade Organization (WTO) of 1995.
[14] Supra, note 11.

With the help of a growing consumer middle class as well as regional markets that are very reliant on Kenya's products, the country should be able to move from its rather stagnant economic position and follow in to the footsteps of the Asian tigers such as Japan, South Korea, Hong Kong, Singapore and Taiwan[15].

1.2 Statement of the Problem

The Kibaki regime ushered in Kenya unprecedented optimism in all spheres of life including the economic front.[16] At the beginning of president Kibaki's first term in office, a survey carried out at the time indicated that Kenyans were the most optimistic people in the world.[17] However, the post-election violence of 2007 – 2008 created a huge dent to this optimism.[18] Apart from losing an estimated 1100 lives as well as occasioning the displacement of over 600,000 families, the violence culminated in the country losing investments worth billions of shillings.[19]

The desire for massive foreign direct investments and international trade to catapult Kenya to higher economic growth levels has never been more urgent. Liberalization of international trade in goods and services as articulated within the framework of the significant trade facilitation world instruments such as the GATT and WTO has made it easy for FDI's to come into Kenya from all directions.[20] Whereas this would appear as most welcome relief, the legal regime's bias against the protection of domestic investments as seen for instance in both the Foreign Investments Protection Act, Cap 518 of the Laws of Kenya and the Investment Promotion Act, Cap 485B of the Laws of Kenya is not tenable.

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[15] According to Consultancy African Intelligence (CAI), the term tiger economy emerged in the 1960's during which many of East Asia's economies experienced spectacular growth averaging an annual GDP growth rate of 6% or higher.(accessed at www.consultancyafrica.com on 17/11/2014).

[16] Mwai Kibaki, an experienced politician with a good background in economics was first elected as President of the Republic of Kenya in the year 2002. He was declared winner of the 2007 general elections but the results were contested by his challengers, a situation that nearly plunged Kenya into a civil war.

[17] The survey was conducted by the respectable Gallup International Annual Survey.

[18] Fiott, Daniel, *The EU and China in Africa: The case of Kenya,* Madariaga Paper, Vol. 3, No. 5 (Jul., 2010).

[19] Kimani Njogu, Youth and Peaceful Elections in Kenya, Twaweza Communications, 2013, Pg.112 & 113.

[20] Supra note 1, 64-65.

Obsession with promotion and protection of FDI's at the expense of the country's own economic, political and social interests by Kenya's legal regime removes the necessary balance. This state of affairs easily compromises the country's quest for sustainable development as well as the attainment of Vision 2030.[21] Under this blueprint, Kenya hopes to increase its annual GDP growth rates to 10% and maintain this average until the year 2030.[22] This may not be attainable under the current investment and trade legal framework.

In the process of attracting more foreign investments, Kenya, alongside her neighbours, Tanzania and Uganda liberalised their trade. The results were very disappointing owing to bad international trade rules and practices, especially in the agricultural sector.[23] Any legal regime that supports an investment and trade policy framework that cannot propel Kenya to higher economic levels is problematic. Consequently, a fresh consideration of the legal regime anchoring these policies thus becomes imperative. The basis of this research was to establish whether a protectionist legal regime would be appropriate in addressing the problem.

1.3 Justification of the Study

As already stated above, foreign direct investment combines aspects of both international trade in goods and international financial flows.[24] Multinational corporations, by their very nature are the conduits through which global economic activities, and by extension, FDI's are transacted.[25] The impact of FDIs on domestic economies of developing countries such as Kenya becomes very significant. An examination of the attendant regulatory framework becomes necessary. Given the close relationship between FDIs and international trade, the consequences and impact of the latter on the domestic front also calls for attention.

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[21] Vision 2030 refers to Kenya's long-term development strategy and blueprint covering the period 2008 to 2030. (The document can be accessed from www.planning.go.ke)

[22] Ibid. 5.

[23] Read, Donna M. Y., Parton, & Kevin A, *Economic Deregulation and Trade Liberalization in Kenya, Tanzania and Uganda; Growth and Poverty*, Journal of Economic Issues, 2009, Vol. 43, Issue 3, 567.

[24] Supra note 10.

[25] Gachenge C. K., & Ngugi K, Challenges Facing Licensing Processes of Foreign Direct Investments; A case of Kenya Investments Authority, International Journal of Sciences and Entrepreneurship. (2013), Vol.1, Issue 2, 561-577.

In arguing a case for a protectionist legal regime, the question of how a country got in the existing legal framework ought to be addressed. The process of treaty negotiation, application and reservation becomes significant. In the year 2001, the Doha Development Agenda or Doha round trade talks were launched under the auspices of the WTO during its fourth ministerial conference.[26] The ministerial trade talks are still going on and present an excellent opportunity for developing countries such as Kenya to participate in the global marketplace on favourable, and not imposed trading terms. The findings of this study should provide a way of helping Kenya negotiate for better trade terms during such key talks.

Under the WTO regime, decisions are supposed to be made by consensus. However, the United States of America has never pretended about its highly influential role in the system. More often, it uses this role to shape decisions in the institution that befit its status as the largest trading nation in the world.[27] Free trade has very many proponents. Topping the list is the WTO, a highly influential international organization, which came into being in 1995, and lies at the centre of the global trading system.[28] The mandate of the WTO is stated as improving the living standards of the people of its member states by establishing legally binding rules, which help trade to flow as easily as possible.[29] Similarly, there are very many views explaining protectionism support.[30] However, a middle ground between the two strong positions has not attracted many expressions. This study, which roots for a measured approach towards trade liberalization, is intended to add voice to those calling for positive protectionism.

[26] The WTO Doha Ministerial; Results and Agenda for a New Round of Negotiations, William H. Cooper, Congressional Research Service Report RL 31206.

[27] World Trade Organization Negotiations; *The Doha Development Agenda*, Ian Fergusson, 2011, 1.

[28] Cephas Lumina, *Free Trade or just Trade? The World Trade Organisation, Human Rights and* Development (Part 1), African Journals Online, Vol. 12, No. 2 (2008).

[29] See the preamble in the Marrakesh Agreement establishing the World Trade Organisation ("WTO Agreement") of 15 April 1994, at paras 1 & 2.

[30] Mayda A. M. & Rodrick D, *Why are some people (and countries) more protectionist than others?,* EUROPEAN ECONOMIC REVIEW 49 (2005), 1393-1430.

The proposed trade and investment regime does not advocate for a complete closure of Kenyan markets to foreign investments. Instead, it is about cautiously embracing liberal investments and trade. FDIs and international trade are very important to the growth and development of Kenya, and hence should be supported. At the same time, they should not be allowed to thrive to the extent that domestic investments have no space at all. It is important for any self-respecting country to use all available instruments to ensure that domestic investments are nurtured and allowed to thrive just like FDIs, if not better. The law is one instrument that can be effectively be utilized to realize this goal. This study focuses on how this can be achieved in a balanced manner, which does not go against the principles of international law. This is informed by the fact that whereas Kenya has been pursuing liberal trade policies for a very long time, it has not achieved good economic growth rates compared to the Asian tigers, with which the country was almost at par, at independence.[31] For instance, in 1963, the South Korean population faced acute starvation, which prompted urgent goodwill from other nations. It is reported that Kenya gave out a loan of 10,000.00 US Dollars (Kshs. 892,200.00) loan as well as relief food to the Asian country.[32] However, this has since changed. Using the Economic Development Plan of 1962, the Government of South Korea identified strategic industries such as textiles in the initial stages of the development plan.[33] Today, Kenya and South Korea are miles apart, with the former languishing down the economic pecking order while the latter is an industrial giant.[34] A change in the economic model with the attendant change in the requisite legal framework is appropriate and desirable.

1.4 Statement of Objectives

The general objective of this research paper was to firstly critically analyse the sufficiency of the legal framework under which FDIs, domestic investments and trade are governed in Kenya. Secondly, a discussion on the viability of a protectionism legal framework in a world where the notion of free trade has gained so much currency will be considered.

[31] Vision 2030 is attempting to improve Kenya's economic fortunes.
[32] Business Daily, Nation Media Group (Kenya), 09 October 2014.
[33] Dong Heon Kim, Senior Professor of Economics, Korea University as quoted in the Business Daily, ibid.
[34]Supra note 32.

The study will argue that in the context of massive foreign investments in the country, a positive protectionist legal framework is necessary in order to help Kenya's desire for better economic development as articulated in Vision 2030.[35] Specifically, a comparative and historical analysis will be undertaken using a few but relevant jurisdictions globally. This will mainly be on the aspect of protectionism.

Focus will also be made on the aspect of treaty negotiations. Are Kenya's treaty negotiators sufficiently equipped to handle high stakes global investment and trade legal regimes such as the on-going Doha trade talks? Rather than wait until world trade policies have been formulated and agreed upon, why not attempt to negotiate and secure better deals in good time? This will obviate the need to complain loudly after the event, and when little, if anything can be done. In conclusion, the research paper will show that there is a case for adoption of a measured protectionist legal regime. Kenya can identify sectors where it has a comparative advantage and strongly support the same as a showcase of domestic investments and trade. The leather industry is given as an example. It will be shown that a protectionist legal regime can only succeed if corruption is eliminated as well as existence of the political will by Kenya's leadership to support the initiative.

1.5 Research Questions

Firstly, is Kenya's legal regime unfavourable to domestic investments and trade? Secondly, does a positive protectionist legal regime still have any place for Kenya in view of the desire for massive foreign direct investments as well as liberal trade promotion? Thirdly, is it viable to run an investment and trade legal regime that combines both aspects of liberalism and protection? These questions arise because of a number of reasons. Firstly, even from the name, the FIPA was specifically enacted to promote and protect foreign investments. Secondly, under the IPA, even there is mention of domestic investments, there is no deliberate effort made in terms of

[35] Supra, note 21.

strong provisions aimed at facilitating and safeguarding domestic trade and investments. It is very unpatriotic to treat both foreign and domestic trade and investments equally. Concerning the second research question, the desire by Kenya to attract massive foreign investments makes it difficult to hear any voices of protectionism. The relevance of these voices requires further exploration and hence these research. Finally, can both positions be captured within the same legal framework? That is what this research sought to find out.

1.6 Hypothesis

Kenya's legal regime is unfavourable to domestic investments and trade. Instead, it is obsessed with promotion and protection of foreign investments and trade. To attain sustainable development aimed at realizing Vision 2030, Kenya must review this legal regime and adopt positive protectionist measures. It is possible, with appropriate formulation, for liberal and closed trade legal framework policies to mutually co-exist.

1.7 Theoretical Framework

Although it has not been possible to state and review all the theories applied in this thesis,[36] it is conceded that this thesis has been heavily influenced by the sociological school of thought. Law must conform to society. The society should not be dictated by the law but instead, it should follow laws that meet its interests and aspirations. This study does not conform to the widely held view that liberalisation of the market is the sole way to go in international investments and trade. Where liberalised trade threatens a country's quest for sustainable development, then measured protectionism is called for. In other words, it is not the law as captured in international trade instruments such as WTO, for instance, which is important, but what is in the best interests of a country such as Kenya. This sociological school of thought is also reflected in Kenya's supreme law, the Constitution.[37]

[36] J. W. Harris, Legal Philosophies (2nd edn. LexisNexis, Butterworth's) 1.
[37] Constitution of Kenya, 2010.

The aspect of social justice is expressed in the sociological school of thought.[38] Under the Kenyan Constitution, there is provision for national values and principles. These include human dignity, equity, and social justice, among others.[39] Even though some of the investment and trade legal instruments signed by Kenya operate under international law, some form of deviation should be tolerated. This is for purposes of ensuring that there is attainment of some level of equity and social Justice. Legal positivism will thus not be appreciated largely by this study.

On the other hand, however, substantial traces of the natural school of law thought may feature prominently. This is owing to the fact that while free trade excites many of its proponents, those who get hurt by its effects could consider it *"immoral"*. Many commentators in the natural school of law have consistently pointed out that any law, which lacks moral validity, is wrong and unjust.[40] According to the hypothesis, the existing legal framework pertaining to investments and trade is unfavourable to Kenya and hence immoral. The need to develop a regulatory framework aimed at addressing this *"immorality'* is a welcome move by naturalists.
The false paradigm model under the international dependence revolution economic theory will feature prominently in this study. Underdevelopment can be attributed to inappropriate advice prescribed by the West in most cases.[41] A case in point includes the structural adjustment programmes (SAPs) recommended to Kenya by the Bretton Wood institutions.[42] The SAPs never worked and in fact were a total failure. Commentators have observed that whereas Kenya was among the first countries to sign a structural loan with the World Bank in 1980, the envisaged trade liberalisation experience had minimal impact, and thus disappointing.[43] South Korea and Malaysia moved far much ahead of Kenya notwithstanding the latter's adoption of the SAPs.

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[38] Supra note 36.
[39] Supra note 37, Article 10 (2).
[40] Yohana, Gadaffi, The Place of Natural Law in Kenya's Jurisprudence, in Journal of Research in Humanities and Social Science, Vol. 2, Issue No. 6 (2014), 39-46.
[41] Todaro M. P. & Smith S. C, ECONOMIC DEVELOPMENT (Addison –Wesley, 11th ed., 2012 at 14-27).
[42] World Bank (WB) and International Monetary Fund (IMF).
[43] Geoffrey Gertz, *Kenya's Trade Liberalisation of the 1980s and 1990; Policies, Impacts, and Implications,* a background paper in a report named The Impact of the Doha Round on Kenya, Carnegie Endowment for International Peace. (http;//www.carnegieendowment.org/files/impact doha Kenya.pdf, 2) (accessed on 12 September 2014).

For Kenya to achieve better economic development, it must reconsider its foreign and domestic investment legal regime. This is aimed at aligning the law to suit the country's specific needs, especially the need to realize Vision 2030.

1.8 Research Methodology

In gathering information for this research paper, the main method used was through the library. Internet searches were also utilized to compliment the library research. The library research method was applied in analysing various positions taken by proponents of both the free trade and protectionist legal frameworks. In addition, relevant Statutes governing Kenya's foreign investment legal regime were closely examined.

1.9 Literature Review

International trade and investments law is a subject, which has attracted a lot of attention.[44] Consequently, the numerous aspects of the subject have received a large coverage. Under the WTO regime, there is a specific Agreement on Trade – Related Investment Measures (TRIMS).[45] This Agreement deals with policies that are deemed inconsistent with GATT. These include measures such as minimum local content and trade balancing requirements.[46]The TRIMS Agreement offers a general perspective on investment regulation. Before the coming into existence of the WTO regime, the prevailing system under GATT did not concern itself with investment matters. Therefore, regulation of investments became a major issue for the developed countries during the Uruguay Round of Trade Negotiations.[47] Generally, the TRIMS Agreement prohibits restrictions on investments.

[44] Dolzer R. & Schreuer C., *Principles of International Investment Law*, Oxford University Press (2008) 1.
[45] www.wto.org (accessed on 18/11/2014).
[46] Ibid.
[47] Otieno – Odek, *The World Trade Organization (WTO) Agreements; Their Impact on Kenya*, in Reporting International Treaties, Friedrich Ebert Stiftung (FES), 2002, 17.

This research paper is concerned about the negative impacts of the unlimited restrictions on investments pertaining to Kenya's domestic industries and trade. The aim is to find a legal avenue through which the harsh effects of unlimited restrictions of investment and international trade on the domestic front can be eliminated. The symbiotic relationship between investment and trade law remains a live issue.

Arwel Davies wrote that trade and investments legal regimes are therefore not only complementary, but also amount to a symbiotic relationship.[48] This relationship need to be defined, compared and distinguished. DiMascio and Pauwelyn have observed that there is a developing trend for multilateral trade agreements to address investment issues.[49] In this regard, the writers give the examples of the WTO Agreement on Trade - Related Investment Measures (TRIMS) and the General Agreement on Trade in Services (GATS).

Another example given is that of the United States of America, which has included investment commitments in broader free trade agreement such as the North Atlantic Free Trade Area (NAFTA) as well as in bilateral free trade agreements such as the one with Korea.[50] Implementation as well as impact of such agreements on the domestic scene of a developing country such as Kenya requires attention and hence this research.

According to Daniel O. Abala,[51] FDI has been identified as a major contribution towards the economic growth of countries. There is a noticeable rush by FDI recipient countries to offer financial incentives such as tax allowances in order to attract more and therefore reap perceived benefits.[52] But there is an equal danger that such FDI's may end up lowering or even replacing domestic savings and investments, transfer low level or inappropriate technologies to developing countries and inhibit the expansion of indigenous firms.

[48] Supra note 10.
[49] Supra note 11, 50.
[50] Ibid.
[51] Supra note 1, 64.
[52] The benefits of FDIs include increased economic productivity and growth rates, promote skills upgrading, and increase employment as well as innovation.

By focusing mainly on locally available cheap raw materials and labour, foreign investors do not help the recipient developing countries such as Kenya to put to good use their comparative advantages in particular sectors where they are strong.[53] This research paper highlights the critical area that is more often than not forgotten.

Growing influence on the globe by foreign countries such as China has not gone unnoticed.[54] The question of measured protectionism in trade is not new at all. However, what this study seeks to postulate is whether such protection can be captured in a regulatory framework that does not put Kenya on a collision course with its trading partners at the global stage. Chinese growing influence on the continent of Africa at both political and economic levels cannot be overemphasised. Daniel Fiott[55] does not fear to state that this has alarmed many in Europe and America leading to media headlines such as *"why China is trying to colonise Africa!"*.

According to Ombaba, Arogo, Bii, Ogeri, Omuya and Kabuka,[56] by the year 2010, China had become the leading source of Kenya's foreign direct investments. David Haroz[57] posits that the partnership between China and Africa, though of mutual benefit, the same carries with it significant risks. Unless the relationship and risks are managed carefully, African nations such as Kenya stand to suffer exploitation in the course of blindly embracing foreign investments on the continent, not just from China, but other developed countries as well. This thesis explores ways of avoiding or managing risks associated with such relationships.

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[53] UNCTAD, 2005.

[54] Denis M. Tull, *China's Engagement in Africa: Scope, Significance and Consequences*, The Journal of Modern African Studies, Vol. 44, No. 3 (Sept. 2006), 459-479.

[55] Fiott (supra note 10).

[56] Ombaba K. M. B., Arogo P. A., Bii P., Ongeri L. Omuya J. & Kabuka P. O., *A study on the Impact of China's Investments in Kenya*: The Case of Kenya, Journal of Emerging Trends in Economics And Management Sciences (JETEMS) 3 (5): 529-537.

[57] David Haroz, China in Africa: Symbiosis or Exploitation? Vol. 35:2 Summers 2011.

The notion that it is best to leave decisions pertaining to investments at the discretion of the foreign investor instead of the developing country's government has been challenged by scholars such as Victor Mosoti.[58] This writer argues that it is simplistic and untenable to assume that left on their own dictates; foreign investments will flow in a manner that conforms to the country's development needs. A further exploration of this angle is pursued in this research paper. Kenya's decision makers are best placed to correctly determine what is good for Kenya and hence the need for policy space through appropriate legislation.[59]

Wycliffe Nyachoti Otiso takes the position that Kenya's investment law and policy is biased against local investors.[60] This apparent favour of foreign direct investments is in tandem with the notion of free trade. This research gives some proposals on how this can be changed for the betterment of the country's economic interests. Whereas as early as the 1950s, commentators like Leland B. Yeager[61] have been very cynical of any attempt to argue in favour of protectionism policies, others like Natalia Melgar, Juliette and Rossi attempt to explain the support of protectionism.[62] The views on both are always opposed. Any attempt to meet half way is very rare.

Kenya's legal regime on foreign investments as articulated in the Foreign Investments Protection Act, Cap 518 of the Laws of Kenya and the Investment Promotion Act, Cap 485B of the Laws of Kenya is obsessed more with promotion and protection of foreign investments. No attempt is made to insulate the local investments against counterproductive negative impacts of free trade.

[58] Victor Mosoti, the WTO Agreement on Trade Related Investment Measures and the Flow of Foreign Direct Investment in Africa: Meeting the Development Challenge, Pace International Law Review, Vol. 15 (1), 2003.
[59] Ibid.
[60] Otiso Wycliffe Nyachoti*, Examining the bias in Kenya's Investment Law and Policy in relation to Foreign Direct Investment and Local Investors, LLM Thesis, UON,* (2007)2
[61] Leland B. Yeager, *Free Trade: America's Opportunity* [1954] (accessed at http://oll.libertyfund.org/title/2038/145273 on 04 November 2013).
[62] Melgar N., Milgram –Beleix J. & Rossi M, *Explaining Protectionism Support: The Role of Economic Factors* (accessed at http://dx.doi.org/10.1155/2013/954071 on 05 November 2013).

This study is concerned about making a case for measured protectionism in Kenya's foreign investments regulatory framework. A rising consumer middle class and growth in regionalism[63] could provide a sufficient basis to anchor protectionism. Gertz takes the view that contrary to expectations, liberalisation of trade did not produce sustained growth, good employment opportunities and reduced poverty and inequality levels.[64] The writer concludes that in shaping Kenya's future trade policy, a balance between regional and global trade integration is a pre requisite. There must be sustained focus on job creation in order to help Kenya maximize trade benefits.[65] This work builds on the development of this conclusion by Gertz.

According to Mary Odongo,[66] positive or negative development impacts of Economic Partnership Agreements (EPAs) can only be addressed through policy considerations. These include deeper integration at the EAC level with a view of protecting goods from potential displacement or trade losses. Similarly, the competitiveness of Kenya's industries needs to be strengthened immediately.[67] Kenya, alongside her East African Community partner states, has been negotiating a comprehensive Economic Partnership Agreement (EPA) together with the European Union (EU).[68] This is for purposes of among other things integrating into the world economy, the East African Community.[69] EPAs are about investments and trade. This paper takes the position that in the process of negotiating EPAs, care must be taken to ensure that the country's interests are safeguarded.

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[63] Sanoussi Bilal, *"Why Regionalism May Increase the Demand for Trade Protectionism*" JOURNAL OF ECONOMIC INTEGRATION, 13 (1), March 1998, 30-61.
[64] Supra note 43.
[65] Ibid.
[66] Mary Odongo, Economic Partnership Agreements, WTO Compatibility and Development for Kenya, Institute of Economic Affairs, Issue No. 35, February 2013, 2
[67] Ibid.
[68] Supra note 66.
[69] Ibid.

Scholars like Ravinder Rena confirm that among the most important functions of the WTO include the review and propagation of national trade policies, ensuring transparency of trade policies and assistance of developing, least – developed and low income countries in transition to adjust to WTO rules through technical co-operation and training.[70] However, the WTO is an agenda of the western countries and consequently, their interests are what matters. Most investments are owned by individuals from the West. Chances are therefore very high that agreements such as TRIMS are mainly aimed at safeguarding the investors' interests. It is therefore up to developing countries such as Kenya to take full charge of their destiny as far as investment and trade matters are concerned. This research papers thus argues for a deliberate effort on the part of Kenya not to confirm in the conventional manner, to the global instruments such as WTO. Instead, the country should chart an independent as well as custom-made path. This can be achieved through an appropriately formulated legal framework as far as issues of FDIs and international trade are concerned.

1.10 Limitations

Foreign Direct Investments come from many countries and trading blocs such as the European Union. This study may however be influenced, albeit in a limited way, by Chinese investments in Kenya. This is owing to China's perceived dominance and strong incursion into the Kenyan market.[71]

1.11 Assumptions

The economic setback experienced by Kenya during the post-election violence in the years 2007 and 2008 have made the country yearn for foreign investments regardless of the quality. This can be seen for instance in the move by Kenya's top leadership to embrace the Chinese government as a partner at both the political and economic fronts.

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[70] Ravinder Rena, Impact of WTO Policies on Developing Countries; Issues and Perspectives, Transnational Corporations Review (Canada) (2012), Vol. 4 (3), 77-78.

[71] Joseph Onjala, The Impact of Africa – China Relations, The Case of Kenya, Africa Economic Research Consortium, Issue No. 5, November 2010 (available at www.aercafrica.org).

China is viewed as a good replacement for both the European Union and United States of America in terms of expected FDI.[72] Similarly, the desire to achieve the objectives of Vision 2030 automatically makes Kenya jump at any investment opportunity.

1.11 Dissemination

The research paper proposes to disseminate its findings to Kenya's law reform commission and ministries of Trade as well as Finance. This is for purposes of using the findings to develop or review policies aimed at helping Kenya to consider reviewing its foreign investments legal framework for the better. This thesis should also attract attention from trade negotiators for guidance in lobbying for what is in Kenya's economic interests.

1.12 Chapter Breakdown

Chapter one in this paper is the introductory chapter. The same contains the research proposal, which covers key areas of the paper. They include the introduction, statement of the problem, justification of the study, objectives, research questions, hypothesis, theoretical framework, research methodology, literature review, limitations, assumptions and disseminations. A chapter breakdown is also given in this part.

In Chapter two, A definition of Kenya's investment and trade legal regime will be attempted. This chapter highlights the current legal regime governing both foreign and domestic investments in Kenya. The notions of free trade compared with protectionism will also be examined. EPAs and other bilateral and multilateral investment and trade agreements concerning Kenya are discussed.

[72] Ibid.

Chapter three provides a comparative analysis of the question of protectionism from other jurisdictions is comprehensively reviewed in this chapter. It is argued that the United States of America, the European Union, Far East countries and even African countries protected their economies for a considerable period prior to growing economically.

Chapter four presents a case for adoption of a positive protectionist legal regime is made in this chapter. Developed countries have done it to reach their high economic heights. Kenya can ride on an appropriate mix of significant factors to safeguard its economic interests outside trade liberalisation. These include a rise in the middle class to provide an internal market. Regional markets are another source of markets. Protectionism can be a bargain for fair trade. Again, Kenya, like most developing countries does not have the huge capacity to benefit from liberalised trade. Operation outside some of the WTO rules can be negotiated for successfully. The chapter also deals with some of the practical methods that can be used to achieve the measured protectionism.

Chapter five concludes the thesis. Kenya’s legal regime should not be purely preoccupied with promotion and protection of foreign investments. Protection of the country’s interests is equally significant. The notion of pure free trade should not be used to restrict Kenya to the economic runaway permanently. Measured protectionism is a pre requisite to take off.

CHAPTER TWO

2.1. Analysis of Kenya's Investment and Trade Legal Regime

In this chapter, an overview of the current investment legal regimes under which both domestic and foreign investments are governed will be highlighted. A brief understanding of the notions of both free trade as well as protectionism will be examined. EPAs and other bilateral and multilateral investment and trade agreements concerning Kenya are discussed. The picture that emerges is that the idea of free trade is quite dominant. However, there is still room for protectionism as far as the questions of investments and trade are concerned.

2.2. An Overview of Kenya's Investment Legal Regime

In this discussion, the fact that trade and investments are closely related was taken into account.[73] Defining an investment or trade legal regime, especially within the Kenyan context is not the easiest of tasks. That notwithstanding, a synopsis is attempted by this thesis. Kenya's trade policy can be understood through a glimpse of the objectives. The objectives point towards a more open trade regime. This is in terms of increasing overseas market access as well as further integration into the world economy.[74] The policy objectives have been practiced through unilateral liberalisation, regional as well as bilateral and multilateral trade agreements.[75] Owing to this free trade direction, Kenya is a member of the East African Community (EAC); Common Market for Eastern and Southern Africa (COMESA); the African Caribbean Pacific – European Union (ACP – EU) and most important of all the World Trade Organization (WTO).[76] Consequently, there should be no surprise that the legislative framework upon which investments are anchored espouses free trade notions.

However, it is acknowledged that pursuit of pure liberalism trade policies can only benefit Kenya if strong rules are put in place to protect the country against pressures from developed

[73] Supra note 11.
[74] Government of Kenya, *Economic Survey*, 1989.
[75] Hezron O. Nyangito, *Agricultural Trade Reforms in Kenya Under the World Trade Organization Framework*, Kenya Institute for Public Policy Research and Analysis (KIPPRA) Discussion Paper No. 25, January 2003, 8.
[76] Ibid.

countries. The rules should also enhance domestic trade.[77] The legal framework governing investments in Kenya is to be found in various legislations that are examined in this thesis. The list is not exhaustive but it captures the core Statutes pertaining to investment and trade matters. Although the legislations govern specific spheres, there is a common thread that can be discerned in all. This is the fact that they are all supportive of the investment climate in Kenya. Any investor, whether foreign or domestic, at one point or the other, interacts with the various Statutes highlighted.[78] The Investment Promotion Act of 2004 is the main anchor.[79] This legislation streamlined the administrative and legal procedures with a view of creating a more attractive investment climate. The Act's objective is to attract and facilitate investment by assisting investors in procuring the requisite licences for purposes of investment as well as providing other assistance and incentives.[80] The Act replaced the government's Investment Promotion Centre (IPC) with the Kenya Investment Authority (KIA).[81]

Other pieces of legislation are equally important. The Companies Act,[82] Partnership Act,[83] as well as the Foreign Investment Protection Act (FIPA) strongly forms part of Kenya's regulatory framework as far as matters of investments and trade are concerned. Under FIPA, a foreign investor is guaranteed capital repatriation and remittance of dividends and interest.[84] Foreign investors are at liberty to convert and repatriate profits including un-capitalized retained profits (proceeds of an investment after payment of the relevant taxes and the principal and interests associated with any loan).[85] The Companies Act of 1948 provides the foundation for company and investment law.[86]

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[77] Ibid.
[78] Mary Mbithi and Jamuhuri Mainga, Doing Business In Kenya; Procedures, And Regulations, Opportunities, Sources Of Finance And Incentives, A handbook for local investors, United Nations Development Programme (UNDP) (2006).
[79] Supra note 6.
[80] Supra, note 2, part I.
[81] Supra note 6, at section 14.
[82] Cap 486 of the laws of Kenya.
[83] Cap 29 of the laws of Kenya.
[84] Supra note 5, at section 7.
[85] Ibid.
[86] Supra note 79.

In 2008, the Anti – Counterfeit Act,[87] came into existence. It established a dedicated Anti – Counterfeit Agency and created a strong legal framework to combat the widespread trade in counterfeit goods imported to Kenya. The young agency is however, facing a number of challenges. Firstly, it is still struggling to build capacity owing to poor funding from the government of Kenya. Secondly, there is lack of clarity regarding its role compared to related agencies in intellectual property protection such as the Kenya Revenue Authority (KRA), Kenya Bureau of Standards (KEBS), Kenya Copyright Board (KCB) and the Pharmacy and Poisons Board.[88] Thirdly, inter agency cooperation has proved difficult. Finally, the government is yet to adopt regulations to guide the process of implementing the Act.[89]

Incoming foreign investment through acquisitions, mergers, or takeovers are governed by Kenya's new Competition Act,[90] which prohibits restrictive and predatory practices that prevent the establishment of competitive markets and seeks to reduce the concentration of economic power by controlling monopolies, mergers, and takeovers of enterprises. In addition, depending on the industry concerned, mergers and takeovers are subject to the Companies Act,[91] the Insurance Act (in case of insurance firms),[92] or the Banking Act,[93] (in case of financial institutions).

Parliament passed the Kenyan Proceeds of Crime and Anti-Money Laundering Bill in 2009, and it came into force in June 2010.[94] In August 2012, Kenya appointed the Anti-Money Laundering Advisory Board, the oversight body that will guide the creation of the Financial Reporting Centre (FRC), Kenya's Financial Intelligence Unit equivalent.

[87] Cap 130A of the laws of Kenya.
[88] U.S. Department of State, 2013 Investment Climate Statement – Kenya (accessed at www.state.gov on 18/07/2014).
[89] Ibid.
[90] Cap 504 of the laws of Kenya.
[91] Supra note 83.
[92] Cap 487 of the Laws of Kenya.
[93] Cap 488 of the Laws of Kenya.
[94] Cap 59B of the laws of Kenya.

In a bid to attract more FDI's, Kenya has joined many world bodies. For instance, Kenya is a member of the World Bank-affiliated Multilateral Investment Guarantee Agency (MIGA).[95] It is also a signatory to the Convention on the Settlement of Investment Disputes (ICSID) between States and nationals of other States.[96] The Convention established the International Centre for Settlement of Investment Disputes (ICSID) under the auspices of the World Bank.[97] Kenya is also a member of the Africa Trade Insurance Agency (ATIA) as well as many other global and regional organizations and treaties, including the Common Market for Eastern and Southern Africa (COMESA); the Cotonou Agreement between the European Union and the African, Caribbean and Pacific States (ACP); the East African Community (EAC); the Paris Convention on Intellectual Property, the Universal Copyright Convention, and the Berne Copyright Convention; the World Intellectual Property Organization (WIPO); and the World Trade Organization (WTO).[98]

Kenya has also signed double taxation treaties with a number of countries, including but not necessarily limited to Norway,[99] UK,[100] Germany,[101]and Canada[102]. On November 27, 2007, Kenya joined with its EAC sister states in signing the first-ever interim economic partnership agreement (EPA) with the European Community (EC). In mid-July 2008, Kenya and its fellow EAC members signed a Trade and Investment Framework Agreement (TIFA) with the United States at the conclusion of the 2008 African Growth and Opportunity Act (AGOA) Forum in Washington, D.C.[103] The significance of these affiliations is explained below.

[95] The body issues guarantees against non – commercial risks to enterprises that invest in member countries.
[96] Supra note 89.
[97] Ibid.
[98] Ibid.
[99] Legal Notice No. 10 of 1970.
[100] Legal Notice No. 253 of 1977.
[101] Legal Notice No. 20 of 1980
[102] Legal Notice No. 111 of 1987.
[103] The Act was later in the year 2000 passed by America's legislature.

Secured interests in property are recognized and enforced in Kenya. The legal system protects and facilitates acquisition and disposition of all property rights, including land, buildings, and mortgages.[104] Kenya has a comprehensive legal framework to ensure intellectual property rights (IPR) protection, which includes the Anti-Counterfeit Act,[105] the Industrial Property Act,[106] the Trade Marks Act,[107] the Copyright Act,[108] the Seeds and Plant Varieties Act,[109] and the Biosafety Act.[110] Kenya is a member of the World Intellectual Property Organization (WIPO) and of the Paris Union (International Convention for the Protection of Industrial Property), along with the United States and 80 other countries.[111] The African Intellectual Property Organization (AIPO) embodies a future prospect for patent, trademark, and copyright protection, although its enforcement and cooperation procedures are still untested.[112] Kenya is also a member of the African Regional Intellectual Property Organization (ARIPO). Kenya is a signatory to the Madrid Agreement Concerning the International Registration of Marks.[113] These affiliations are expected to increase Kenya's interactions with the world and thereby attract more investments.

The promulgation of Kenya's new constitution in August 2010 put in place a framework to establish regulatory institutions that support investment growth and productivity.[114] In order to operationalise the new laws, however, various pieces of legislation have to be put in place within the next five years, and the content of this legislation will determine whether the new constitution's potential is realized.

[104] Constitution of Kenya, 2010, Article 40.
[105] Supra note 79.
[106] Cap 509 of the laws of Kenya.
[107] Cap 506 of the laws of Kenya.
[108] Cap 130 of the laws of Kenya.
[109] Cap 326 of the laws of Kenya.
[110] Cap 321A of the laws of Kenya.
[111] Supra note 89.
[112] Ibid.
[113] Ibid.
[114] The aspects of good governance, environmental protection, devolution, functional judiciary, good public finance and service as well as proper security systems are all geared to creating an investor friendly Kenya.

The previously mentioned legal framework has opened up Kenya greatly and it has been ranked among the most accessible and connected markets in Africa. The country stands among the continent's top five behind South Africa, Tunisia, Guinea, Sudan, and Mauritania with regard to reliability of the supply chain. Kenya ranked 76 out of the 150 countries tested for efficiency in key supply chain areas such as customs procedures, cost of logistics, and infrastructure quality.[115] Through the Port of Mombasa, Kenya is a major hub for international and regional trade for neighbouring land - locked countries such as Uganda and the Great Lakes region.

In the financial sector, Parliament amended the Banking Act,[116] in 2004 to delegate the power to register and deregister commercial banks and financial institutions from the Finance Minister to the Central Bank of Kenya (CBK).[117] The separate Central Bank of Kenya Act,[118] enhanced the security of tenure for the Governor, increased the Bank's operational autonomy, strengthened the CBK's bank supervision functions, and codified statutory restrictions on government borrowing from the Bank. The CBK sets requirements for all banking institutions and building societies to disclose their un-audited financial results on a quarterly basis by publishing them in the print media. Parliament also amended the Central Bank of Kenya Act in December 2004 to establish an independent Monetary Policy Advisory Committee (MPAC) whose mandate is to advise the Bank with respect to monetary policy. The amended Act provides for the CBK to publish the lowest interest rate it charges on loans to banks, referred to as the central bank rate.

In the recent past, Kenya has witnessed further improvements in the financial sector's legal and regulatory framework, beginning with the enactment of the Cooperative Societies (Amendment) Act of 2004,[119] which governs the formation and management of cooperatives in Kenya. To regulate Kenya's burgeoning insurance industry, Parliament passed the Insurance Amendment Act 2006, which resulted in the establishment of the Insurance Regulatory Authority.

[115] World Bank Survey on Trade and Logistics (2007).
[116] Cap 488 of the laws of Kenya.
[117] Ibid, at sections 5 and 6.
[118] Cap 491 of the laws of Kenya.
[119] Cap 490 of the laws of Kenya.

To strengthen the Sacco industry, Parliament passed the 2007 Sacco Societies Act.[120] As a result, access to financial services has improved, especially for those previously unable to bank. Mobile money has grown in size and popularity and now provides savings and insurance services to the large majority of Kenyans who do not have access to traditional banking services. Special economic zones have been established under the Export Processing Zones Act.[121] They are meant to facilitate export oriented investment and development of a conducive environment for such investments.[122]

Kenya's investment law mirrors closely that of its former colonial master, Britain.[123] It offers protection against expropriation of private property subject to due process as well as adequate and prompt compensation.[124] Expropriation may only occur for either security reasons or public interest. A foreign investor's investment license may also be revoked under certain circumstances. These include the following: (1) if an untrue statement is made while applying for the license, (2) provisions of the Investment Promotion Act or any other law under which the licence is granted are breached and (3) if the terms and conditions of the general authority are breached.[125]

Though the affiliation by Kenya to international bodies has been aimed at attracting FDI's into the country, the result is opening up of the Kenyan economy excessively. It is not surprising that most of the affiliations occurred either during or just immediately after the structural adjustment programmes experiments. The legal regime has always been favourable to free trade but at the expense of domestic investments.[126]

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[120] Cap 490 B of the laws of Kenya.
[121] Cap 517 of the laws of Kenya.
[122] Akash Devani, *Investing in Kenya; an Overview of Existing Regulatory Environment and Framework for Investors*, January 2009.
[123] Supra note 89.
[124] Cap 518, at section 8.
[125] Supra note 6, part VI.
[126] Supra, note 60.

Similarly, Kenya's legislative framework as captured in some of the statutes mentioned in this segment is preoccupied more with promotion and attracting foreign investments. There is no deliberate effort to protect local investments. An economy that is opened too much and does not have the capacity to compete is not desirable. Consequently, the affiliations, which could not have been well thought out have not worked well for Kenya.[127] The next section addresses specifically the notions of free trade and trade protectionism. Can the two mutually co-exist or one is better than the other, within the Kenyan context?

2.3. Free Trade

The notion of free trade provides that economies that are more open grow faster than closed ones.[128] This emphasis has been made by many international organizations such as the World Trade Organization.[129] There is proclamation on its website to the effect that a strong and prosperous trading system has been realized, which in turn has contributed to unprecedented growth. Briefly, the narrative can be summarized, as trade liberalization is the only known way to escape from slow economic growth. Free trade has a firm founding in the WTO trading system. This system dates back to the GATT of 30th October 1947.[130] GATT was intended to be the provisional agreement governing global trade pending creation of an International Trade Organization (ITO) as a specialized agency of the United Nations Organization (UNO).[131] Eventually, the WTO came into being and it encompassed trade in services as well.[132] GATT was restricted to the aspect of goods only. The global trade regime has always been concerned with a reduction of barriers to international trade in goods and services. This trade liberalization is a key aspect of international trade and represents one of the most visible symbols of globalization in the recent past.[133]

[127] Supra note 58.
[128] Jenny Minier, *"When is Trade Protection Good for Growth*, Paper prepared by the Department of Economics, University of Kentucky, October 2005.
[129] "The WTO in Brief", (available at http://www.wto.org)
[130] Supra note 27..
[131] The GATT agreement provided rules for the regulation of the world trading system from 1948 to 1994 when the WTO came into existence. However, it was never ratified and consequently, the ITO never came into existence.
[132] Trade in services is contained in the General Agreement on Trade and Services (GATS).
[133] Supra note 27, at 24.

According to proponents of free trade,[134] it is fair because it offers consumers the most choices and the best opportunities to improve their standard of living. It fosters competition, spurring companies to innovate and develop better products and to bring more of their goods and services to market, keeping prices low and quality high in order to retain or increase their market share. Free trade can spur innovation. Competition leads to increasing innovation. This is evident, for example, in the intense competition in the growth of electronic commerce. Free trade promotes innovation because, along with goods and services, the flow of trade circulates new ideas.

Since companies must compete with their overseas counterparts, countries' firms can take note of all the successes as well as the failures that take place in the global marketplace. Consumers then benefit because companies in a freely competing market must either keep up with the leader in order to retain customers or innovate to create their own niche. Removing barriers to competition such as quotas and tariffs that limit access and competition is both good economic and public policy.[135] Free trade rewards risk-taking by increasing sales, profit margins, and market share. Companies can choose to build on those profits by expanding their operations, entering new market sectors, and creating better-paying jobs. Trade liberalism also fosters support for the rule of law.

Companies that engage in international trade have reason to abide by the terms of their contracts and international agreed-upon norms and laws. The World Trade Organization,[136] for example, though not a company or country, compels its member countries to ensure that their trading companies honor trade agreements and, in any trade dispute, to abide by the decisions of the WTO as mediating body. By supporting the rule of law, free trade also can reduce the opportunities for corruption.

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[134] Supra note 61.
[135] Ibid.
[136] Granger L., Explaining the Broad – Based Support for WTO Adjudication, Berkeley Journal of International Law, Vol. 24, Issue 2, 2006.

In countries where contracts are not enforced, business relationships fail, foreign investors flee, and capital stays away. It is a downward spiral that especially hinders economic development in countries where official corruption is widespread. Free trade, reinforced by the rule of law, removes such incentives for corruption by spurring economic growth, increasing the number of better-paying jobs, and ultimately increasing the level of prosperity. However, free trade transmits more than just physical goods or services to people. It also transmits ideas and values. A culture of freedom can flourish whenever a great society, as 18th century economist Adam Smith termed it, emerges with the self-confidence to open itself to an inflow of goods and the ideas and practices accompanying them. A culture of freedom can become both the cornerstone and capstone of economic prosperity.[137]

As the foregoing discussion shows, the ability to trade freely increases opportunity, choices, and standards of living.[138] Countries with the freest economies today generally have adopted a capitalist model of economic development, remaining open to international trade and investment.[139] These countries include the United Kingdom and many of its former colonies and dominions: Hong Kong, Singapore, New Zealand, the United States, Australia, and Canada. Every day in the marketplaces of free countries, individuals make choices and exercise direct control over their own lives. With a sound infrastructure based on economic freedom, assured property rights, a fair and independent judiciary, the free flow of capital, and a fair system of low taxation, poor countries can create an environment that is friendly to trade and inviting to foreign investors.[140]

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[137] Supra note 61.
[138] Supra note 61.
[139] Supra note 61.
[140] Economic Freedom Index, *2000,* ranks Taiwan as the 11th freest economy in the world. With its economic freedom, came the rise of democratic institutions. For the first time since the ruling party (the Kuomintang, or KMT) established a government in Taipei 50 years ago, a democratic transition of power took place in Taiwan.

A number of explanations have been put forth to explain the growth of trade liberalism in developing countries. Some scholars have indicated that economic crises have forced countries to reform and liberalize. Others are of the view that external pressures from the US and Western countries in general, as well as international institutions, such as the WTO, IMF and World Bank, have compelled the world, including developing countries to engage in free trade. Lastly, the spread of neoliberal policy ideas and democracy have been credited with bringing economic liberalization.[141] Another aspect of free trade in the form of EPAs will be examined in the next segment.

2.4. Economic Partnership Agreements

Economic Partnership Agreements are another way through which investments and trade occur. Kenya can reap benefits from these agreements if it negotiated for what is in its best interests. By way of example, in negotiating for any agreement with any developed country, Kenya must ensure that it addresses the question of its capacity to compete before committing itself to any agreement. Several economic partnership agreements (EPAs) between developed and developing countries thus emerged. The African Growth and Opportunity Act (AGOA) is a good example.[142] The Economic Partnership Agreement between the European Union and members of the East African Community where Kenya is a key member is another example. Similarly, Kenya has entered into several bilateral and regional trade agreements with other countries. It is reported that there are some 230 regional trade agreements (RTAs) in force worldwide. Virtually every country is a party to one or more agreements. The slow process of multilateral trade negotiations in the WTO has largely contributed to the increasing focus on regionalism and RTAs.[143]

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[141] Helen Milner; *Why the Move to Free Trade? Democracy and Trade Policy in the Developing Countries*, Columbia University, February 12, 2004, 3.
[142] Legislation by the US that gives qualified access to the American market of goods from sub - Saharan African Countries.
[143] Meyer, N. (2010), "Bilateral and Regional Trade Agreements and Technical Barriers to Trade: An African Perspective", *OECD Trade Policy Working Papers*, No. 96, OECD Publishing, (2010) 10.

These agreements still amount to trade liberalisation. Nevertheless, Kenya can still reap benefits from these agreements if it negotiated for what is in its best interests. By way of example, in negotiating for any agreement with any developed country, Kenya must ensure that it addresses the question of its capacity to compete before committing itself. Several Economic Partnership Agreements (EPAs) between developed and developing countries thus emerged. The African Growth and Opportunity Act (AGOA) is a good example. The Economic Partnership Agreement between the European Union and members of the East African Community where Kenya is a key member is another example. Similarly, Kenya has entered into several bilateral and regional trade agreements with other countries. It is reported that there are some 230 regional trade agreements (RTAs) in force worldwide. Virtually every country is a party to one or more agreements. The slow process of multilateral trade negotiations in the WTO has largely contributed to the increasing focus on regionalism and RTAs.[144] In the next section, the question of trade protection will be given consideration.

2.5. Protectionism

Protectionism is generally defined as the policy of imposing duties as well as quotas on imports in order to protect, against global competition, home industries from overseas competition.[145] This in turn would lead to the growth of local industries, the growth of jobs and a better living standard for the citizens due to money being spent and reinvested locally. When industries are just beginning, it makes sense to protect them from the perils of foreign competition at first, until the industry grows and matures. At that time, the protection can be lifted and the mature company will be competitive.[146] Of course there are other factors such us corruption as well as inefficiencies that complicate progress. Trade protection alone is therefore not sufficient to guarantee economic success. It must as of necessity, be accompanied by the political goodwill on the part of a country's leadership in order to realize the full benefits for the people.[147]

[144] Ibid.
[145] Supra note 62.
[146] Jing Ma and Yuduo Lu, *Free Trade or Protection: A Literature Review on Trade Barriers*, Research in World Economy, Vol. 2 No. 1, 2011, 72.
[147] Supra note 62.

Another advantage of protectionism is that government revenue increases from tariff revenue.[148] This revenue could be used to fund social welfare programs. Similarly, with government monitoring, workers will be paid a fair living wage. Ground and air pollution laws will be enforced and those companies violating the same will be subject to fines and mandatory clean-up. Although strictly speaking, this is not trade protection, it is an aspect of government intervention aimed at ensuring that dumping does not occur.

The government could establish a quality bureau to inspect all foreign made goods being imported into the country. The operating principle would be *'we should not import it if we can make it'.* An example would be the '*mitumba* industry'.[149] The local market is flooded with used clothing from abroad yet we can make clothing here at home by supporting the cotton growers and the textile industry. An option would even be the growing of hemp for the textile industry. The *jua kali* sector is an example of another major area that needs to be developed to realize its full potential.[150]

2.6. Free Trade or Protectionism?

The end of the *Moi era* in 2002 ushered in Kenya unprecedented optimism in all spheres of life including the economic front.[151] However, the post-election violence of 2007 – 2008 created a huge dent to this optimism. The desire for massive foreign direct investments to catapult Kenya to higher economic growth levels has never been more urgent. Liberalisation of international trade in goods and services as articulated within the framework of the General Agreement on Tariffs and Trade (GATT) as well as the General Agreement on Trade in Services (GATS) has made it easy for FDIs to come in from all directions. This is because GATT and GATS promote free movement of goods and services across the globe.

[148] Ibid, Pg. 74.
[149] *Mitumba* refers to used or second hand clothes
[150] The *Jua Kali* sector refers to Kenya's informal industrial sector.
[151] President Daniel Arap Moi ruled Kenya for a period of 24 years but during his reign, the country did not attain good economic growth. Therefore, when a new government under President Mwai Kibaki came into power, there were many expectations from Kenyans for better economic times.

FDI aids the movement of goods and services due to the close relationship between trade and investments.[152] Whereas this would appear as most welcome relief, the legal regime's obsession with promotion and protecting foreign investments as seen for instance in both the Foreign Investments Protection Act, Cap 518 of the Laws of Kenya and the Investment Promotion Act, Cap 485B of the Laws of Kenya is not tenable. From the title and preamble, it is evident that the former Act clearly deals with the protection of foreign investments.

The latter Act treats both foreign and domestic investments at the same level. The Act does not warn against the negative impacts of FDIs. These include over utilization of the natural resources, use of out dated technology, preference of imported to local inputs, displacement of the local investments, political dependence on FDI source countries and social disruptions associated with the creation of tastes for expensive foreign consumer goods.[153]The Government of Kenya encourages foreign direct investments more than domestic ones.[154] Foreign trips by the head of State to various countries as well as investment conferences attest to this fact.

In addition, export platforms such as the Export Processing Zones (EPZs) confirms Kenya Government's attempts to implement a series of measures aimed at attracting foreign investors into the country.[155] It is significant to point out that some of these much touted export platforms have been very disappointing in terms of performance. By way of example, up to the year 1997, exports from the EPZs had only accounted for 3.5% of the total manufacturing exports while employment in these firms was hardly 1% out of the total manufacturing employment.[156] This outcome clearly shows that obsession with promotion and protection of foreign investments at the expense of the country's own economic, political and social interests by Kenya's legal regime is not always the perfect thing to do. It removes the necessary balance between foreign and domestic investments.

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[152] Supra note 11.
[153] Njeru B. N., The Impact of Foreign Direct Investments on Economic Growth in Kenya, Master's Thesis, University of Nairobi, 2013.
[154] Kenya Investment Guide (available at aabf.org/Kenya_inv_uide.htm accessed on 18/11/2014).
[155] Supra note 1, at 65.
[156] Glenday and Ndii, "Export Platforms In Kenya", mimeo, 2007.

It is therefore not surprising or strange that most National laws dealing with investment issues in developing countries are guided by the single-minded purpose of attracting foreign investments through concessions that are usually extensive.[157] This state of affairs easily compromises the country's quest for attainment of the goals outlined under Vision 2030. Many of the industrialized countries in the word protected their home markets at the same time promoting exports.[158] Poor countries with no capacity to benefit from more trade openness should insulate their markets considerably. The European Union has been doing it [159] The United States of America and some Asian Countries such as Malaysia have equally not been left behind. In Africa, South Africa and Egypt represent good examples.[160] This aspect will be discussed substantively in chapter three of this research paper.

The monitoring of trade measures taken by G20 economies report (Mid October 2010 to April 2011) reveals that trade restrictions have become more pronounced than in the past.[161] This being the case, there is no good reason why Kenya cannot follow this model and achieve the requisite development. As will be examined in more detail in the subsequent chapters, whilst advanced developing countries, which have been participating in free trade for long periods of time, may be able to bear the pressures of further liberalisation, other developing countries may not be able to compete with the faster opening of their markets or with other demands of the developed countries.[162] There is still a widespread belief that liberalisation is necessarily good for development, and the faster the liberalisation the better it is for development.[163]

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[157] Victor Mosoti, Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO; Are Poor Economies Caught in Between, Northwestern Journal of International Law and Business, (2005), Vol. 26, Issue No. 1, 95, 100.
[158] Takatoshi Ito and Anne Krueger, Trade and Protectionism: NBER- EASE, Vol. 2.
[159] This is through the EU's Common Agricultural Policy (CAP), which is designed to protect European farmers from competitors.
[160] A substantive discussion on this issue will be dealt with in the next chapter.
[161] There is a rider to the effect that the report is intended to be a purely factual and is issued under the sole responsibility of the Director-General of the WTO. The report has no legal effect on the rights and obligations of WTO Members, nor does it have any legal implication with respect to the conformity of any measure noted in the report with any WTO Agreement or any provision thereof. This report is without prejudice to Members' negotiating positions in the Doha Round.
[162] Brazil, Russia, India, China and South Africa on one hand may not be at the same economic level with Kenya, Uganda and Tanzania by way of example.
[163] The European Union Explained; Trade, EU, 2014(available at http://europa.eu/pol/index_en.htm accessed on 18/11/2014).

This was the intellectual basis for developed countries to pressurize developing countries to quickly and deeply cut their tariffs and remove non-tariff barriers, as well as open up their services sector, financial sector and investment regime through the failed structural adjustment programmes (SAPSs).[164] However, there has been growing scepticism from not only civil society but also policy makers regarding this orthodoxy, mainly because such rapid liberalisation has led to import surges in many developing countries, with adverse effects on the local industrial and agricultural sectors, and on the balance of payments and the debt position. In short, the policy prescription of market economy, privatization and external liberalisation as founded upon structural adjustment programmes did not work.[165]

The emerging paradigm is that developing countries require certain degrees of protection to enable the local firms and farms to compete in their own domestic markets, and that this was the way the now-developed countries arranged their own trade and industrial policies when they were at the development stage. As early as 1920, the US had put in place measures aimed at protecting its textile market against imports from Japan, Taiwan and Hong Kong.[166] Such protection is especially required by developing countries when many agricultural products are heavily protected by tariffs and subsidies in the developed countries, and where export and domestic subsidies enable these countries to sell artificially - cheapened products on the world market.[167] Tariff protection is one way through which developing countries can defend their farmers from unfair competition, especially since quantitative restrictions were prohibited under the Uruguay Round.[168]

[164] Supra note 66 at 24.
[165] Miwa Yamada*, Evolution in the Concept of Development; How has the World Bank's Legal Assistance Extended its reach?* IDE Discussion Paper No. 133. March 2008, 4-5.
[166] Helen Hughes, Anne Krueger*, Effects of Protection in Developed Countries on Developing Countries' Exports of Manufactures*, in *The Structure and Evolution of Recent U.S. Trade Policy*, Robert E. Baldwin and Anne O. Krueger, eds. Volume Publisher: University of Chicago Press, 1984, 392.
[167] Supra note 147.
[168] Trade negotiation round prior to establishment of the WTO.

2.7. Bilateral and Multilateral Treaty Agreements

There is no comprehensive multilateral instrument for the regulation of foreign investments; the same are therefore only subject to country specific Bilateral Investment Treaties (BITs).[169] At the multilateral level, WTO's Trade – Related Investment Measures (TRIMS),[170]that is fairly limited in scope and the General Agreement on Trade in Services (GATS) play a critical role. One of the ways through which countries have tried to attract FDIs is by way of executing BITs that offer protection to the foreign investors.[171] By the end of the year 2002, a total of 533 BITs, to which an African country was a party, had been signed.[172] This implies that out of the then 53 countries on the continent, every country had executed about 10 treaties. Kenya has in force three BITs (all EU) with Germany, UK and Netherlands.[173] Through these BITs, FDIs are expected to flow into the country and support the much-needed economic growth through the resultant trade.

This chapter has discussed and analysed the prevailing legal regime for Kenya's investment and trade. An appreciation of the close relationship between trade and investments as noted in the previous chapter has been briefly continued. The meaning and impact of free trade, EPAs, protectionism and BITs has been considered in relation to the subject matter.[174] The next chapter will focus on a comparative and historical study of trade protectionism in selected key and relevant jurisdictions.

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[169] Supra note 158.
[170] Patrick Low and Arvind Subramanian, TRIMS in the Uruguay Round; An Unfinished Business Presentation at the Uruguay Round and the Developing Economies World Bank Conference (26/01/1995)
[171] Mary Hallwad – Driemier, *Do Bilateral Investment Treaties Attract FDI?: Only a bit...and they could bite* (World Bank, Working Paper No. 3121, June 2003) (available at http:econ.worldbank.org)
[172] UNCTAD, Bilateral Investment Treaties: A Compilation. (available at http://www.unctadxi.org)
[173] Lynette Gitonga, A Resource for Global Trade Issues and Solutions from an African Perspective, 2012 (accessed at www.lynettegitonga.com/2012/04 on 18/1/2014).
[174] The subject matter is the title of this research paper, i.e. Foreign and Domestic Investments; Case for a Protectionist Legal Regime?

CHAPTER THREE

3.1. Protectionist Legal Regimes: A Historical Comparative Study

This chapter will conduct a quick survey of some few but relevant jurisdictions on the question of trade protectionism. The aim is to place the subject in context and argue that Kenya will not be engaging in a new venture that has not been, or is not being practiced elsewhere. Care must however be exercised by pointing out that the roots of free trade have become deep. However, there will be certain specific circumstances that may justify resort to protectionism. Pure trade protectionism is not advocated for, and so is pure trade liberalism. The purpose of this comparative study is to confirm the fact that many jurisdictions protected their key sectors in the early stages of their economic development. It is not suggested that the wheel be re-invented, but rather, the significance of taking control of a country's economic interests.

The historical comparative study will be limited to a few but relevant jurisdictions. These include the USA, EU, Germany, Malaysia, South Africa and Egypt. The USA has been chosen due to one important reason. Currently, USA is at the forefront of pushing for free global trade. However, after the First World War, the USA opposed the formation of the International Trade Organization (ITO).[175] At the time, USA feared losing its trading influence to the United Kingdom of Great Britain.[176] This body was poised to succeed GATT. It is the WTO and not ITO that was eventually created.

[175] Douglas A. Irwin, Do we need the WTO? Cato Journal, Vol. 19, No. 3 (2000) 355.
[176] Ibid.

Interestingly, the USA has been at the forefront in pushing the WTO agenda despite failing to support the ITO. Clearly, when the need for an organization to control global trading did not suit the USA, its congress declined to support the ITO. Now that USA has developed sufficient capacity to take advantage of global trade, instruments such as WTO have become very important.[177]

It is important to be concerned about protectionism in the EU because it is a very significant trading block. According to the European Commission, the EU is in prime position when it comes to global trade. The openness of its trade regime has meant that the EU is the biggest player on the global trading scene and remains a good region to do business with. The EU has achieved a strong position by acting together with one voice on the global stage, rather than with 28 separate trade strategies. Europe has become deeply integrated into global markets.[178]This paper argues that trade protection has contributed to this success. Germany, on the other hand is considered in some quarters as the European economic powerhouse.[179] A protectionist legal regime, this paper postulates, contributed to this good position. Malaysia has been picked for two reasons. Firstly, the country represents Asia and hence the global outlook of this study. Secondly, protection of the automobile industry is a good illustration for Kenya. The case of Australia is similarly meant to give a global outlook to the research. South Africa and Egypt have been picked to represent Africa. In addition, South Africa's automobile industry is deemed a good case study. Similarly, Egypt and Kenya share a Free Trade Area.[180]

3.2. The United States of America

USA has always been one of the leading countries that embraced trade protectionism.[181] It has underpinned protection of trade through a myriad of Acts passed by its Congress. A brief discussion of two historical Acts and their impact on the economy of USA is very helpful.

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[177] Edward S. Kaplan, American Trade Policy, 1923-1995, Greenwood Press, USA (1996), 53.
[178] European Commission website (accessed at ec.europa.eu/trade/policy on 17 November 2014)
[179] Gavin Hewitt, Germany: Europe's Indispensable Power, 25/06/2013 (accessed at www.bbc.com on 17/11/2014).
[180] COMESA is the FTA that is shared by Kenya and Egypt.
[181] United States Tariff Act, 1930.

3.2.1. Smoot-Hawley Tariffs Act of 1930

The Smoot-Hawley Tariff Act was signed into law on 17th June 1930, just as the USA economy was beginning to falter on the eve of the great depression whose measure unlike any before it raised existing tariffs on over 20,000 USA imports.[182]

This was an Act of Parliament aimed at providing revenue, to regulate commerce with foreign countries, to encourage the industries of the United States of America, to protect American Labour and for other purposes. It has been noted,[183] that the Smoot-Hawley Tariff Act of June 1930 raised USA tariffs to historically high levels. The original intention behind the legislation was to increase the protection afforded to domestic farmers against foreign agricultural imports.[184] Massive expansion in the agricultural production sector outside of Europe during the First World War led, with the post-war recovery of European producers, to massive agricultural overproduction during the 1920s. This in turn led to declining farm prices during the second half of the decade.[185]

During the 1928 election campaign, Republican presidential candidate Herbert Hoover pledged to help the beleaguered farmer by, among other things, raising tariff levels on agricultural products.[186] But once the tariff schedule revision process got started, it proved impossible to stop. Calls for increased protection flooded in from industrial sector special interest groups, and soon a bill meant to provide relief for farmers became a means to raise tariffs in all sectors of the economy. When the dust had settled, Congress had agreed to tariff levels that exceeded the already high rates established by the 1922 Fordney-McCumber Act and represented among the most protectionist tariffs in USA history.[187] The Smoot-Hawley Tariff was born as an

[182] Tristan Potter, *"The Distributive Impact of Tariff Policy During The Interwar Period", Thesis in Economics*, Vanderbilt University, 2009.
[183] http://future.state.gov/when/timeline/1921_timeline/smoot_tariff.html (accessed on 06 May 2014).
[184] Ibid.
[185] Ibid.
[186] Ibid.
[187] Supra, note 183.

agricultural tariff during the election of 1928.[188] It became the highest U.S. tariff of the 20th century and is considered to be the most blatantly protective tariff in its history.[189] The average rate on all dutiable goods rose to 52.8%, an increase of 18% from the Fordney-McCumber Act of 1922 Some of the most important products on the list included: sugar, cotton, hides, meat and dairy products, cotton, wool and silk textiles, chinaware and surgical instruments.

It is possible to conclude that American prosperity was built upon protective tariffs. Pat Buchanan, who one time was a presidential candidate in the US, once stated that "Behind a tariff built by Washington, Hamilton, Clay, Lincoln, and the Republican presidents who followed, the USA had gone from an agrarian coastal republic to become the greatest industrial power the world had ever seen – in a single century.[190] Such was the success of the policy called protectionism that is at times disparaged today."[191]

Moreover, previous studies have centred on analysing the impact of either interest groups or party politics.[192] President Hoover signed the law because he supported the bill as it finally included a provision called Flexible Tariff Provision (FTP), which he had strongly advocated. The FTP, which the Fordney-McCumber Tariff Act of 1922 first introduced, enabled the president and the Tariff Commission, an agency independent from Congress, to change tariff rates without congressional debate and approval. Through the FTP, the federal government could change tariff rates for single items at any time, in addition to the congressional general tariff revisions that occurred about every six years.[193]

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[188] Mark Milder *"Parade of Protection: A Survey of the European Reaction to the Passage of the Smoot-Hawley Tariff Act of 1930"*. (Accessed at www.cba.uni.edu/economics/themes/milder.pdf on 07 May 2014).
[189] Ibid.
[190] Buchanan, 1998, 224.
[191] Ibid.
[192] Kumiko Koyama The Passage of the Smoot-Hawley Tariff Act: Why Did the President Sign the Bill? Journal of Policy History (2009) Vol 21 2nd edn. 163-164.
[193] Ibid.

3.2.2. Agriculture Adjustment Act of 1933

This was *an Act of Parliament* to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred because of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes. Agriculture Adjustment Act controlled the supply of seven "basic crops" – corn, wheat, cotton, rice, peanuts, tobacco and milk – by offering payments to farmers in return for taking some of their land out of farming, not planting a crop.[194]

The Act highly stimulated American Agriculture. In 1935, it is believed that the income generated by farms was 50 percent higher than it was in 1932, which was partly due to farm programs such as the Agriculture Adjustment Act.[195]To accomplish its goal of parity (The Agriculture Adjustment Act evened the balance of supply and demand for farm commodities so that prices would support a decent purchasing power for farmers.[196]) the Act reduced crop production.[197] The Act accomplished this by offering landowners acreage reduction contracts, by which they agreed not to grow cotton on a portion of their land.

By law, they were required to pay the tenant farmers and sharecroppers on their land a portion of the money, but after Southern Democrats in Congress complained, the Secretary of Agriculture surrendered and reinterpreted section 7 to no longer send checks to sharecroppers directly, hurting the tenants. For most tenants and sharecroppers, the Agriculture Adjustment Act was a major help. To the extent that the Agriculture Adjustment Act control-program has been responsible for the increased price [of cotton], increased the amount of goods and services consumed by the cotton tenants and croppers area.

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[194] http://www.livinghistoryfarm.org/farminginthe30s/water_11.html (accessed on 09 May 2014).

[195] Rasmussen, Wayne D., Gladys L. Baker, and James S. Ward, "A Short History of Agricultural Adjustment, 1933-75." Economic Research Service, United States Department of Agriculture, Agriculture Information Bulletin No. 391 (March 1976), 4.

[196] http://www.u-s-history.com/pages/h1639.html (accessed on 09 May 2014).

[197] Burton Folsom JR, *The Origin of American Farm Subsidies*, 2006. (accessed at fee.org/files/doclib/0604Foldom.pdf on 09 May 2014).

Furthermore, the landowners typically let the tenants and croppers use the land taken out of cotton production for their own personal use in growing food and feed crops, which further increased their standard of living. Another consequence was that the historic high levels of turnover from year to year declined sharply, as tenants and croppers tend to stay with the same landowner. Researchers concluded, "As a rule, planters seem to prefer Negroes to whites as tenants and croppers."[198]

Additionally, USA has taken some protectionist measures targeting countries that pose a threat to the economy. The 'Buy American' provision and the boycott of Chinese-made products are used to protect USA local industries, enhance employment, and maintain their competitiveness towards similar foreign industries in China).[199] Further, The USA Consumer Production Safety Commission (CPSC) and the USA Food and Drug Administration (FDA) have addressed their concerns about the quality, health and safety of merchandise that are made in China. In 2007, around 150 brands of pet food from China were recalled because the ingredients of rice protein concentration and wheat gluten resulted in the death and sickness of pets in the U.S.

In the same year, the FDA revealed that toothpaste products imported from China were found to contain poisonous chemicals. In 2008, the 'scandal' about Chinese milk powder incident sent a new alert to the world. There were six babies killed and 294,000 got sick from the poisonous milk powder; because the ingredients contained melamine, which can cause kidney problems. As a result, the FDA decided to delay further imports from China and requested evidence to prove no melamine contamination of Chinese products.[200] Later, the European Commission started to test milk powder products from China.

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[198] Fred C. Frey and T. Lynn Smith, "*The Influence of the AAA Cotton Program upon the Tenant, Cropper, and Laborer," Rural Sociology* (1936), 483–505 at 501–3.

[199] Jie Zhou "The Role and Impact of the New Global Protectionism in Recent U.S. - CHINA Trade Relations with Illustrations from China's Toy and Tire Industries" A dissertation submitted to Auckland University of Technology in partial fulfillment of the requirements for the degree of Master of Business (MBus,) 2010, at 25. (accessed at http://aut.researchgateway.ac.nz/bitstream/handle/10292/1217/JieZ.pdf?sequence=3 on 14 May 2014).

[200] Ibid.

USA recalled heparin, which caused 19 deaths after the tested result, revealed that the raw material of this product contained a counterfeit ingredient, which was produced in China.[201] Whereas the USA may have in subsequent years embraced liberal trade, it is evident that trade protectionism has played a big role in putting the USA on its current economic growth platform.[202] Protectionism helped this economic giant to build capacity over a considerable period. The country can therefore afford to open up its markets without much worry because it has over the time developed the muscles to fight off most threats to its economy.

Kenya is yet to reach that high level. This does not mean that Kenya should make use of the old Acts passed a long time ago by applying similar measures. Rather, the issue is to utilize the idea and place the same in the current context where trade liberalization is the norm. This will be addressed further and more specifically in the remaining chapters.

3.3. Australia

Protection in Australia has been more than a policy; it has been a faith and dogma and is interwoven with almost every strand of Australia's Democratic nationalism.[203] Protectionism has also seen its support from the political party - Australian Protectionist Party whose primary policies inter alia included protection of jobs and industries.[204] The Lyne Tariff of 1908 was the first genuine protectionist tariff introduced by the Federal Government, and included more than 440 articles with duties nearly double those of the preceding tariff**.** Tariffs on imported manufactured goods then proceeded to rise for the next seven decades.

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[201] Ibid.
[202] Supra note 197.
[203] Keith Hancock's Australia (1930) The Cult of Protectionism in Australia http://www.the-rathouse.com/Revivalist4/RC_protect.html (accessed on 12 May 2014).
[204] http://www.protectionist.net/primary-polices (accessed on 12 May 2014) Propagation of tariff barriers against cheap foreign imports to encourage the survival, rebuilding, and emergence of local manufacturing industries. Enact polices to increase the level of Australian ownership of companies, public assets, and resources. Forge a national apprenticeship programme with incentives for certain industries and country centres. Effectively limit the use of contracted foreign labour.

The culmination was that by 1970, Australia was matched only by New Zealand in having the highest manufacturing tariffs among industrialized countries.[205] The history of Australia highly underpinned protectionist trade. The chief dates are: 1902, when the rival fiscal parties agreed upon a 'compromise tariff'; 1908, when Deakin's Government, with the support of the Labour party, established a Protectionist tariff; and 1921, when the Hughes Government widely extended this tariff in order to safeguard industries which had sprung up under the natural protection enjoyed during the war,[206] and to satisfy the ambitions of economic nationalism which the war had stimulated and additionally in this year was establishment of the Tariff Board, a body intended to be representative of the chief economic interests of Australia.[207]

The duties of the Tariff Board, as laid down by the Act of 1921 and succeeding Acts, were to advise Parliament on tariff business requiring legislation, and to advise the Minister of Trade and Customs on matters of administration. The Tariff Board wielded effective power in originating duties and deferring them and altering them and even (by classifying specified goods as 'concession items') dispensing with them. It is the body, which made decisions and is at the very centre of Australia's Protectionist system. Additionally, the manufacturing industry has also contributed a lot to the economy of Australia and can only give tribute to their protectionist policies.

By the centenary of British settlement, a thriving manufacturing industry had grown up, producing a range of goods sufficient to supply most domestic needs whose federation established a borderless national market and tariff protection, enabling Australia's small-scale manufacturing sector to embark on a period of growth, which would, within a few decades, transform the nation into a fully-fledged industrial state.[208]

[205] http://economicstudents.com/2012/09/the-evolution-of-import-protection-in-australia (accessed on 12 May 2014).
[206] The First World War.
[207] Supra note 204.
[208] http://www.ausinnovation.org/publications/vision-2020/advancing-australia/manufacturing-in-australia-does-it-have-a-future.html (accessed on 13 May 2014).

The opening of the Newcastle Steelworks in 1915 established the Australian steel industry; the building of the Ordnance Factory at Maribyrnong added an interchangeable part mass production facility in 1924 and, in the same year, Holden Motor Body Builders built a modern automotive body plant at Woodville. In 1936, the Commonwealth Aircraft Corporation was established at Fishermen's Bend. During the war that shortly followed,[209] these substantial investments in industrial capability paid great dividends; Australian manufacturing geared up for national defense, expanding its output and capability at an astonishing rate. In the peace that followed, new industries flourished and the golden era of Australian manufacturing ensued. By the late 1950s, manufacturing accounted for 29% of Australian GDP.[210] Today, Australia imposes import duties (taxes) on goods deemed to compete with Australian manufactured goods; the rates (once as high as 60 per cent on chemicals, sometimes with import controls and additional *primage duties*), have been reduced to a maximum of 5 per cent in 1996 notwithstanding; the average is 3.5 per cent.[211]

3.4. European Union

Countries that are members of the European Union do not practice protectionist trade. This is because their appended signature as members of the European Union has subjected them to become supporters of free trade. As such, their countries implement laws that are pro free trade. But that has always not been the case. For a considerably long period, the general view held is that the combination of domestic support, market protection and export subsidies by industrialized countries, led by the EU, has depressed world prices and reduced market opportunities for developing countries.[212]

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[209] The Second World War.
[210] Supra note 204.
[211] http://www.chemlink.com.au/tariff.htm (accessed on13 May 2014).
[212] Xinshen Diao, Eugenio – Diaz Bonilla and Sherman Robinson; The Impact of Agricultural Trade Policies on Developing Countries, 2003, International Food Policy Research Institute (available at www.ifpri.org).

While the EU has domestic lobbies pushing for market access, especially in developing countries, they are on the defensive as far as domestic support and export subsidies are being targeted for reductions.[213] EU subsidies on the cost of production are as high as 40%.[214]This is a clear demonstration of the fact that protectionism is alive. Consideration of the same in one of the strongest economies within the EU, Germany,[215] is relevant and follows in the next segment.

3.5. Germany

In 1879, Germany changed its course and adopted the 'iron and rye' tariff and at this point until the outbreak of the First World War, there was a gradual return to protectionism in continental Europe.[216] The tariff was aimed at imposing tariffs on a wide variety of industrial and agricultural goods. The rationale behind the Tariff is the claim that falling transatlantic and other transportation costs led to a decline in European grain prices and so the owners of large grain-producing estates, the Junkers were hurt by the decline in grain prices and therefore became the leading supporters of tariff protection.[217] The German 1879 tariff is often considered as the first in a series of European tariffs (including in Germany itself) resulting from agriculture's demand to protect itself from the effects of increasing integration in the international economy. As such, the 'iron and rye' tariffs perceived as an early example of a backlash against globalization.[218]

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[213] Aileen Kwa, WTO Members Fight over Developing Countries' Agricultural Markets; An Ominous Outcome for the South, 2002 (accessed at www.iatp.org/files/wto on 17/11/2014).
[214] Ibid.
[215] Supra note 180.
[216]Asaf *Zussman the Rise of German Protectionism in the 1870s: A Macroeconomic Perspective Department of Economics*, Hebrew University, April 29, 2008. (Accessed at http://pluto.huji.ac.il/~azussman/protectionism.pdf (accessed on 15 May 2014).
[217] Ibid at 3.
[218] Ibid at 4

A prominent line of research on the supply-side of the 1879 tariff emphasizes the role of the tariff as an independent source of tax revenues for the German central government. Bismarck was dissatisfied with their system of taxation mainly because it weakened the federal government's position relative to the states (Its government independent sources of revenue stemmed only from indirect taxes that composed of customs and excise taxes) and he therefore imposed the iron and rye tariff to provide the German federal government with an independent source of income.[219]The establishment in 1873 of the Union of Iron and Steel Manufactures is frequently mentioned in the historical literature as the first step in the organized protectionist campaign.[220] During the next several years, the pro-tariff coalition widened. A noteworthy step in the organization of the protectionist movement was the formation in 1876 of the Central Union of German Manufacturers. In addition to the iron and steel sector, the protectionist organization now included other industries such as chemicals, sugar, cotton spinning, linen, and leather.[221]

These sectors were the dominant active participators of tradable goods. They supported trade protectionism for a number of reasons:[222] Firstly, producers of tradable and non-tradable goods were hurt by the severe economic decline. Secondly, the overvaluation of the currency was hurting producers of tradable goods. Thirdly, the exporting industries also suffered from decreased demand in the foreign markets, due to a slowdown in the economies of Germany's major trading partners. The agricultural industry also joined them albeit late around 1877 and it was at this time that Bismark began to have the feel of protectionism; firing in April 1876 of Rudolph Delbruck, the president of the Imperial Chancellery, who was the preeminent free-trading liberal in the leadership circle.[223]

[219] Ibid.
[220] Ibid.
[221] Ibid.
[222] Ibid.
[223] Ibid.

The iron and rye tariff was assented on 07 July 1879 and was fully implemented by 01 January 1880. The wide spectrum of goods covered by the tariff reflected the breadth of the protectionist coalition. The tariff dealt with 43 groups of commodities. A partial list of items included wheat, rye, oats, barley, maize, flour, meat, pigs, oxen, sheep, iron and steel goods and semi-manufactured goods, machinery, glass, yarns and textiles. Exemption from tariff was given to some raw materials. The ad-valorem equivalents of the specific tariff imposed were in the range of 5% to 7% for grain and somewhat higher for industrial goods.

3.6. Malaysia

Malaysia has vastly promoted protectionism in the hope that its economy is boosted. For example, 80% of television programming must originate from local production companies owned by ethnic Malays.[224] The same also applies to its automotive industry. With more than half a million sales per year, Malaysia is the biggest market for automobiles in South East Asia.[225] The history of Malaysian automotive industry goes back to early 1960s, when the Malaysian government developed a policy to promote an integrated automobile industry to strengthen Malaysia's industrial base. The main objectives of the government in promoting an automobile assembly industry were to reduce imports, save foreign exchange, create employment, develop strong forward and backward linkages with the rest of the economy, and transfer industrial technology.[226] Consequently, Malaysia represents one of the biggest automobile markets in the region.

In the 1960s and 1970s, the industry was fragmented and consisted of inefficient assembly plants. The industry‘s progress, to a well-developed manufacturing sector with regards to motor vehicles as well as components, can be traced back to numerous government incentives that were initiated in the mid-1980s and remain until today.

[224] Ibid.
[225] “Market Watch 2012”, The Malaysian Automotive and Supplier Industry pg 6 http://www.malaysia.ahk.de/fileadmin/ahk_malaysia/Market_reports/The_Malaysian_Automotive_and_Supplier_Industry.pdf (accessed on 14 May 2014).
[226] http://www1.american.edu/ted/proton.htm (accessed on 14 May 2014).

The upshot of this policy was that two national car projects Proton, which commenced operation in 1985 and Perodua, which was founded in 1994 dominate the automotive industry commanding 26% and 30% respectively of the local market.[227] In the non - national car segment, Nissan held 6.5% of the market, while Toyota held 18% and Honda 6%[228]. Producing the first national car project, Proton's entry into the local automobile market in 1985 has resulted in massive structural changes in the industry, which was reflected in the shift of the domestic car market, which depended on imported cars, particularly Japanese makes, to one that is dominated by locally made cars.[229] Notwithstanding an unsuccessful start due to the 1985-86 recessions, this caused the decrease in demand and increased vehicle prices, because of the Japanese yen appreciation against the national currency, the recovery of the Malaysian economy contributed to the increase in Proton's production and market share.

The demand and market share of Proton increased, making it the bestselling passenger car in Malaysia, with a market share of 73%.[230] Its success can be attributed to the national car manufacturers who enjoy a certain amount of protection against foreign competition in the form of tariff and other non-tariff barriers formulated by the government through protectionist policies. Increased tariffs and taxes have been used by Malaysia to achieve this goal.[231]

High import tariffs have contributed significantly to developing Malaysia's National Car Projects. By relying less on imported automobiles, Malaysia has to a certain degree reduced its balance of payment deficit. The impact of high tariffs on imported vehicles has had the following positive results. Protection of the domestic automotive industry in such a way led to local producers of national cars earning higher profits due to their higher prices and increase in production.

[227] "Market Watch 2012"The Malaysian Automotive and Supplier Industry, 5 (http://www.malaysia.ahk.de/fileadmin/ahk_malaysia/Market_reports/The_Malaysian_Automotive_and_Supplier_Industry.pdf) (accessed on 14 May 2014).

[228] Ibid.
[229] Supra, note 228.
[230] Ibid.
[231] Ibid.

The measure reduced foreign exchange outlays because the tariffs reduced demand of imports as the price differential make imported automobiles unaffordable for many people. Higher profits for nationals led to higher government revenue – unlike quotas, which benefit the importer or exporting country, revenues from tariffs are collected by the government of the importing country.

Protectionism contributed to Human resource development. According to the terms of their joint venture, agreement between China and Malaysia, Mitsubishi Motor Corporation (MMC) was responsible for plant construction, training and supervision of preparations for production and technical assistance in localization. The national car project required that all Proton staff (engineers, researchers, designers, managers, and mechanics) be trained according to Japanese standards and procedures. Malaysian employees of Proton — from production workers to managers — have been sent to MMC in Japan since 1983 for training. Up to 1991, around 500 had been to Japan for training, while another 178 went in 1992. Proton employees have received training in various aspects of car manufacturing such as production control, welding, painting, trim and final, maintenance, tooling, stamping engineering and quality control. The Proton workforce has been trained in Japan as well as in Malaysia, and is still supervised by Japanese. Many specialists from MMC have also been dispatched to the Proton plant to train Proton employees in Malaysia. In 1991 and 1992 alone, about 200 Japanese specialists from MMC were in Malaysia to provide training under the Technical Assistance Agreement with Proton.[232] Malaysia's protectionist policies have also accelerated the development of automotive components and parts manufacturing, which has created new players as well as given component parts manufacturers the scale of production necessary to become viable. Some of these vendors have also ventured into original equipment manufacturing (OEM) activities for other automotive makers and started exporting their products. Another significant feature is the creation of second and third-tier subcontractors and suppliers.[233]

[232] Ibid.
[233] Ibid.

Proton made a major step in upgrading its engineering capabilities with the acquisition of Lotus Group International Limited, a British automotive engineering company and manufacturer of luxury sports car in October 1996. This step allowed Proton to gain a great engineering expertise, which will enhance them to improvise and come up with new models that are globally competitive and innovative. Currently, the factory has a capability of producing 230 000 units per year. An important milestone in the Malaysian automotive industry was the introduction of Proton WAJA in May 2000, which represents the first Malaysian designed car to be manufactured and actually affordable for local customers.[234] Perodua was the second national car project. Through proper planning and focus, Perodua has provided the Malaysian population with the opportunity of owning a compact, affordable and reliable vehicle, whose standard and quality are good.

Since the establishment in 1994, the domestic market share of Perodua has grown to approximately 25%.[235] One of the most recent records shows that exports of motor vehicles in 2011 (Jan - Aug) amounted to RM654.2 million (2010: 938.2 million, 2009: RM741.5 million). Exports of parts and components were RM2.2 billion (Jan - Aug 2011) (2010: RM2.6 billion, 2009:RM1.99 billion).[236] Major export destinations are ASEAN (Association of South East Asian Nations) countries, such as Thailand and Indonesia, but large quantities are also transferred to China, Syria and UK.[237]

[234] Ibid.
[235] Ibid.
[236] The currency of Malaysia is known as Malaysian Ringgit (RM).
[237] "Market Watch 2012"The Malaysian Automotive and Supplier Industry, 11 http://www.malaysia.ahk.de/fileadmin/ahk_malaysia/Market_reports/The_Malaysian_Automotive_and_Supplier_Industry.pdf (accessed on 14 May 2014).

3.7. South Africa

South Africa's motor industry has always been protected and has received big support from government initiatives.[238]The reason behind this government intervention is not difficult to see. This industry provides substantial employment to the national and local economies in South Africa. Every time the motor industry has faced a crisis, the government has always been at hand to rescue it. Protection of the South African car assembly plants dates as far back as the1920s when they were first established.[239] It is evident that the domestic industry developed mainly for purposes of serving the local market needs. Subsequently thereafter, in the 1960's, the South African economy faced a crisis in terms of foreign exchange shortage. The motor vehicle industry was hard hit because although cars were for the most part assembled locally, heavy reliance was placed on imported components – up to 80%. Only 20% of the local content was being utilized.[240] In response, the Government of South Africa immediately imposed a local content requirement.[241]

Between 1961 and 1981, a series of local content programmes was introduced and carried out. The percentage of local content requirement in the motor vehicle assembly industry rose from 52% to 66%.[242] South Africa has not stopped caring about its domestic economic agenda. Recently,[243] the country published and invited the public to comment on the Promotion and Protection of Investment Bill, 2013.[244] Among the key highlights of the Bill are that it recognizes the wellbeing of the people of South Africa and reaffirms the Government's right to regulate in the public interest in accordance with the law.[245]

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[238] Information procured from the Department of Economic Development and Tourism, Kwazulu - Natal Provincial Government.
[239] Policy In The South African Motor Industry; Goals, Incentives And Outcomes, The South African Journal of Economics, 2002, 1274.
[240] Ibid, at 1275.
[241] See full discussion in Duncan D., We are motor men: The Making of the South African Motor Industry. Caithness, Scotland: Whittles Publishing. (1997).
[242] See full discussion in Black, A. (1994), An Industrial Strategy for the Motor Vehicle and Component Sector, Cape Town: University of Cape Town Press.
[243] The Bill was published on 01st November 2013 through Notice 1087 of 2013 by Mr. Pravin Gordhan, Acting Minister of Trade and Industry.
[244] The Bill is available online at www.gpwonline.co.za
[245] Republic of South Africa; Promotion and Protection of Investment Bill, 2013 – the preamble.

In addition, the purpose of the proposed legislation is clearly stated as to promote and protect investment in a manner that is consistent with the public interest and a balance between the rights and obligations of investors as well as ensure equality in the treatment of foreign investors and citizens of the Republic of South Africa.[246] One conclusion that can be made from these efforts is that South Africa's own agenda is more important than the global free trade agenda. Kenya ought to elevate its personal economic agenda above the global one if it hopes to attain progressive economic growth in line with the Vision 2030 dream.

3.8. Egypt

The other country in Africa that has used trade protection measures for the benefit of its citizens is Egypt. This has been done in the form of subsidies in its energy sector. Kenya and Egypt are both members of the Common Market for Eastern and Southern Africa (COMESA) that trade with each other on preferential terms. At the same time, the two countries are also in competition for foreign direct investments (FDI). In the same breath, Kenya and Egypt have a Free Trade Area (FTA) pact that allows them to carry out trade on preferential terms among themselves. However, unlike Kenya, for a very long period of time, energy subsidies in Egypt have existed The same have been formally justified as a means of ensuring affordable energy services to lower income households. Nevertheless, the other segments of the population have equally benefitted from the subsidies in the Egyptian energy sector. If the energy subsidies were calculated based on full economic cost, the same would amount to 11.9% of the country's GDP.[247] It has been reported that firms such as Colgate Palmolive as well as Procter and Gamble have used the free trade area (FTA) arrangement with Kenya to capitalize on the energy subsidies in Egypt. This they have done by shifting their manufacturing operations to Egypt where they cheaply produce items such as toothpaste, washing powder, sanitary towels and diapers for shipment to Kenya.[248] The other classic case is that of Eveready East Africa, Limited.

[246] Ibid, Section 3.
[247] Chief Economist Complex, March 2012; A Publication of the African Development Bank (AFDB).
[248] Business Daily, Thursday, July 10, 2014; A Publication of the Nation Media Group at page 4.

This battery manufacturing company recently closed its operations in Kenya because of inability to cope with cheap imports. The company will however distribute similar products from one of its affiliates based in Egypt.[249] Through subsidies, Egypt is able to attract more foreign direct investments than Kenya. In fact, Kenya has thus ended up losing a major avenue to create employment for its many jobless youth.

This chapter has been examining how some jurisdictions have applied trade protectionism policies in the interest of their nationals. It is probable that some of the old legislations and statutes referred could no longer be in operation. That is not a big issue. The emphasis is not just on protection per se, but rather, the fact that protection has been used as a foundation upon which greater economic development has been raised upon. In the next chapter, focus will now shift to the justification of making good use of the idea in Kenya and the methodology to employ.

[249] Reuters Africa News of 01 October 2014 (accessed at af.reters.com/article/KenyaNews on 16 October 2014).

CHAPTER FOUR

4.1. Case for a Measured Protectionist Trade Regime

The previous chapter dealt with a comparative and historical study of trade protectionism in several jurisdictions.[250]In this chapter, focus will shift on making out a case for protectionism and how to go about the same under the law. Protectionism is one major avenue through which domestic investments can be nurtured and grown to maturity. There is appreciation of the fact that the notion of free trade is currently deeply rooted, even in Kenya.[251] However, in this chapter, it is argued that, even though free trade has gained so much currency worldwide, pursuit of pure liberal trade policies ought not to be Kenya's agenda. There are compelling reasons as to why Kenya ought to be more cautious in embracing free trade. They include the fact that free trade as conceptualized is an agenda of the developed countries. The first part of this paper will dwell on the rationale for a measured approach in trade protectionism. The second portion of the paper will suggest practical ways to realize this protection without offending the law.

Developing countries such as Kenya have no capacity to compete fairly. Kenya needs to adopt a strategic approach to enhance its trade volumes. For instances, a number of products where the country has a comparative advantage can be identified and utilized as a basis for growth. The South African motor industry examined in the previous chapter is a case in point. The rising middle class in the country can be a very good source of internal markets. In this regard, regional markets within the wider East and Central Africa will be important. The fact that Western countries are concerned only with their individual agendas has been demonstrated in many ways. A classic example is the EU support for its farmers culminating in depressed prices for agricultural products that many developing countries such as Kenya relies on.[252]

[250] These included USA, EU, Germany, Australia, Malaysia, South Africa and Egypt.
[251] Kenya is a member of the WTO, which strongly advocates free trade.
[252] Supra note 160.

Free trade, yes, but there is still room for measured trade protectionism. Brazil, Russia, India, China and South Africa, commonly known as BRICS, recently launched a new development bank and reserve fund.[253] The move is viewed as a major achievement since they can now play a much bigger role in the global financial order. This is in terms of countering Western – led financial institutions such as the International Monetary Fund and World Bank.[254] This is a sign of better economic growth. If these countries had blindly pursued liberal economic policies, they may not have achieved the feat of beginning a bank. How trade protectionism can be realized within the existing legal framework is the question that forms the next discussion.

4.2. Exceptions to the WTO Rules

Promotion of free trade could be the main preoccupation of the WTO. However, under the same legal regime, there is provision for exceptions to the general rules. WTO members are permitted to take such measures with a view to among other things protecting public morals; human, animal or plant life or health; and, the conservation of exhaustible natural resources.[255] There is also the right to take measures aimed at protecting essential national security interests that may restrict trade in goods.[256] Regional Trade Agreements (RTA), in which the Most Favoured Nation (MFN) principle is discarded in order to grant the right of preferential treatment to goods within a Free Trade Area (FTA) or Custom Union (CU), is another exception.[257] There is also the right to take measures with a view of safeguarding a member's external financial position and its balance of payments (BOP).[258] Finally, in very exceptional circumstances, temporary waivers can be granted with the authorization of the other members.[259]

[253] This was during the 6th BRICS' summit held in Fortaleza, Brazil.
[254] Business Daily, Thursday, July 17, 2014; A Publication of the Nation Media Group at page 3.
[255] Article XX GATT 1994.
[256] Article XXI GATT 1994.
[257] Article XXIV GATT 1994.
[258] Articles XII and XVIII GATT 1994.
[259] Article IX GATT 1994.

The above highlighted exceptions to the WTO rules are a clear demonstration that pure free trade is not practical. This realization is what prompted the promoters of WTO to provide for avenues of trade protection. Kenya ought to exploit some of these avenues and carefully protect its trade where necessary, rather than blindly pursuing liberal policies.

4.3 Developed Countries only care about their own Priorities

One example from the intellectual property rights sphere is very telling. A conflict arose in the case of ***Monsanto vs. Schmeiser*,**[260] as to ownership of rights; the rights of farmers cultivating their legally owned farmers and intellectual property owning multinationals. Which rights would be given precedence? Briefly, Monsanto,[261] held a patent over some glyph sate resistant canola seeds and or plants. Monsanto's patent required every purchaser of the seed to sign both a Grower's Agreement as well as a Technology Use Agreement prescribing the conditions under which a farmer may use the patented seeds. An individual farmer living in Saskatchewan by the name Percy Schmeiser had grown canola plants in the region for more than half a decade. He had not signed any of the two (2) agreements with Monsanto. Through cross-pollination, the patented seeds ended up growing on the defendant /farmer's field. The multinational brought an action against the farmer for using patented seeds without Monsanto's consent, and thus infringement. The Supreme Court of Canada shockingly, found in favor of Monsanto.

In so finding, the court defined infringement as any act, which interferes with the full enjoyment of the monopoly of rights of the patentee. The court went on to add that the infringement could occur in the absence of any intention on the part of the infringer. In the disclosed circumstances, intention is immaterial and infringement occurs when the essence of an invention is taken, regardless of the intention of the infringer.

[260] Supreme Court of Canada, Judgment of 21st May 2004. SCC 34
[261] A giant multinational corporation from the United States of America.

Judge Mc Kay held in this case that a farmer's rights over his own land does not entitle him to use proprietary genetic material if he does not have the permission of the owner of the patent irrespective of how that material gets onto his farm.[262] The decision of the court evidently elevated intellectual property rights over land rights. It should not be lost to observers that most, if not all of the important as well as commercially viable intellectual property rights are owned and applied in the interests of big western multinational corporations such as Monsanto, Pfizer, Astra Zeneca, etc.[263] On the other hand, land is mainly associated with poor farmers. The finding by the Canadian Supreme Court is equally an affront to the common law maxim *cujus est solum ejus est usque ad coelum et ad inferos*.[264] This is further amplified by another maxim, *quicquid plantatur solo solo cedit*.[265]

These maxims could mean nothing, if the court decision is anything to go by. That aside, there is one major point of concern from the court decision that pertains to this research. Kenya, like many developing countries does not own many genetically modified patents. If the court decision were to be applied here, the implications would be that plant breeder's rights would be elevated over landowner's rights. This would be tantamount to "re colonization" of land rights by western firms that own genetically modified technologies. Commentators have noted that this would have grave implications on the sovereignty of Kenya, where the fight for land was the main basis for a very fierce struggle for independence.[266]

The above case is a clear demonstration of the way of thinking of Western countries. The rights of giant multinational corporations are more significant than those of some poor farmers. There is every possibility that many Kenya farmers, especially, small scale ones may not own or afford patents. Such a decision if applied today in Kenya can cause undue hardship.

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[262] Supra, note 262.
[263] This protection is achieved through application of the Trade Related Aspects of Intellectual Property Rights (TRIPS), one of the WTO Agreements.
[264] He who owns the land owns everything reaching up to the very heavens and down to the depths of the earth.
[265] Whatever is planted in the ground belongs to the ground.
[266] Patricia Kameri – Mbote, Monsanto vs. Schmeiser: Implications for Land Rights of Kenyan Farmers, in INTELLECTUAL PROPERTY RIGHTS IN KENYA, 109(Moni Wekesa & Bernard Sihanya, eds., Konrad Adenauer Foundation, 2009.

However, does the West care? It is therefore not surprising that the Western philosophy is prepared to go all the way, including subjugating the long and widely held view of land ownership as expounded in the common law maxims.[267] FDI related dispute settlement under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) is another area where one can discern a bias by the developed countries against the developing countries. Although investments can flow from any country to another, subject to the applicable Bilateral Investment Treaties (BITs), developing countries like Kenya need more FDI's than developed ones.[268] From this argument, it follows that most investors will be from developed countries and host Nations will be the developing ones.[269]Although ICSID, as an arbitral institution has been involved in FDI related dispute resolution since inception in the 1960s, some of its features are said to be favorable to investors of developed countries over developing host States.[270]

The biased features include the requirement of the investors' consent prior to institution of arbitration, exclusion of the jurisdiction of the local courts, and preferences to the application of international law in dispute resolution.[271] In the case of ***SPP vs. Egypt***,[272] the Tribunal applied international law in favor of the Clamant under the pretext that Egyptian law did not cover every point in the dispute. This is notwithstanding the fact that under the relevant agreement, jurisdiction was to be based on a domestic Egyptian legislation.[273] The very same Western nations have always actively propagated the notion of free trade. This propagation is only in their personal interests. In any event, before they began drumming up support free trade, the Western nations offered protection to their trade regimes. It is only after building sufficient capacity that they began actively propagating trade liberalization policies.

[267] Supra notes 266 and 277.
[268] The fact that a country is developing and not developed is in itself a clear testimony that it requires more investments, whether foreign or domestic in order to progress ahead economically.
[269] Ibid.
[270] Nakib Nasrullah, FDI Related Dispute Settlement and the Role of ICSID: Striking Balance Between Developed and Developing Economies, The International Law Journal, 2013, 94.
[271] Articles 26 and 46 of the ICSID Convention, 1966.
[272]Award of 1992 in ICSID Case No. ARB/84/3.
[273] Supra note 272.

Free trade, it is acknowledged, is significant and cannot be wished away. Nonetheless, Kenya should adopt an independent path that will steer the country to much higher economic prosperity. This path envisages a mutual co-existence of both free trade and protectionist legal regimes. In his introduction statement contained in the ICSID annual report of 1984, the Secretary General, Ibrahim Shihata, contended that economic development through the promotion of foreign investment flows to the third world was one of the primary purposes of the establishment of ICSID. In other words, it was not just a mere conflict resolution mechanism. However, the development concerns of Third World Countries have not only failed to feature before ICSID Tribunals, but even worse, when raised, they have not received a positive treatment. This is demonstrated by the third case of ***Antoine Goetze vs. Republic of Burundi – (2000) 15, ICSID Review – FILJ 457.*** At paragraph 126 of the award, it was noted that it is not the Tribunal's role to substitute its own judgment for the discretion of the Government of Burundi of what are imperatives of public need….or of national interest.

4.4. Developed Countries Protected Their Economies in the Initial Stages[274]

It is a fallacy that early industrializes such us Great Britain and even the United States of America could have developed their industrial sector without infant industry protection.[275] Western countries have over the years built massive capacity of their industries as well as products. Indeed, in all cases, to develop their industries, Western countries went through an infant industry protection phase and heavy government intervention in the foreign sector. The degree of protection and government intervention varied from one country to another. The United States was the motherland of infant industry protection not only at the intellectual level but also in fact.

[274] Supra, Chapter 3 of this thesis.
[275] Mehdi Shafaeddin, *How did Developed Countries Industrialize? The History of Trade and Industrial Policy; The Cases of Great Britain and the USA*, Discussion Paper No. 139 presented during the United Nations Conference on Trade and Development, Geneva, 1998 (accessed at http://www.unctad.org/en/pub/pubframe.htm on 20/09/2014).

Despite the fact that the Industrial Revolution contributed to the rapid industrialization of Great Britain, its industrial sector benefited from trade protection and other forms of government intervention in the trade flow through the Navigation Act and by means of political power and even military power. Moreover, government intervention in both cases was not confined, although it was more significant, to foreign trade.[276] It has been said that without government intervention, transition from farm and cottage to factories and cities in Great Britain would not have been smooth.[277] The governments concerned intervened in the domestic economy – particularly in the United States – directly and indirectly, to assist capital accumulation, institutional development and infrastructural build-up and to provide training, research and development (R&D), etc. In neither case can trade policy alone explain industrial and export success.

It has been observed that the modern protectionist school of thought was actually not only born in the United States of America, but it was also the mother country and the bastion of modern protectionism.[278] It is worth noting that the United States observed a very high rate of growth during the 19th century, when it followed protectionist policies. This is attested by the fact that the estimated annual average growth rate of the United States of America over the period 1829-1831 to 1909-1911 is 2.4, as against 1.2 for Western Europe. In particular, the intensification of protectionism after 1860 allowed the country to accelerate growth and catch up rapidly with Great Britain in terms of GDP per capita, technological development and export performance. Its growth rate of per capita income in fact bypassed all major European countries between 1870 and 1913.[279]

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[276] Ibid.
[277] Ashton, T. D. (1948), the Industrial Revolution, 1760 – 1830 (Oxford University Press, London, New York).
[278] Bairoch, P. Economic and World History (Brighton: Wheatsheaf), (1993).
[279] Ibid.

In concluding this point, it is evident that all other industrialized countries have developed their manufacturing industries through infant industry protection and government intervention.[280] For instance, Germans did it from the 19th century. On the other hand, without trade protectionism, France could not have developed its manufacturing industries. Canada started trade protectionism in 1879 and Australia as well as New Zealand in the 1860's.[281]

4.5. Protection is Important in Building Capacity

Developed countries could afford to liberalise their economies and reap benefits, having built sufficient capacity through trade protectionist policies. Not so, for the developing nations like Kenya, which do not have a mature industrial base? Developing countries still rely heavily on primary agricultural products such as tea, coffee and cocoa. Without a strong manufacturing sector, unlimited trade liberalisation cannot be of good benefit.[282] The recent uniform trade liberalization undertaken by developing countries through Structural Adjustment Programmes (SAPs) did not succeed. This is because many developing countries, even though independent, did not have a mature industrial base.

Despite their shortage of foreign exchange, exacerbated by the worldwide economic depression, they were persuaded, or forced, to open up their markets, benefiting the industrialised countries, which were their main source of supply of manufactured goods.[283] Once again, the argument in support of trade liberalisation was confused.

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[280] Ibid.

[281] Bairoch, P. ,"European Trade Policy, 1815-1914", in S. Mathias and S. Pollard (eds*), The Cambridge Economic History of Europe,* Vol. VIII: *The Industrial Economies: The Development of Economic and Social Policies* (Cambridge: Cambridge University Press), (1989), 1-160.

[282] S. M. Shafaeddin, *Trade Liberalization and Economic Reforms in Developing Countries; Structural Change or De – Industrialization?* Discussion Paper No. 179 presented during the United Nations Conference on Trade and Development, 2005, p. 11 and 12.

[283] Ibid.

This time, the economic and export success of East Asian NICs,[284] was attributed to their trade liberalisation, rather than to their previous policies of infant industry protection and government intervention. On that basis, universal trade liberalisation was advocated to all developing countries. This is not to deny that selective trade liberalisation has beneficial effects, particularly for those developing countries which have developed their industrial base but need to become competitive. However, the impact of premature, universal and uniform trade liberalisation on some developing countries in recent years is similar to that of the 19th century: many of those with a fragile industrial base became de-industrialized; most of those whose industrial base was negligible suffered from delayed industrialisation.[285]

4.6. Unfair/Unequal Global Trade Legal Regime

Today, international declarations from organisations such as the United Nations are seen to propagate the important question of free and fair trade.[286] Nice expressions such as commitment to an open, equitable, rule – based, predictable and non – discriminatory multilateral trading and financial system have been written down.[287] Attempts have been made by some countries such as the US to walk this talk. Duty – free access is granted to some exports from sub – Saharan Africa, albeit with conditions, such as the requirement of good governance.[288] Scholars have lamented that the one institution around which the rules of the entire international trading system are based – the WTO, and which would be expected to take the lead in the fair and equitable trade agenda, has disappointed.[289] The inability of developing nations to participate and reap fully the benefits of free trade in the same manner as developing countries must also be seen within the context of the background leading to the establishment of the World Trade Organization.

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[284] Newly Industrialized Countries.
[285] Supra note 95 at p. 24.
[286] Amritar Narlikar, *Fairness in International Trade Negotiations; Developing Countries in the GATT & WTO,* WORLD ECONOMY (2006) 5.
[287] Millennium Development Goals (MDG).
[288] Supra note 288at 6.
[289] Ibid.

The history of the first rounds of multilateral trade negotiations shows that the exchange of market access concessions was a process characterized by reciprocity and mutual benefits among participating countries.[290] More recently however, the results of the Uruguay Round, where for the first time developing countries negotiated actively, shows that the concessions given by them were more valuable than those they received. In these negotiations, developing countries did not achieve the degree of reciprocity expected from the previous history of the trading system. This outcome has been explained in part by increasingly aggressive demands by industrial countries and in part, by the lack of adequate resources of least developed countries. These and other "structural factors" such as lack of negotiating experience and inadequate knowledge on economic impacts weaken the negotiating capacity of developing countries and suggest that in multilateral or regional trade negotiations with industrial countries, they are at a disadvantage. In addition, developing countries have faced huge difficulties in implementing some of the agreed issues.[291]

It has been observed that in trying to comply with some Uruguay Round agreements including the Agreement on Custom Valuation, the Sanitary and Phytosanitary Agreement, the Agreement on Technical Barriers to Trade and the Agreement on Trade Related Intellectual Property Rights, investment in capital goods, in buildings, and in skills are required. A preliminary assessment indicates that in order to comply with these obligations, some developing countries have to make investments that are higher than their combined development budget.[292] The launching of the Uruguay Round was heralded by most qualified observers and multilateral institutions in part because industrial countries accepted to include textiles, clothing and agricultural protection on the negotiating table.

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[290] Ralph Ossa, A New Trade Theory of GATT/WTO Negotiations, Staff Working Paper ERSD -2009 – 08.
[291] Supra note 288.
[292] Finger, J. Michael and Philip Schuler, *"Implementation of Uruguay Commitments: The Development Challenge*: THE WORLD ECONOMY, April 2000.

The expectation was that this Round would increase the market access opportunities faced by developing countries in developed country markets. The promise of these new trading opportunities and the lack of negotiating experience help to understand why developing countries accepted an ambitious negotiating agenda that included several "new areas" that had not been the subject of negotiations previously. This agenda included services and intellectual property where comparative advantage is clearly on the side of industrial countries. Therefore, the grand exchange of concessions expected for this round at its launching ceremony, can be characterized as one where developing countries would liberalise their markets in the new areas of interest to industrial countries in exchange for increased market access in agricultural and labour intensive manufactured products.[293] It may have never occurred to the developing nations' negotiators that their countries lacked the capacity to benefit from the promises made by the Western nations. At the Uruguay Round, there was no reflection on development needs, development stages or development priorities. In many cases, industrial countries standards became the "international norm".

A number of commentators have argued that the Uruguay Round opened a divide in the trading system in such a way that we can talk of the "before" and "after" it.[294] The GATT trading system, in which developing countries did not participate much, was more transparent and balanced than the WTO system. In the old system, the weaker countries could feel quite assured that the hegemonic countries would not make an abuse of their power. This appears to be no longer the case and now differences in resources, in experience, in managerial capacity, in knowledge, and in negotiating strength, matter. This situation is not only in multilateral negotiations but also in regional negotiations involving developed and developing countries.

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[293] Ibid.

[294] Julio Nogues; Unequal Exchange: Developing Countries in The International Trade Negotiations, 2002 A paper prepared for the Murphy Institute Conference on "The Political Economy of Policy Reform" in honour of J. Michael Finger.

Differences in these factors are so important that sitting both groups of countries together in international trade negotiations is likely to generate an "unequal exchange process" that results in unbalanced outcomes with costs to developing countries and to the trading system. The outcome of such unequal exchanges cannot be the basis of developing a fair trading system. Developing countries like Kenya must, therefore, as a matter of necessity, find another way of growing economically other than the much-touted global system of free trade as espoused in the WTO/GATT legal framework.

4.7. Rising Middle Class Good Market for Kenyan Products

The middle class can be defined in relative or absolute terms. In relative terms, the middle class is defined as individuals or households that fall between the 20th and 80th percentile of the consumption distribution or alternatively, between 0.75 and 1.25 times median per capita income, respectively.[295] Using the absolute approach, the middle class is usually defined as individuals with annual income exceeding $3,900.00 in purchasing power parity (PPP) terms or with daily per capita expenditures between $6 and $10.[296]

Strong economic growth in the past two decades has helped reduce poverty in Africa and increased the size of the middle class. By 2010, the middle class had risen to 34% of Africa's population – or nearly 350 million people. This was up from 126 million people or 27 % in 1980. This represents growth rate of 3.1% in the middle class population over the period 1980 to 2010 compared with a growth rate of 2.6% in the continent's overall population over the same period. Africa's middle class can therefore be a key source for private sector growth, accounting for much of the effective demand for goods and services supplied by the private sector entities.[297]

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[295] Birdsall, 2000.
[296] Banerjee and Duflo, 2007.
[297] The Middle of the Pyramid: Dynamics of the Middle Class in Africa, African Development Bank, 20/04/2011 (available at www.afdb.org).

Analysts have publicized the rapid expansion of Kenya's middle class. For instance Aly Satchu Khan, an investment analyst, believes that the mushrooming of malls is a sign of a growing middle class. The AFDB estimates that about 16.8 percent or 6.7 million Kenyans belong to the middle class, capable of spending $2 to $20 per day. Hardly any conversation about Kenya's (and Sub-Sahara Africa's) growth and economic outlook misses a mention of 'the growing middle class.

It is only through consumption that opportunities for wealth creation and accumulation are created. When you shuttle to town using a *matatu,*[298] and pay fare; when you have a meal at a restaurant; when you get a hair-cut (hair-do) at the barber's (salon); when you go to a Memorial Park and part with Kshs. 20, that is how you stimulate the economy to growth. Consumption, on its part, is determined by one's income level. Better put, it is determined by one's level of income after they have met basic financial obligations such as rent, school fees, loan repayment, day-to-day costs of food and transport among other things. The income that remains and is available for additional, but not necessarily basic consumption is disposable income**.** The higher the disposable income, the higher one tends to consume. Private consumption, government expenditure and investment are critical catalysts for economic growth and development. The more an economy is populated by persons with income high enough to consume, save and invest for wealth creation and accumulation the better it is placed to accelerate its growth.

Rising investments in Africa's service sector, the unlocking of its vast natural resources and the sound economic policies pursued by African countries in the last two decades are spurring the rise of the continent's middle class at a faster rate than population growth. Investments in the key areas of banking, telecommunications, information technology, transport, tourism, housing and real estate have lifted the continent's middle class. With East African economies among the fastest growing in the world, the Kenyan middle class is expected to continue rising, bringing Kenya ever closer to its goal of becoming a middle-income nation by 2030.

[298] Small sized vehicles (usually carrying 14 passengers) commonly used in Kenya's public transport sector.

A burgeoning middle class has boosted Kenyans' purchasing power, giving rise to a thriving mall culture and booming housing market. Such a happening ought to provide an alternative way of growing Kenya's economy instead of reliance mainly on foreign investments arising out of free trade. In the segment that follows, a discussion on the modalities of implementing a protectionist legal regime are considered in detail.

Political economy forces operate to influence, for the good or bad, both unilateral and multilateral trade policies. The ideal situation would have been for developing countries to have the courage to insist that all reasonable doubt as to the economic effects of all proposed agreements be removed before they allow a decision to be approved.[299] However, this is easier said than done. Many developing countries are facing difficult debt repayment problems, which sometimes can become interlinked with international trade negotiations in ways that are not the best for the multilateral trading system or the individual countries. For example, in 2001, in its road to disaster, Argentina walked into the IMF headquarters more often than ever before as successive financial arrangements failed to convince the international capital markets that things were moving in the correct direction. In their efforts to send positive signals, the financial negotiators sought a bilateral trade agreement with the US and under the pressing economic conditions, they concluded that any deal which could offer a signal that exports and GDP will soon start growing was good.[300]

For these negotiators, the sooner an agreement was signed the better, quite irrespective of its "content". In the end, things didn´t work on either the finance or the trade side. Even if they would have worked, it is likely that the trade agreement would have not been the best for the country simply because it would have been negotiated under a pressing debt and financial situation that was not receptive to trade negotiations in the interests of the real economy.

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[299] Supra, note 296.
[300] Ibid.

This example illustrates the existence of circumstances where developing countries´ trade negotiations can be weakened by pressing financial problems.[301] If this is anything to go by, then Kenya must think outside the traditional box and innovatively seek ways that will spur it to higher economic prosperity. A number of suggestions will be made. They include one, making good use of the reservation mechanism to international treaties. Two, proper investment in the trade agreements negotiating teams. Three, identifying and utilizing the comparative advantage of some products for export purposes. Last but not least, is the political will by the government to avail support measures that will enhance trade and thus catapult Kenya to where countries like those ones in the BRICS formation have found themselves.

4.8. Proper use of Reservations to International Treaties

Reservations in international investment agreements (IIAs) are a key technique for balancing flexibility of national authorities with international obligations in the field of investment, especially for developing countries.[302] Reservations to international treaties are a long-established diplomatic custom. Put simply, the making of a reservation allows a country to be bound by an international treaty while attempting to be excused from some specific requirement. Thus, reservations allow a country to rewrite certain treaty obligations, as they will affect that country. In essence, reservations are special forms of exceptions to international agreements. A reservation differs from an exception in that an exception applies to all signatories to a treaty and is contained in the treaty's text.[303] By comparison, reservations apply only to the country making them and are generally only found with the "instruments of ratification" of a particular treaty or in an annex to the treaty.

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[301] Ibid.

[302] United Nations, Preserving flexibility in international investment agreements: the use of reservations, UNCTAD, series on international investment policies for development, 2006.

[303] An exception to an international treaty is a provision which permits all the signatories to an international agreement to take actions that would otherwise conflict with the treaty.

The Latin phrase "pacta sunt servanda," which means that treaties must be observed, summarizes the general rule of treaty law.[304] Since a reservation permits a country not to observe a specific treaty obligation, it constitutes some kind of violation of this rule. Traditionally, reservations were therefore only permitted if every member of a treaty agreed to the reservation. However, within the last forty years, international practice has changed.[305]Reservations are now permitted as unilateral statements made during the negotiation of a treaty. The international treaty that governs the formation and interpretation of treaties,[306] defines a reservation in the following terms:

> *"……………….a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.*[307]

Because reservations contemplate a violation of the *pacta sunt servanda* rule, international law has placed certain limits upon reservations. Article 19 of the *Vienna Convention* states that:

> *"…………….A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:*
>
> *(a) the reservation is prohibited by the treaty;*
>
> *(b) the treaty provides that only specified reservations, which do not include the reservations in questions, be made; or*
>
> *(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty…………..".*

Countries enter into international investment agreements (IIAs) with a view to enhancing their investment climate, attracting more and better quality foreign direct investment (FDI) and benefiting from capital inflows.

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[304] Article 26 of the Vienna Convention on the Law of Treaties (The Vienna Convention).
[305] A discussion on this subject can be found in Ian Brownlie, *Principles of Public International Law*,(4th Edn.) (Oxford: Oxford University Press, 1990) pp. 608-611
[306] The Vienna Convention on the Law of Treaties.
[307] Article 2 (1) (d)

IIAs can offer a series of benefits in this regard, not least by helping to promote a stable, predictable and transparent enabling framework for investment.[308] However, realizing these potential benefits remains a challenge and host countries need to strike a delicate and complex balance between using IIAs for attracting FDI on the one hand, and preserving the flexibility needed for the pursuit of national development objectives on the other hand.[309] Investment policy is one component of a country's overall development strategy, interacting with a host of economic, social, environmental and other policies in pursuit of a better, more balanced and sustainable allocation of resources. Attracting FDI can have a positive impact on a country's development process if investment inflows are properly managed to that end. [310]Such management implies a capacity to pursue and implement policies aimed at ensuring that FDI brings benefits and positive spill-overs, preferably to all segments of society, including the poor and marginalized. It also requires capacity to implement policies that aim at keeping potential negative implications to a minimum – bearing in mind the long-term needs of societies and the ecosystems they inhabit.[311]

At the national level, the regulation of FDI may take many forms.[312] Host countries may adopt policies regulating the admission, establishment and treatment of foreign investors and their investments.[313] Other relevant policies are those in fields such as taxation, company, labour, environmental and competition law, as well as sector-specific industrial policies. Many developing countries, however, do not yet have fully-fledged regulatory regimes and institutions in place. More often than not, national regulatory frameworks are still evolving, with domestic agencies struggling to establish regulatory independence.[314] This may involve a process of trial and error, with regulators seeking to identify those specific policy options that best suit their countries' developmental objectives and their unique contexts.

[308] Supra note 307.
[309] Ibid.
[310] Ibid.
[311] Ibid.
[312] Ibid.
[313] Ibid.
[314] Ibid.

It is, therefore, key that national regulators enjoy the necessary flexibility to do so.[315] It is in the very nature of international agreements to constrain policy options at the national level. In the case of IIAs, the obligations they establish limit the choices available to policy makers in designing national investment policies. This may be the case, for instance, with respect to performance requirements (such as technology transfer or local content requirements), market access conditions for foreign investors in sensitive sectors or industries, or preferential treatment of established domestic enterprises.[316] While enhancing host countries' investment climates, it is important that IIAs do not unduly constrain the degree of flexibility afforded to national policy makers in the pursuit of development or other national policy objectives.

IIAs have long recognized – albeit in varying degrees – the need to preserve flexibility for national development policies. Such recognition can often be found in the preamble of an agreement. In addition, it can manifest itself in a more direct operational manner, for example in an agreement's substantive obligations and operating modalities, as well as in the overall degree of flexibility an agreement affords to its contracting parties. Among the key means through which IIAs grant flexibility are their basic principles and objectives, their design and overall structure, their content and obligations as well as their implementation methods.[317] The degree to which an IIA limits the flexibility of its contracting parties depends on the agreement's scope, as well as on the content and detail of the obligations it enshrines.

The broader the scope of an agreement, and the greater the level of detail of its disciplines, the greater the potential for constraints, which host countries may face when setting their public policies. However, IIAs do not tend to impose specific policies on their parties.

[315] Ibid.
[316] Ibid.
[317] UNCTAD Report, 2000.

Accordingly, one could argue that under the great majority of IIAs (especially under those limited to post- establishment treatment and without prohibition of performance requirements) countries retain considerable freedom to adopt policy options of their choice in regard to social, environmental, and, to a more limited extent, also economic matters – as long as they refrain from discrimination.[318] At the same time, however, countries may feel the need to exclude certain economic areas (sectors, industries and policies) from the obligations imposed by investment agreements. Through reservations, contracting parties afford themselves extra flexibility for these sectors, industries or policies; reservations allow them to apply measures that would otherwise be contrary to the provisions of the agreement.[319] Kenya should put to practice treaty reservation clauses in various agreements with a view of safeguarding her economic interests.

4.9. Adequate Investments in the Treaty Negotiating Teams

Kenya has followed the dangerous path of other developing countries by giving the responsibility of administering the trade negotiations to their Foreign Affairs Ministries.[320] This has led to a weakening of the negotiating strength in a number of ways. First, in the new agenda of trade negotiations, tariffs and non- tariffs barriers are only two of the items on the table. Had trade negotiations remained focused on these barriers, the decision on which ministry is responsible for the negotiations would not have been that serious.[321] The negotiating agenda that has been expanded considerably since the Uruguay Round and now it includes a number of topics where concessions granted sometimes may result in net costs and concessions received in these same areas could be of not much value. Diplomats have not been trained to assess the economic dimensions of the increasing number of items that are being included in most negotiating agendas with industrial countries.[322]

[318] Supra note 296.
[319] Ibid.
[320] When Uhuru Kenyatta, Kenya's elected President after the 2013 general elections constituted his cabinet, the trade docket was lumped together with the ministry of foreign affairs. (see www.mfa.go.ke accessed on 18/11/2014).
[321] Supra note 296.
[322] Ibid.

As a consequence, they are more likely to agree to unbalanced outcomes.[323] The other problem is that most career diplomats are lawyers by training and they do not necessarily share the same kind of concerns that economists and entrepreneurs might have as they observe a negotiation becoming unbalanced.[324] Reaching agreement in a negotiation is usually higher in the ranking order of priorities of a Foreign Affairs Ministry, than walking away from a meeting because a balanced and mutually beneficial negotiation is not being reached. This is more likely to occur when those sitting on the other side of the table have 'political clout'. Thirdly, the structure of incentives in the diplomats' careers implies that they usually are keen to obtain a foreign assignment, as local wages are generally lower than those they receive abroad. Under these circumstances, it is a challenge to train diplomats with the goal of transforming them in the elite negotiating group of the country. As career diplomats, eventually they will want to leave for a foreign assignment.[325]

Kenya, like many, if not most developing countries are negotiating without an economic assessment of the probable economic consequences of the agreements they may end up signing. This contrasts with the situation of industrial countries that apparently know with precision what they want to achieve in the negotiations.[326]These specific objectives are defined in close consultations with interest groups and in many cases; they are supported by a good understanding of economic costs and benefits.[327] This knowledge comes not only from academic research but also from government-financed analysis, and what is probably most important, from a long experience of close collaboration and exchange of ideas between the private and public sectors.

[323] Most Ministry of Foreign Affairs officials do not have the necessary experience to deal with trade negotiations, especially, fairly complex ones. (see note 298).
[324] Kenya's current cabinet secretary in charge of foreign affairs, Amb. Amina Abdalla, is a trained lawyer.
[325] Supra note 296.
[326] Ibid.
[327] Ibid.

It is therefore imperative that Kenya develops a tradition of holding consultations among public offices and between the public and private sectors for defining positions for the international trade negotiations.[328]

For instance, in the Uruguay Round many countries acted more from the basis of binding unilateral reforms than from the basis of negotiating an exchange of concessions.[329] Poor negotiations could have led to Kenya signing many international trade treaties that have opened up its economy to high levels that are more than necessary. Given the high stakes involved in international trade agreements, it is recommended that adequate investments be made in the negotiation process to ensure that the outcome is in the best economic interests of Kenya.[330]

4.10. Supporting Businesses with a Comparative Advantage

As the country attempts to increase its economic muscle, exports, it has been observed, represents Kenya's "weak engine".[331] A comparative advantage is necessary for a country to benefit from international trade. Kenya's potential in the textiles industry is big. Although due to market liberalisation and the flood of 'mitumba' (imported second hand clothing) in the nineties, most factories collapsed, including Rift Valley Textile Mills (RIVATEX) and Kisumu Cotton Mills (KICOMI). Rivatex has since been brought back to its feet after it was taken over by Moi University in 2007. The Kenyan textile sector - the cotton textile industry as well as local apparel manufacture- has failed to reap maximum benefits from AGOA, the African Growth and Opportunity Act, which since 2000 has impressively whipped up apparel exports from Kenya to the United States of America.[332] This is because cotton farming and manufacturing have not picked up well.

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[328] Ibid.
[329] Ibid.
[330] Ibid.
[331] World Bank's Kenya Economic Update, 2010.
[332] Simiyu B. M., The African Growth and Opportunity Act: Implications for Kenya's Growth and Quest for Sustainable Economic Development, LLB Thesis, UON 2001.

Since January 1, 2008, the Economic Partnership Agreement (EPA) with the EU has opened a new window of opportunity. If this time the textile industry could jump on the bandwagon, the benefits of EPA would not be restricted to the apparel exporting companies alone (like is the case under AGOA), but would serve the interests of the whole cotton-textile-apparel supply chain in Kenya.

Kenya has everything to gain an honourable position in the global textile and apparel economy. Within the East African region, Kenya and Ethiopia are the only countries to have a comparative advantage in textiles and apparel.[333] The main benefit of garment exports for the country has been the creation (at the peak of employment) of some new jobs. These kinds of arrangements are more beneficial to the people of Kenya than pursuing liberalized trade generally.

Apart from textiles, another good area of opportunity worth capitalizing on the way South Africans did with their motor industry is the leather sector. The leather industry in Kenya has been equated to the often-told tale of two shoe salespersons sent to scout out possible new business in a remote African country. One man calls his wife the moment he lands, telling her: “Honey, I’m coming back home. There is no hope here. Nobody here is wearing shoes, so there’s no one to sell to.” The second man wires the boss and says, "Fantastic opportunity here, no one wears shoes. Send in a thousand pairs immediately!" Were that country Kenya, the second salesperson would now be a leather baron. Kenyans now buy between 20 and 24 million pairs of shoes every year.[334] The Kenya Leather Development council was started in the year 2010 to oversee trade in hides, skins, leather and leather-goods.

[333] According to a 2007 study conducted by the US International Trade Commission (' Sub-Saharan Africa: Factors affecting trade patterns of selected industries').

[334] Statistics procured from the Kenya Leather Development Council.(available at www.leatherdevelopmentcouncil.go.ke)

Most of the tanneries processing leather were closed down when the government abolished the 22 per cent export compensation after it was abused. Similarly, liberalization of the sector in the mid-1990s culminated in the importation of cheap and poor quality imports. This brought the industry on its knees and it did not recover, until now.[335] Globally, the need for processed leather is high, even in new areas such as leather for furniture, and automotive. Global trade in leather is worth US$77.5 billion (Sh6.68 trillion) with footwear taking 60 per cent of this.[336] There is no reason why Kenya cannot be a major player and join market leaders such as such as China, Italy and India.[337] Focus on promoting local production of high quality leather and making value addition viable and sustainable. Most of the Kenyan leather is being exported raw or as wet blue – the lowest level of leather processing.[338]

Kenya leather exports amounted to about Sh5.9 billion in 2010 while leather goods exports are minimal.[339] The leather industry is one sector that can create huge employment and earn good revenues if the same was nurtured properly. There is no reason why the government of Kenya cannot come in, strongly protect the sector, and thereby reap huge benefits. In as much as the protection of the leather industry would seem to defy the notions of free trade, which seeks the removal of all export, taxes, and the action, is imperative. With skilled negotiators, Kenya can make arguments in favor of revitalizing this significant sector.[340] After all, under the WTO system, administered trade protection is permissible.[341] This is a situation where trade restrictions that provide protection from imports are beyond the protection afforded by the tariffs that were negotiated as part of the GATT agreement.[342]

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[335] Ibid.
[336] Ibid.
[337] Ibid.
[338] Ibid.
[339] Ibid.
[340]Developing The Leather Sector In Kenya Through Export Taxes: The Benefits Of Defying The EU, A study written by Marc Curtis (www.curtisresearch.org) on behalf of Traidcraft Exchange, Oxfam Germany
[341] Meredith A. Crowley, *an Introduction to the WTO and GATT*, Economic Perspectives, 2003, 49.
[342] Ibid.

They include the use of anti-dumping duties, countervailing duties, safe guard measures and tariffs for assistance with balance of payment problems. Reliance can for instance be placed on the use of safeguards.[343] The service sector need not be left behind. Kenya has the potential to export business services throughout East Africa and to the rest of the world. The recent ICT revolution as represented by Safaricom's success has increased the mobile phone and internet to millions of people. However, many service providers in the areas of for instance accounting, legal practice, engineering architecture and insurance are in most cases small or medium sized. Through government support, incentives ought to be availed to enable the small entities merge or partner up. This will give them the advantage to participate in the process of exporting their services.

4.11. Political Will to safeguard better investment and Trade Interests

Kenya can succeed in pushing its personal agenda for sustainable economic growth at the expense of unlimited trade liberalization. However, all such efforts will be meaningless, if there is no political will to implement measures that will genuinely benefit the country's poor majority. A classic example is Kenya's sugar industry. Notwithstanding the benefit of protection from other COMESA sugar producing countries, for a long period, the industry continues to face huge challenges and has never quite taken off. The problems in the sugar sector in Kenya have been occasioned by some self-inflicted factors such as high-level corruption. This is epitomized by the importation into Kenya of cheap sugar from other producers by the very same leaders who are expected to steer the sector to competitiveness. Insufficient investments and poor research are the other reasons that have made the sector remain on its deathbed for very long periods. At the broader continental level, Kenya can team up with other African countries in pushing for the best possible trade deals. These would include measures aimed at protecting their fragile economies from perpetual stagnation.

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[343] A safeguard measure is a temporary tariff or quota that is used to protect a domestic industry from "fair" foreign competition.

Lately, African countries and their leaders have been very vocal in condemning the International Criminal Court (ICC), especially those concerning Kenya.[344] African leaders have discussed the possibility of withdrawing from the ICC due to what they perceive as discriminatory practices.[345] In the same vein, a resolution was recently passed to the effect that no sitting African head of state should appear before an international court.[346] The zeal with which Kenya and other African countries have opposed the ICC should be emulated when it comes to trade negotiations. It would be very good to see the same energy, if not much more, expended in rooting for better trade deals for Kenya and Africa. The day when it will be announced that African countries are contemplating pulling out of major international agreements governing trade globally because the interests of their populations are not properly secured will be a good day.

In conclusion, unless the government of Kenya is serious and takes a keen interest in pulling the country out of its current poor economic form, protectionist trade legal regimes would not be very helpful. The proposal to protect certain key sectors of the economy for the benefit of Kenyans is thus based on an assumption. The presumption is that there is sufficient political goodwill and intent on the part of the government of Kenya to fight for Kenya's economic interests. Admittedly, in the initial stages, the Kenyan consumer will pay higher prices for locally manufactured products because the production process will not be as efficient and will be fraught with errors as the learning curve grows. Nevertheless, in the end, the rewards will far outweigh any disadvantages experienced in the early stages.

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[344] Uhuru Muigai Kenyatta and William Samoei Arap Ruto, Kenya's President and Deputy President respectively are currently facing crimes against humanity charges at the ICC. The same arose from the post election violence that engulfed Kenya in late 2007 and early 2008.
[345] BBC NEWS – AFRICA (Accessed at http;// www.bbc.com/news/world-africa on 16 October 2014).
[346] The resolution was passed during the African Union summit held in Ethiopia on 12th October 2013.

As workers become more experienced and efficient, prices of commodities will drop. The government will ease tariffs and producers will then be able to compete with foreign made products. If there is a surplus in production, it may be exported to neighbouring countries thereby bringing in foreign exchange. In addition, there will be an increase in the availability of jobs in the manufacturing and agricultural sector. This will in turn stimulate the local economy due to workers spending more on other services. A mutual co-existence and balance between liberal trade and protectionist policies is feasible.

CHAPTER FIVE

5.1. Conclusion

This research paper set out to examine the treatment of foreign and domestic investments under Kenya's legal regime. Related to the study was the question of trade. Liberalization of international trade in goods and services as articulated within the framework of the significant trade facilitation world instruments such as the GATT and WTO has made it easy for FDI's to come into Kenya from all directions.

There were questions that this research paper sought to find answers to. Firstly, does Kenya's legal investment and trade legal framework have a bias against domestic ventures in favour of FDIs and related trade? Secondly, given WTO's articulation of free trade policies, is there still room for protectionist legal regimes? Finally, can investments, which are not restricted, as well as free trade, mutually co-exist with protectionist tendencies? In addressing these questions, Kenya's current legal framework as pertains to FDIs, domestic investments and trade has been highlighted.[347] Chapter three looked at a comparative study of the subject in various relevant and carefully selected jurisdictions across the globe. In this chapter, a case for adoption of a measured trade protectionist legal regime was made. Similarly, the methodology of legally putting into place the suggested measures was explained.

[347] See chapter two of this thesis.

In conclusion, it is reiterated that foreign investments and trade are very important to a country such as Kenya. However, over reliance on the same solely and or largely to the exclusion of promoting domestic investments and trade is not good in the long term. This is because any disruption of the foreign terrain where supply of trade and investments come from will adversely affect the country.

Similarly, domestic trade and investments ought to be given a chance to systematically grow, not just locally, but beyond the borders. To achieve this, the law can be used to create the right balance. It is appreciated that FDIs and international trade are very important to the growth and development of Kenya, and hence should be supported. At the same time, they should not be allowed to thrive to the extent that domestic investments have no space at all. It is important for any self-respecting country to use all available instruments to ensure that domestic investments are nurtured and allowed to thrive just like FDIs, if not better. The law is one instrument that can be effectively utilized to realize this goal. This study focuses on how this can be achieved in a balanced manner, which does not go against the principles of international law. Any legal regime that supports an investment and trade policy framework that cannot safeguard domestic investments as well as propel Kenya to higher economic levels is problematic. Consequently, a fresh consideration of the legal regime anchoring these policies thus becomes imperative. This is what has been undertaken in this study. Full liberalisation of Kenya's economy in terms of investments and trade can be very detrimental in the end. The cotton industry in Kenya collapsed due to the negative effects of liberalisation, which paved way for the massive entry into the country of cheap second hand clothes.[348]

[348] Kenya's Apparel & Textile Industry, report prepared for the Export Processing Zones Authority in 2005 by PKF Consulting limited (available at www.epzakenya.com).

The same fate befell the skin and hide industry that resulted in the closure of many locally manufactured shoe shops. Similarly, one of the reasons that have occasioned economic instability in the sugar industry is the unregulated entry into the country of cheap sugar into the country from places like Brazil.[349] Whether by default or design, Kenya, like many developing countries has been pursuing liberal trade tendencies for a considerably long period. However, the country remains in the third world bracket.

Between the years 2009 and 2103, Kenya was ranked the 31st poorest country in the world.[350] It is therefore evident that further pursuit of such liberal trade policies forever will not make Kenya attain the much-desired economic take off to levels where emerging economies of the world such us Brazil, Russia, India, China and South Africa have reached. This is because the global trade legal regime is skewed in favour of developed countries. If this is the case, then the country should take charge of its destiny by formulating legislation that supports its investment and trade policies.

This study recommends that Kenya considers taking the route South Africa has taken by practically caring about its domestic economic agenda. As noted in chapter three of this research paper, recently,[351]South Africa published and invited the public to comment on the Promotion and Protection of Investment Bill, 2013.[352]

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[349] Supra note 332.
[350] Valentina Pasquali, The Poorest Countries in the World, In GLOBAL FINANCE MAGAZINE (Accessed at https://www.gfmag.com/global-data/economic data/the-poorest-countries-in-the-world on 10 October 2014).
[351] The Bill was published on 01st November 2013 through Notice 1087 of 2013 by Mr. Pravin Gordhan, Acting Minister of Trade and Industry.
[352] The Bill is available online at www.gpwonline.co.za

The proposed Bill clearly recognizes the well-being of the people of South Africa and reaffirms the Government's right to regulate in the public interest in accordance with the law.[353] In addition, the purpose of the proposed legislation is clearly stated as to promote and protect investment in a manner that is consistent with the public interest and a balance between the rights and obligations of investors as well as ensure equality in the treatment of foreign investors and citizens of the Republic of South Africa.[354] To the South Africans, their own agenda is more important than the global free trade agenda. Kenya should emulate this by elevating its personal economic agenda above the global one if it hopes to attain progressive economic growth in line with the Vision 2030 dream.

[353] Republic of South Africa; Promotion and Protection of Investment Bill, 2013 – the preamble.
[354] Ibid, Section 3.

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