

**UNIVERSITY OF NAIROBI  
SCHOOL OF LAW**

**A CRITICAL APPRAISAL OF THE LEGAL FRAMEWORK GOVERNING  
INTERNATIONAL TRADE AND FOREIGN INVESTMENTS IN KENYA**

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G62/82785/2015**

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS  
FOR THE AWARD OF THE MASTER OF LAWS DEGREE OF THE UNIVERSITY OF  
NAIROBI, SCHOOL OF LAW**

**SUBMITTED 27 JULY, 2016**

**DECLARATION**

This thesis is my original work and has not been presented for a degree at the University of Nairobi or any other university or examination body.

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Declaration by the Supervisor:

This Thesis has been submitted for examination with my approval as University Supervisor.

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## **DEDICATION**

This thesis is dedicated to my high school teacher and mentor Mr. Enock J. Keya, my mother Mrs. Margaret Wanyama, my brothers Benjamin and Collins, my LL.M class mates and friends: Lillian Mutuma, Job Wafula, Wanza Musau, Margaret Muthoni, Nelson Mandela, Hon. Stephen Kalonzo Musyoka, Onyango Oloo, Dudley Ochiel, Nadiya Aziz, and Ebby Kashindi. For their love, encouragement, guidance and inspiration. I will live to cherish you forever.

## **ACKNOWLEDGEMENT**

It is with genuine pleasure to express my deep sense of thanks and gratitude to the most High God for giving me the strength, health and opportunity to successfully complete my graduate program. I am extremely thankful to my brothers Benjamin and Collins for their immense support and guidance.

I would like to acknowledge my supervisor Prof. Wambua Musili for his enthusiastic, invaluable comments and guidance in my effort to complete this thesis. I would also like to acknowledge the National Council for Law Reporting Research Team led by Siphirah Gatimu and Ken Oduor for their passionate participation and provision of research materials whenever I requested.

Finally, I would like to acknowledge with great appreciation, the support and love of Josephine Mutie, Sandrah Nowamani, Winnie Matiri, Mercy Cherotich and other colleagues at the National Council for Law Reporting for showing confidence in my work, and for their patience and help

## **LIST OF LEGAL INSTRUMENTS**

### **Kenya**

1. Republic of Kenya, Constitution of Kenya, 1969 (Now Repealed).
2. Republic of Kenya, Constitution of Kenya, 2010.
3. Republic of Kenya, Foreign Investments Protection Act, Cap. 518.
4. Republic of Kenya, Foreign Judgments (Reciprocal Enforcements), Cap. 43.
5. Republic of Kenya, Investment Promotion Act, Cap. 485B
6. Republic of Kenya, Investment Disputes Convention Act, Cap. 522
7. Republic of Kenya, Local Governments Act, Cap. 265.
8. Republic of Kenya, Nairobi Centre for International Arbitration Act, No. 26 of 2013.
9. Republic of Kenya, Companies Act, Cap. 486.
10. Republic of Kenya, Companies Act, No. 17 of 2015
11. Republic of Kenya, Export Processing Zones Act, Cap. 517
12. Republic of Kenya, Special Economic Zones Act, No. 16 of 2015
13. Republic of Kenya, Value Added Tax, No. 35 of 2013
14. Republic of Kenya, Income Tax Act, Cap. 470
15. Republic of Kenya, Prevention of Fraud (Investments) Act, Cap. 65B.
16. Republic of Kenya, Public Private Partnerships Act, No. 15 of 2013.
17. Republic of Kenya, County Governments Act, 2012.
18. Republic of Kenya, Transition to Devolved Governments Act, 2012.
19. Republic of Kenya, Intergovernmental Relations Act, 2012.
20. Republic of Kenya, Treaty Making and Ratification of Treaties Act, No. 45 of 2012
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1. East African Community, Treaty Establishing East African Community, 1999.
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3. World Trade Organization, General Agreement on Tariffs and Trade, 1994 (GATT 1994).
4. United Nations, United Nations Charter, 1945.

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2. Twictor Investments Ltd v. The Government of the United States of America [2003] eKLR.
3. Tubor Mulnar & Another v. Republic [2007] eKLR.
4. Overseas Private Investment Corporation & 2 others v. Attorney General [2013] eKLR.
5. World Duty Free Company Limited v. Republic of Kenya, (ICSID Case No. ARB/00/7), Award (4 October 2006).

## **ABBREVIATIONS AND ACRONYMS**

ACA .....	Anti-Counterfeit Agency
ACP .....	African, Caribbean and Pacific States
Art. ....	Article
BITs.....	Bilateral Investment Treaties
Cap. ....	Chapter
CEO.....	Chief Executive Officer
CIF .....	Cost Insurance and Freight
CoK.....	Constitution of Kenya
EPAS.....	Economic Partnerships Agreements
EPC .....	Export Promotion Council
EU .....	European Union
F.O.B.....	Freight on Board
FDI .....	Foreign Direct Investment
GATS .....	General Agreement on Trade in Services
GATT .....	General Agreement on Tariffs and Trade
GDP.....	Gross Domestic Product
GOC .....	Government of Chile
KAM .....	Kenya Association of Manufacturers
KEBS .....	Kenya Bureau of Standards
KECOBO .....	Kenya Copyright Board
KEPSA.....	Kenya Private Sector Alliance
KIA .....	Kenya Investment Authority
KIICO .....	Kenya International Investment Conference
KIPI.....	Kenya Industrial Property Institute
KNCCI .....	Kenya National Chamber of Commerce and Industry
Las.....	Local Authorities
MEAAC .....	Ministry of East African Affairs and Commerce
MFAI.....	Ministry of Foreign Affairs and International Trade
MITs.....	Multilateral Investment Treaties
OAG.....	Office of the Attorney General
Sch.....	Schedule

SEZA.....	Special Economic Zones Authority
TRIPs .....	Trade Related Aspects of Intellectual Property
UN.....	United Nations
UNDP.....	United Nations Development Program
USCIT .....	United States Court of International Trade
USD.....	Unites States Dollar
WB .....	World Bank
WTO .....	World Trade Organization



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## ABSTRACT

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*"What would this island (Earth) be without foreign trade, but a place of confinement to the inhabitants, who (without it) could be but a kind of hermites, as being separated from the rest of the world; it is foreign trade that renders us rich, honourable and great, that gives us a name and esteem in the world."*<sup>1</sup>

Charles Molloy,<sup>2</sup>

*De Jure Maritimo et Navali, 1676*

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Kenya has since independence been a significant player in international trade and foreign investments. The changes in the inter-state system associated with globalization have led countries to search for new forms of international economic cooperation, in a bid to enhance international trade and investments. Kenya is now part of the globalized world where globalization is seen as an impetus towards interconnectedness of states and no state can survive in isolation. Kenya therefore cannot achieve viable economic goals without international trade and investment and indeed no country can succeed without international trade. This study evaluated the legislative framework governing international trade and foreign investment in Kenya. The study also appraised: the principles of National Treatment and Most-Favoured Nation in international investments treaties more particularly those ratified by Kenya; the effect of fidelity clauses in International Investment Agreements; and the role played by capital structure of foreign firms in domestic market and the essence of arbitration in international commerce and how they affect foreign investments in Kenya. These, are discussed under different thematic areas in this study. The study established that there are sufficient laws but inefficient and ineffective in governing international trade and foreign investments in Kenya. The study recommended for: Enhanced comprehensive policy, legislative and regulatory framework; strengthening institutional and enforcement mechanisms; creation of a robust intellectual property rights regime; harness and formulate a vibrant international commercial arbitration system and meaningful anticorruption administration in governance of international trade and foreign investments in Kenya.

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1 [http://www.miripravo.ru/company/project\\_e.htm](http://www.miripravo.ru/company/project_e.htm), accessed 5 January 2016.

2 Charles Molloy was the compiler of an extensive treatise on maritime law and commerce, entitled 'De Jure Maritimo et Navali.' Charles Molloy an Irish lawyer was popularly known as a writer on maritime law.

# CHAPTER ONE

## INTRODUCTION

### 1.1 Background to the Study

Kenya was founded by the British government in 1895 then referred to as the East African Protectorate.<sup>3</sup>The Kenya's territorial delineation was influenced by the construction of the Kenya-Uganda railway by the British government hence the political delimitation of the area which became the republic of Kenya firmly began at this time.<sup>4</sup> The construction of the railway began from the East African coast at Mombasa in 1896 and reached its planned terminal on the shores of Lake Victoria in 1902.<sup>5</sup>This is the year that marked the beginning of a deliberate policy of European settlement in Kenya.<sup>6</sup>The country emerged from the colonial rule in 1963, assuming a republican form of government in 1964 under President Kenyatta, as a new independent African state that became a key player in the politics, economics and strategic development in the international arena.

The government since then pursued moderate domestic and foreign policies, making agreements with the major world powers and receiving economic and military assistance in return. This was based on the principle of positive non-alignment.<sup>7</sup>This meant that the government borrows technological know-how and economic methods without commitment, to seek and accept technical and financial assistance without compromising its sovereignty and to participate fully in world trade without political domination.<sup>8</sup>

A number of issues led to Kenya's need to establish international relations. International trade, tourism, financial assistance, market for agricultural products and foreign investments prompted Kenya to establish relations with foreign states. The country got admission to the United Nations on December 16, 1963 and since then became a member of most of the UN agencies gaining much more international recognition from other UN state parties.<sup>9</sup> Foreign policy is the guiding principle for any state to effectively participate in international trade and foreign investment. Kenya has been pursuing a foreign policy that aims at diversification of links in order to realize

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3 Republic of Kenya, Embassy of the Republic of Kenya in Japan, 'A brief History of Kenya' <[www.kenyarep-jp.com/kenya/history](http://www.kenyarep-jp.com/kenya/history)> accessed 22 December 2015.

4 Maumo Leonard Oluoch, 'Kenya's Foreign Policy Towards Israel, 1963-2002: Contradiction Between Rhetoric and Practice'(M.A Thesis, University of Nairobi 2009) P 1.

5 History World, 'History of Kenya' [www.historyworld.net/wrldhis/PlainTextHistories.asp?historyid=ad21](http://www.historyworld.net/wrldhis/PlainTextHistories.asp?historyid=ad21) accessed 22 December 2015.

6 Ibid n 3.

7 Ibid.

8 Ibid.

9 United Nations, 'Member States' <<http://www.un.org/en/members/growth.shtml#1960>> accessed 22 December 2015.

the benefits of foreign investment.<sup>10</sup> External financial sources have been as such an important determinant of Kenya's foreign policy on international trade and foreign investment.<sup>11</sup>

The need by Kenya for market of its primary goods, manufactured goods and human resources within the East African region for instance had to see Kenya pursue the policy of good neighborliness in the region and the principle of nonalignment outside the region.<sup>12</sup> Kenya is now part of the globalized world where globalization is seen as an impetus towards interconnectedness of states and no state can survive in isolation. Kenya therefore cannot achieve viable economic goals without international trade and investment and indeed no country can succeed without international trade. Kenya needs market for its products within the region and outside the region hence the need for Kenya to enact legislations that promotes her engagement in international trade and foreign investment. The country has entered into multiple trade agreements with different states, the Constitution of Kenya 2010 now recognizes international treaties ratified by Kenya as the laws of Kenya and indeed Kenya has enacted various legislations in view of promoting international trade and foreign investments in Kenya.<sup>13</sup> Until 2014, Kenya did not have a written foreign policy that clearly outlines its economic obligation and participation in the international arena.<sup>14</sup> The country has a national trade policy and currently developing an international investment policy<sup>15</sup> and has a number of legislations that govern international trade and investments. This research therefore critically appraises the legal framework that governs international trade and foreign investments in Kenya and as such assesses the efficiency of the legislative framework on international trade and foreign investment in Kenya.

## **1.2 Problem Statement**

Kenya's performance in attracting FDI is slowly taking a downward trend, trailing Tanzania and Rwanda as the top investment destinations in East Africa.<sup>16</sup> This dampens the country's ambition to become a regional leader in tapping foreign direct investment. *"The new report that lists the investment climate across all 54 economies in Africa indicates that East Africa's economic giant is trailing her neighbours in terms of attracting top investments. The study conducted by*

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10 Ibid n 3.

11 Ibid .

12 Ibid.

13 Article 2(6).

14 Republic of Kenya, 'Kenya Foreign Policy' Ministry of Foreign Affairs (2014) p5.

15 Respondent No. 2( 11 May 2016 in Nairobi).

16 <http://www.researchkenya.or.ke/thesis/27003/the-relationship-between-work-permits-and-the-inflow-of-foreign-direct-investment-in-kenya--a-focus-on-the-ministry-of-immigration-and-registrations-of-persons>

*diversified financial services brand, Rand Merchant Bank, ranks Kenya 11th, having fallen from the top 10 bracket since the previous study released last year.*<sup>17</sup>The report cites a plethora of challenges for the Kenya's drop in attraction of foreign investment which includes an inefficient legal system, graft, and the failure to put into practice a double taxation treaty with Uganda and Tanzania that hamper access to finance.<sup>18</sup>At the same time, Non-Tariff Measures (NTMs) are cited as some of the issues affecting Kenya's exporters and importers thus inhibiting her presence in the global trade arena due to Kenya's exporters' inability to access international markets.<sup>19</sup>

International trade and foreign investment is a key pillar of any state's economic development. Indeed it is one of the key components of the Kenya's foreign policy. Kenya however never had a written foreign policy that clearly outlines its economic obligation and participation in the international arena until 2014 when it was formulated.<sup>20</sup> The country is working on an international investments policy and has a national trade policy in place. There are a number of legislations that governs international trade and foreign investments in Kenya. This research critically appraises the legal framework that governs international trade and foreign investments in Kenya and assesses the efficiency, sufficiency and effectiveness of such framework on international trade and foreign investment in Kenya.

### **1.3 Justification of the Study**

Kenya's drop in tapping foreign investments is associated with the inefficient legal system. This study analyzes the legislative framework governing international trade and foreign investments and provides recommendations for the promotion of international trade and foreign investments in Kenya. The lack of specific international trade legislation that supports domestic business environment and upon which international trade and foreign investment is supposed to be hinged, creates an inviable business conditions necessary to attract foreign investments in Kenya. Kenya has no policy on international trade and foreign investments. This study is justified because it seeks to provide a way forward on the need to develop holistic policies on international trade and foreign investments from which the laws shall be underpinned. The study as such provides scholarly literature to guide the development of a regulatory frame work to

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17 <[http://standardmedia.co.ke/m1/story.php?articleID=2000171567&story\\_title=Kenya-loses-its-position-among-Africas-top-10-foreign-investment-destinations](http://standardmedia.co.ke/m1/story.php?articleID=2000171567&story_title=Kenya-loses-its-position-among-Africas-top-10-foreign-investment-destinations)> accessed 22 December 2015.

18 Ibid.

19 <[http://www.coastweek.com/3609\\_16.htm](http://www.coastweek.com/3609_16.htm)>accessed 26 July 2016.

20 Ibid.



enhance Kenya's participation in international trade and investment. The study also makes contribution on the existing literature on international trade and foreign investments in Kenya.

#### **1.4 Objectives of the Study**

The main objective of this research is to critically analyze the legal framework under which international trade and foreign investments in Kenya operate. This is based on the recognition that international trade and foreign investment is a key pillar in economic development of any state. The specific objectives are:-

- (i) Identify and assess the sufficiency and efficiency of the laws on international trade and foreign investment in Kenya;
- (ii) Identify and discuss the possible issues and challenges brought about by the legislative insufficiency and inefficiency on international trade and foreign investments.
- (iii) Suggest reforms to the legislative framework

#### **1.5 Research Questions**

Kenya's economic development and prosperity depends on her robust economic engagement with other states hence necessary to secure Kenya's regional and overall economic objectives. This study seeks to answer the question as to which are the laws governing international trade and foreign investments in Kenya. In providing an answer to this question, the following questions are asked:-

- (i) What is the current legislative framework on international trade and foreign investments in Kenya?
- (ii) Is the legislative framework sufficient, effective and efficient in promoting international trade and foreign investments?
- (iii) If not, what are the suggested reforms to the legislative framework?

#### **1.6 Research Hypothesis**

This research proceeds on the presumption that there is an insufficient and inefficient legislative framework governing international trade and foreign investments in Kenya. This weakness in the legislative framework is the cause for Kenya's unsound international trade and foreign investment regime. Accordingly, there is need to review and strengthen Kenya's legislative framework on international trade and foreign investments.

## 1.7 Theoretical Framework

The Constitution of Kenya, 2010 is viewed as a bold attempt to reengineer the state.<sup>21</sup> The terms of the social contract by which the people were governed were radically revised because it had become frayed and fallen into disuse.<sup>22</sup> State functions were reviewed placing international trade under the Ministry of Foreign Affairs, a function which then was under the Ministry of Trade.<sup>23</sup> The state in the realist tradition is regarded as the most significant player in international trade and foreign investments.<sup>24</sup> The change in ministerial functions may have been attributed to the fact that there exists a close interrelation between international trade and international relations and the need for government to advance economic diplomacy under which international trade is a key component. The Kenya's Foreign policy states:<sup>25</sup>

*Through economic diplomacy, Kenya will continue to strengthen and consolidate its trade and investment links with traditional partners while exploring new trade and investment partners in order to expand access of Kenyan products to foreign markets, while at the same time increasing investments for our country.*

It is evident that increased international trade, and the lowering of barriers to such trade, frequently results in improved international relations.<sup>26</sup> Kenya has since independence been a central player in international trade and foreign investments and appreciates the emergence of the forces of globalization which are often seen as impetus behind the increased interconnectedness of states.<sup>27</sup> Theoretically, this study is underpinned by Neo-functionalism theory. This section demonstrates how neo-functionalism theory is useful for explaining the participation of Kenya in international trade and foreign investments.

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21 Key Note address by the Chief Justice of Kenya at the MCAs Forum in Mombasa, March 21, 2014 < [www.judiciary.go.ke](http://www.judiciary.go.ke) > accessed 28 November, 2015.

22 Ibid.

23 CoK, 2010, Fourth Sch.

24 Vhulenda Edna Matshili, "Sub-national Governments and Foreign Policy: The case of the Limpopo Province in South Africa," (M.A Thesis, University of South Africa 2013) p. 13  
<[http://uir.unisa.ac.za/bitstream/handle/10500/14181/dissertation\\_matshili\\_ve.pdf?sequence=1](http://uir.unisa.ac.za/bitstream/handle/10500/14181/dissertation_matshili_ve.pdf?sequence=1)> accessed 2 November, 2015.

25 Ibid n 14 .

26 RAND, 'International Economic Relations' < <http://www.rand.org/topics/international-economic-relations.html> > Accessed 30 December 2015.

27 Ibid n23

### 1.7.1 Neo-functionalism Theory

The theory of neo-functionalism emerged in the mid 1950s as a theory of regional integration in a process by which countries remove barriers to free trade.<sup>28</sup> Neo-functionalism was used to explain the integration theory of the Western Europe.<sup>29</sup> Neo-functionalism was developed by Earnings Haas whose aims were to give an explanation to a regional integration of Europe after the Second World War.<sup>30</sup> The theory was also aimed to explain the regional integration and development in the areas of economics cooperation in Latin America but it was Europe where political and economic integration was best developed therefore the theory became closely associated with the EU.<sup>31</sup> Ernst B. Haas who is regarded as the founding father of neo-functionalism theory argues that neo-functionalism started as a “sympathetic critique” of the functionalist theory. Neo-functionalism developed as a result of a fairly rapid period of integration during the 1950’s, when it became evident the economic-political divide in functionalism was not representative of the realities of integration.<sup>32</sup> The rapid pace at which integration was taking place made it impossible for the functionalism theory to offer explanations for some levels of integration.<sup>33</sup> It was in response to such failure for explanation to some events of integration that, E B Haas (1958) published the *Uniting Europe*, the work regarded as the seminal neo-functional text in which neo-functionalism first took form.<sup>34</sup> Neo-functionalism theory’s key features which make it relevant to this study are; its description of the concept of integration and the discussion of its core notion ‘spill-over.’<sup>35</sup> This theory argues that when countries agree to cooperate in a given sector this cooperation creates incentives to cooperate in other similar areas and indeed sometimes full benefits of integration in one sector may only be realized by cooperating in the other sector.<sup>36</sup> This is what is referred to as spill-over, a situation in which cooperation in one field necessitates cooperation in another.<sup>37</sup>

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28 Neofunctionalism <<http://testpolitics.pbworks.com/w/page/25795541/Neo%20-%20functionalism> >accessed 2 February 2016.

29 Ibid.

30 Ibid.

31 Ibid.

32 Gary Duncan, The inside Threat: European Integration and the European Court of Justice, Linköping Universitet, Sweden, <<http://www.diva-portal.org/smash/get/diva2:22177/FULLTEXT01.pdf> >accessed 29 November 2015.

33 Ibid n 27.

34 Ibid.

35 Neofunctionalism: Logic and Critique <<http://hum.port.ac.uk/europeanstudieshub/wp-content/uploads/2013/05/Module-4-extract-5-Neofunctionalism-logic-and-critique.pdf> > accessed 30 December 2015.

36 Civitas, ‘Theories of European Integration’ <<http://www.civitas.org.uk/eufacts/OS/OS16.php> > accessed 30 December 2015.

37 Ibid n31

Neofunctionalism also holds that economic integration almost always leads to an increase in interaction between actors in the integrating region.<sup>38</sup>

### **1.7.2 Relevance of Neo-functionalism in this Study**

The theory of neo-functionalism is relevant in this study because, it acknowledges the fact that no state can exist and develop in isolation. It is a theory of integration. International trade refers to the exchange of goods or services on international front. This type of trade enhances greater competition and more competitive pricing in the market.<sup>39</sup> The competition results in more affordable products for the consumer.<sup>40</sup> The exchange of goods also affects the economy of the world as dictated by supply and demand, making goods and services obtainable which may not otherwise be available to consumers globally.<sup>41</sup> Foreign investment on the other hand refers to the flow of capital from one nation to another in exchange for significant ownership stakes in domestic companies or other domestic assets.<sup>42</sup> Typically, foreign investment denotes that foreigners take a somewhat active role in management as a part of their investment.<sup>43</sup> This theory therefore advances the meaning of international trade and foreign investments and would, for instance, properly explain the trade relations between Kenya and other East African states under the EAC framework, EU, US, China among other nation states to which Kenya trades with. International trade and foreign investments operates along agreed international legal architecture such as treaties, conventions and protocols. This involves negotiations and bargaining based on each nation's preferences. Neo-functionalists argument is based on the fact that states act as model of integration.<sup>44</sup> Since a state is used as a model of integration, the result of the process of integration, assuming it is continued on a forward movement, is a gradual shift from the diplomatic to the domestic thus boosting trade both at domestic and international level.

### **1.7.3 Criticism of Neo-functionalism Theory**

While neo-functionalism offers a compelling logic of integration, both failings of integration in other parts of the world and stagnating European integration throughout the 1960s and 70s challenged some of the assumptions of neo-functionalism.<sup>45</sup> This theory fails to account for increasing protectionism and limitations to integration process put up by member states at

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38 Ibid.

39 <<http://www.businessdictionary.com/definition/international-trade.html#ixzz3vn6alqYn>> accessed 30 December 2015.

40 Ibid.

41 Ibid.

42 <[www.investopedia.com/terms/f/foreign-investment.asp](http://www.investopedia.com/terms/f/foreign-investment.asp)> accessed 30 December 2015.

43 Ibid.

44 Ibid n 41.

45 Ibid.

times.<sup>46</sup> Some of the critics of neo-functionalism are Eilstrup-Sangiovanni and Stanley Hoffman who argued that neo-functionalism placed too much attention to non-state actors as opposed to states which are the core actors of international relations and therefore which remains the ultimate authorities on integration.<sup>47</sup>

Neo-functionalism however still remains a powerful theory in the analysis of regional integration and globalization which are the key impetus towards interconnectedness of states and advancement of international trade and foreign investment. Neo-functionalism therefore still presents an important basis for the analysis of contemporary integration process.

## **1.8 Research Methodology**

This section introduces the research methodology that is used for this study. The study is based on both primary and secondary sources of data. This section is divided into the following subsections for purposes of collection of primary data: sampling methods, research instruments and administration of the research instruments

### **1.8.1 Sampling Methods**

Sampling is the act, process or technique of selecting a suitable sample, or a representative part of a population for the purpose of determining parameters or characteristics of the whole population.<sup>48</sup> The way in which a researcher selects subjects for a study determines how one is able to generalize the results of the study.<sup>49</sup> This study used purposive sampling and snowball sampling.<sup>50</sup> Purposive sampling allows a researcher to pick respondents who are conveniently and readily available to complete the questionnaires.<sup>51</sup> For the purpose of this study, interviewees, who were purposively sampled for the research, as per Appendix B. Purposive sampling is considered ideal because it is expected that gathering data on a sample will be less time consuming and less costly.<sup>52</sup> The only problem with Purposive sampling however, is the fact that one has to know the population under study for the sample method to give accurate results.<sup>53</sup> Snowball sampling was also be utilized to help in drawing up the sample of participants who

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46 Ibid.

47 Ibid.

48 Donald K. Kombo and Delno L.A Tromp, *Proposal and Thesis Writing: An Introduction* (Paulines Publications Africa 2006).

49 Ibid.

50 Ibid.

51 Research Methodology<

<http://dspace.unza.zm:8080/xmlui/bitstream/handle/123456789/164/mwafuililwa20001.PDF?sequence=2>>accessed 30 January, 2016.

52 Ibid.

53 Ibid.

were to provide adequate information for the study.<sup>54</sup> This type of sampling entails a situation where the researcher starts with one member of a group who in turn refers the researcher to another member.<sup>55</sup> This method was of great import and as reinforcement to the purposive sampling.

### **1.8.2 Research Instruments**

The research instruments adopted for this study were the Questionnaires and structured Interviews. The questionnaires consisted of two types of questions thus closed-ended and open-ended questions. The close-ended questions sought to provide alternative answers for the respondents to choose from while the open-ended questions were used to solicit for more additional information from the respondents. Questionnaires are preferred since they produce no bias while structured interviews have a high rate of reliability with regard to the information collected.<sup>56</sup>

### **1.8.3 Administration of the Research Instruments**

The questionnaires were self-distributed to the purposively-selected respondents. Structured interviews were also used to solicit relevant information from the respondents more specifically those who accepted the interviews. This written response method is very ideal since the researcher is able to solicit information using interview questions from more people in the shortest time possible compared to personal interviews.

The secondary data involved the reading and reference to the relevant books, articles, journals, conference papers, constitution of Kenya, relevant national government statutes and case laws, international treaties and agreements, conventions and protocols. Additionally, information from the internet on the subject under study was used as well. The relevant information captured from these sources was applied in the analysis of the information obtained from the primary sources.

## **1.9 Literature Review**

There exists a lot of literature on international trade and foreign investments. Many of the scholars discuss foreign direct investments and the protectionist legal regime on international trade and investments in Kenya. Little literature exists on thorough analysis of the legal regime governing international trade and foreign investments in Kenya. The Constitution of Kenya now

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54 Chapter 3: Methodology

<http://wiredspace.wits.ac.za/bitstream/handle/10539/1489/03Chapter3.pdf;jsessionid=4E217234DA82E6B81D8FB850566164FD?sequence=6accessed> 30th January 2016.

55 Ibid.

56 Ibid n50.

recognizes international treaties which Kenya has ratified to form part of the laws of Kenya.<sup>57</sup> It provides international trade as one of the key functions to be implemented by MFAI.<sup>58</sup> This is a shift from the previous constitutional regime where international trade was a function implemented by the then Ministry of Trade and Industrialization. There is therefore need to review the laws on international trade and foreign investments to conform with the CoK and analyze the existing gap in these laws to secure a sound international trade and investment regime in Kenya. This study therefore aims to analyze this situation and provide a way forward and contribute to the development of a sound legal and policy framework on international trade and foreign investments and also enrich the attendant literature. This section is structured in terms of the source of literature as follows:

### 1.9.1 Books

Baron de Montesquieu, in his book ‘The Spirit of the Laws’ stated: ‘Peace is the natural effect of trade. Two nations who traffic with each other become reciprocally dependent; for if one has an interest in buying, the other has an interest in selling; and thus their union is founded on their mutual necessities.’<sup>59</sup>The same therefore holds true for Kenya’s participation in international commerce and the laws that regulate such a commercial relationship. Dolzer and Schreuer argue that under the rules of customary international law, no state is under an obligation to admit foreign investment in its territory, generally or in any particular segment of its economy.<sup>60</sup> However, once a state has admitted a foreign investment, a host state will be subject to a minimum standard when customary law alone governs. Modern treaties on foreign investment go much beyond this minimum standard in the scope of obligations a host state owes towards a foreign investor.<sup>61</sup>They further argue that international investment law is designed to promote and protect the activities of private foreign investors.<sup>62</sup> This does not necessarily exclude the protection of government-controlled entities as long as they act in commercial rather than in governmental capacity.<sup>63</sup> Dolzer and Schreuer also states that another novel issue in international trade is the existence of legitimate expectations on the part of investors.<sup>64</sup> Legitimate expectations may be created not only by explicit undertakings on the part of the host state in contracts but also

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57 Article 2(5).

58 Part one of the Fourth Sch., Paragraph 1.

59 Baron de Montesquieu, 1748, *The Spirit of the Laws*, book 20, Chapter 2: ‘Of the Spirit of Commerce’ <<http://press-pubs.uchicago.edu/founders/documents/v1ch4s2.html>> accessed 31 December 2015.

60 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2008)P 7.

61 Ibid.

62 Ibid.

63 Ibid.

64 Ibid.

by undertakings of a more general kind.<sup>65</sup> They contend that a host state's legislative framework on international trade and foreign investment is a key source of investors' legitimate expectations. To an investor, what matters is the state of the law of the host country at the time of the investment.<sup>66</sup> Dolzer and Schreuer address the general legal framework governing international trade and foreign investment. This study gives a specific analysis of the legislative framework governing international trade and investments in Kenya.

Delimatsis argues that each country usually has its own perception regarding the way that a specific market failure should be remedied and, consequently, regulatory diversity in the services realm is justified.<sup>67</sup> He further avers that GATs recognizes each country's prerogative to regulate trade in services in its own jurisdiction as part of the exclusive competences that WTO members have.<sup>68</sup> Delimatsis argues for the international trade in service generally and does not specifically address the Kenyan scenario, which this study addresses.

Soopramanien argues that market access and labour standards are some of the outstanding issues in international trade.<sup>69</sup> Developing countries argue that although there have been significant reductions in tariffs under GATT, most of the reductions have occurred in areas which are not of significant economic interest to developing countries. Labour standards is an issue since members of WTO argue that it is used for protectionist purposes. This study complements Soopramanien assertion by demonstrating how these issues have been factored in, in the domestic laws with a view to enhance international trade and compliance with WTO requirements.

Arvius asserts that standards have many roles and functions.<sup>70</sup> They not only establish a common trading language between parties in commercial transactions but they also ensure public safety and environmental protection within and outside the national borders.<sup>71</sup> He therefore argues that inappropriate regulations can result in high costs and inefficiencies in trading partner states as well as in the domestic economy and have international consequences.<sup>72</sup> Arvius's argument addresses the essence of the standards requirement at the international trading level. This study built up on his argument and contextualizes it by analyzing the Kenyan laws on standards and

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65 Ibid.

66 Ibid

67 Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency and Regulatory Diversity* (Oxford University Press 2007).

68 Ibid.

69 Soopramanien, 'Introductory Remarks' in World Bank, *Legal Aspects of International Trade* (Washington D.C 2001).

70 Christer Arvius, 'Overview of the Issues' in United Nations Economic Commission For Europe, *Standards, Regulations and International Trade* (Roundtable on the impact of standards on international Trade Geneva, 15 June 1998).

71 Ibid.

72 Ibid.



evinces their impact on international trade and foreign investments in Kenya.

Yabs states that international trade involves the economic activities of exchanging goods and services between nation states.<sup>73</sup> The nature of international trade includes goods and services, different states and investors. This takes into account individual firms and people and it transcends boundaries of nations. The scope of international trade covers all states of the world that engages in trading activities and it involves all aspects and activities of firms from production, distributions and consumption.

Yabs further argues that among the factors that affect international trade in Kenya are legal aspects which may be positive or negative to the operation of international trade and foreign investments in Kenya. He contends that these legal aspects includes laws, some of which may be conducive to the operation of international trade and investments and some may be negative in the sense that they hinder the development of international trade in Kenya. He further argues that such laws includes such legislations governing monopolies, antipollution laws, social security, price controls, competition and company ownerships. Yabs avers that among the challenges facing international trade and foreign investments is the resistance by most Multinationals to patent products from developing countries and cites black Tea which Kenya is the leading producer but has not been patented. This study therefore sought to point out the existing deficiencies in the law on international trade and foreign investments, and propose possible solutions in an effort to enhance Kenya's position in international business.

Redfern and Hunter state that it is sometimes said that every arbitration is a "national" arbitration, in the sense that it must be held at a given place and is accordingly subject to the national laws of that state.<sup>74</sup> They argue international arbitration will usually have no connection with the state in which the arbitration takes place, other than the fact that it is taking place on the territory of that state. They argue that even states that make no formal distinction between "domestic" and "international" arbitrations in their legislation are compelled to recognize the distinction when it comes to the enforcement of arbitral awards.<sup>75</sup> Redfern and Hunter however, do not address arbitration in the Kenyan context hence this study seeks to fill the gap by analysing the legislative arbitral process in international trade and investments in Kenya.

Todd contends that international trade is dynamic in nature and therefore the legal frameworks

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73 John Yabs, *International Business Operations in Kenya* (2nd edn, Lelax Global Ltd 2007) p 22.

74 Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th edn Sweet & Maxwell 2004).

75 Ibid.

developed long ago are no longer entirely suitable, in the modern globalized world.<sup>76</sup> He points out that commercial parties need a legal framework within which to operate and that F.O.B and C.I.F did not develop until proper legal framework was put in place.<sup>77</sup> Todd's argument captures the documentation involved in international trade and does not analyse the legal framework governing international trade in Kenya. This research therefore critically looked at the legislative framework governing international trade in Kenya.

Grydehoj states that when discussing the governing capacities of subnational jurisdictions, it is important to differentiate between *de jure* distribution of competencies between governments at the national and subnational levels and the *de facto* competencies acquired through tradition and practice.<sup>78</sup> He argues that although foreign relations are generally considered the exclusive *de jure* competency of sovereign states, which possess diplomatic legitimacy in the international arena, most subnational jurisdictions have the ability to engage directly with foreign state and private actors.<sup>79</sup> He opines that in the Arctic context for instance, the government of Greenland is making considerable political investments in engaging with the Chinese and Chinese businesses even though Greenland lacks the competency to unilaterally carry out foreign relations.<sup>80</sup> Grydehoj's argument does not take in the considerations of the constitutional complexities and functional divisions in Kenya. It addresses the scenario of the Arctic governments. This study built on his scholarly argument and provides a way forward with regard to the Kenya's position since international trade and foreign investment is a national function.<sup>81</sup>

Keohane and Nye defined transnational relations as interactions across the border in which at least one actor is nongovernmental.<sup>82</sup> This definition can be used to describe cross border interactions of a provincial or state government with non-governmental actors such as multinational corporations.<sup>83</sup> This definition captures the concept of foreign direct investment which forms part of the study. Keohane and Nye's argument concerns international trade in

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76 Paul Todd, *Cases and Materials on international Trade Law* (1st edn London Sweet & Maxwell 2003).

77 *Ibid.*

78 Adam Gryhoj, 'Opportunities for Local development in a Nationally Contested Arctic: When Nordic Communities Engage with Asian Economies' (2013) *Quarterly Review 2*, *Baltic Rim Economies* <<http://www.islanddynamics.org/Grydehoj%20-%20Opportunities%20for%20Local%20Development%20in%20a%20Nationally%20Contested%20Arctic.pdf>> accessed 31 December 2015.

79 *Ibid.*

80 *Ibid.*

81 Fourth Schedule, Part 1 Para. 1

82 Keohane and Nye in, *Subnational governments as international actors: Constituent Diplomacy in British Columbia and the Pacific Northwest*, <<http://ojs.library.ubc.ca/index.php/bcstudies/article/download/1339/1384>> accessed 29 November 2015 at page 26-34.

83 *Ibid.*

subnational regions. This study went further to demonstrate the essence of a sound legislative framework in international trade and investments in Kenya.

Matthieu , Milet and Mirza argues that in order to promote international services, most bilateral and multilateral trade agreements aim at elimination of discriminatory barriers.<sup>84</sup> However, domestic regulations, which apply to all firms alike and do not intend to exclude foreign sellers, are often seen as serious obstacles to cross-border trade in services. They posit that much as services account for a large share of GDP, in both developed and developing economies, there are high barriers to international trade in services even though there exists GATS at the WTO which seeks to eliminate regulatory barriers that discriminate between domestic and foreign suppliers. This analysed the Kenya's legal regime governing international Trade and Investments with a view to assess whether trade in professional services for instance is given sound legal protection in Kenya.

Sauvant, Economou, Gal, Lim and Willinski states that both inward FDI and outward FDI are primarily driven by economic factors.<sup>85</sup> Firms need to have certain 'ownership' advantages that give them the competitive capabilities to invest successfully in foreign lands. Economic opportunities to host countries ('location-specific' advantages), in turn, entice them to invest there, assuming that FDI provides the 'internationalization' advantages that make such investment the preferred course of action in comparison with other modes of international economic transactions such as trade. They argue that policies need to be in place to ensure that linkages with the domestic economy are in place that the foreign investment does not crowd out domestic firms and that appropriate competition rules are observed among other things. This underlies the significant attention paid to policies to attract, retain and maximize the potential benefits of inward FDI. Their argument however, is not centered on Kenya, which this study sought to address.

### **1.9.2 Journal Articles**

Wang asserts that the normative delimitation of regulatory boundary of domestic law *vis-a-vis* international investment law over transnational investment related activities lies in the equilibrium between competing parameters, namely marketable and socialized interest

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84 Matthieu , Milet and Mirza, 'The Impact of Domestic Regulations on International Trade in Services: Evidence from Firm-Level Data' (2014) European Commission , <<http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=39223456> > accessed 31 December 2015.

85 Sauvant, Economou, Gal, Lim and Willinski, in "Yearbook on international Investment Law and Policy 2012-2013" (1st edn, Oxford University Press 2014) p 6.

concerns.<sup>86</sup> His argument is based on the fact that international trade and foreign investments are largely driven by the market interests and the political gains to some extent, among the trading partners. Domestic laws are therefore enacted to respond to such market and social interest concerns. Wang addresses a general effect of domestic law on international trade and foreign investments. This study narrowed down to Kenya by analyzing the laws governing international trade and foreign investments in Kenya.

Schwartz affirms that formal relationship between states is best established through treaties.<sup>87</sup> Rights and obligations of states more often than not, emanate from established principles in treaty law. Treaties bestow rights on third party states and citizens, and as such treaties regulate a wide spectrum of international relationship in the economic, social and political arena. To contextualize Schwartz's argument, this study made reference to CoK which under Article 2(6) provides that international law ratified by Kenya forms part of the Laws of Kenya. This study analyzed the provision and demonstrated its impact on international trade and foreign investment in Kenya.

Moloo and Khachaturian contends that increasingly foreign investors are aware of the legal protections afforded to their investments under international law.<sup>88</sup> They argue that such legal protections provide investors with important means of ensuring the safety of their investments from the wrongful acts of the host state.<sup>89</sup> They however fail to address legal protection under domestic legal regime. This study sought to make academic contribution by addressing legal protectionism under the Kenya's legislative framework.

Sandra contends that whereas EPAs create easy penetration of goods and services from Kenya to the European Market and vice versa, there could be losses if Kenya does not buttress its legal and economic framework.<sup>90</sup> He admits that international trade is meant to foster economic growth and development for trading partners but add that EPAs may hinder the economic growth because they allow, reciprocal trade liberalization for ACP countries with each country granting duty-free

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86 Peng Wang, 'Role of National Law in International Investment Law System: A competitor, A supplementary or A cooperator?' (2014) Xi'an Jiaotong University School of Law Working Paper 2 /2014 < Available at SSRN: <http://ssrn.com/abstract=2398170> or <http://dx.doi.org/10.2139/ssrn.2398170> >accessed 1 February 2016.

87 Reporting International Treaties, 'The WTO Agreements: Their Impact on Kenya' <<http://library.fes.de/pdf-files/bueros/kenia/01613.pdf> >accessed 2 February 2016.

88 Rahim Moloo and Alex Khachaturian, 'The Compliance With the Law Requirement in International Investment Law' (2011) 34(6) Fordham International Law Journal <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2310&context=ilj> accessed 2 February 2016.

89 Ibid.

90 Juma Jill Sandra, 'The Legal and Economic Implications of Economic Partnership Agreements in Kenya's Trade Arena: Assessing Liberalization of Agriculture and Food Security' (2nd Biennial Global Conference of the Society of International Economic Law, University of Barcelona, Spain 10 July 2010) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1628112](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1628112)>accessed 2 February 2016.

access to as much as 90% of imports from the EU during an implementation period of 10-12 years.<sup>91</sup> He therefore analyses the impact of EPAs on Kenya's participation in international trade and does not address the domestic legislations that govern international trade and investments hence this study sought to fill that gap by giving a critical analysis of how these domestic laws have embraced such agreements as EPAs.

Jardim avers that economic globalization and free trade agreements make national economies more interconnected, business issues increasingly cross-affect more jurisdictions and nations.<sup>92</sup> He contends that as a result of this, national courts are gradually exposed to litigation involving international trade rules. His arguments is based on the Latin America jurisdiction and though relevant to this study, she fails to address how the Kenyan courts deal with disputes concerning international trade rules, which this study looked at.

Davies argue that trade and investments exist in a symbiotic relationship and as such there is an overlap between these concepts because of the difference in trade law and investment law characteristics.<sup>93</sup> This has posed a challenge to private parties involved in international trade and foreign investments since states which are affected in an international trade transaction can be expected to exercise restraint in the initiation and conduct of proceedings based on the balance between a successful outcome, and possible damage to diplomatic relations with the respondent states. Private parties however have been denied an opportunity to enjoy such privilege under the international law governing trade and investments. Courts have for instance declined to grant WTO law 'direct effect' so that these actions have been almost universally unsuccessful. Since the Constitution of Kenya admits international treaties to form party of the laws of Kenya, the argument would be that then can WTO law have a direct effect in Kenya? This study analyzed this argument and demonstrated its relevance to this study.

Niki reiterates the emergence of globalization and its influence international trade.<sup>94</sup> He states that with increasing impact of globalization, multinational organizations are emerging as among the most profitable entities in the world hence a company needs to be aware of the language and culture of the state where it plans to embark with its investment. Politics and laws of the nation

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91 Ibid.

92 Maria Angela Jardim de Santa Cruz Oliveira, 'International Trade Agreements Before Domestic Courts: Lessons From the Brazilian Experience' (4th Biennial Global Conference, World Trade Institute, University of Berlin July 2014) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2448445](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2448445)> accessed 2 February 2016.

93 Arwel Davies, 'Scoping the boundary between the trade law and investment law regimes: when does a measure relate to investment?' (2012) 15(3), *Journal of International Economic Law* <<http://jiel.oxfordjournals.org>> accessed 31 December 2015.

94 Niki Geiersbach, 'The Impact of International Business on the Global Economy' (2010) 3(2), *Business Intelligence Journal* <[http://www.saycocorporativo.com/saycouk/bij/journal/vol3no2/article\\_8.pdf](http://www.saycocorporativo.com/saycouk/bij/journal/vol3no2/article_8.pdf)> accessed 31 December 2015.

can either make international trade and foreign investment easy or hard. He further avers that world business recommends governments to provide basic legal and institutional framework that enhances effective competition in international trade and investments. He further states that politics and laws are therefore, very important in international trade since they determine how and where international trade may be conducted by an organization or the state. Universality of laws is therefore essential to facilitate greater economic benefits in international trade. This study propounded an appraisal of the laws on international trade and foreign investment to afford universality, constitutionality and responsiveness to the ever-changing international business environment.

### **1.9.3 Online Materials**

UNCTAD contends that among the challenges facing investors in Kenya is the delay in administration of taxation.<sup>95</sup> Investors face delays in obtaining refunds of VAT and Withholding taxes and customs clearance sometimes take time with goods subject to multiplicity of inspections.<sup>96</sup> This study will further this argument by critically analyzing the tax laws in Kenya and evince their impact on international trade and foreign investments.

SAYLOR argues that international trade is a field in economics that applies microeconomic models to aid the interpretation of international economy.<sup>97</sup> It is concerned with the basic supply-and-demand analysis of international markets; firm and consumer behavior; perfectly competitive, oligopolistic and monopolistic market structures; and the effects of market distortions. Their further argument is that the growth of international trade and investment has been stimulated partly by the steady decline of trade barriers since the Great Depression of the 1930s, the post-world war II era and GATT, prompted regular negotiations among an increasing member states to reciprocally reduce tariffs. SAYLOR fails to address the impact of domestic laws on international trade and investments. This study sought to fill the gap by critically analyzing the laws of Kenya on international trade and foreign investments. Kenya is certainly East Africa's gateway for foreign investment<sup>98</sup> and with plans to transform Nairobi into an international banking and financial hub in the next two decades, a number of challenges including an inefficient legal system, graft, and the failure to put into practice a double taxation

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95 United Nations Conference on Trade and Development, 'An investment guide to Kenya: Opportunities and Conditions 2012' <[http://unctad.org/en/PublicationsLibrary/diaepcb2012d2\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaepcb2012d2_en.pdf)> accessed 2 February 2016.

96 Ibid.

97 Saylor, 'International Trade: Theory and Practice,' <<http://www.saylor.org/site/textbooks/International%20Trade%20-%20Theory%20and%20Policy.pdf>> accessed 31 December 2015.

98 <http://www.standardmedia.co.ke/business/article/2000171567/kenya-loses-its-position-among-africa-s-top-10-foreign-investment-destinations>, accessed 31 December 2015.

treaty with Uganda and Tanzania that hamper access to finance have to be addressed.<sup>99</sup> This study analyzed Kenya's legal system that governs international trade and foreign investment and made proposal to enhance Kenya's global economic transactions and competitiveness.

### **1.10 Scope and Limitation of Study**

This study limited its research to the legal framework governing international trade and foreign investments in Kenya. It therefore only analyzed the laws on international trade and investments and as such does not analyse the policy framework that governs international trade and foreign investments such as the Kenya Foreign Policy and other trade policies, whose implementation may have spillover effect that may demonstrate some relations to this study. The study also limited itself to international trade and foreign investments concepts and not foreign affairs, diplomacy, foreign relations and foreign policy which though have bearing on the administration of international trade and foreign investments.

### **1.11 Chapter Break down**

This research has four chapters. **Chapter One** sets out the agenda of the study. It introduces the topic of study and sets forth the background to the study, statement of the problem, justification of the study, objectives of the study, research questions, research hypothesis, theoretical framework, research methodology, literature review, limitations of the study, and the chapter break down.

**Chapter Two** appraises the best practices in selected jurisdictions in the world. This demonstrates how legislative framework governing international trade and investment in these jurisdictions, has promoted the growth of international trade and foreign investment. It then points out the best practices that Kenya can emulate to enhance the development of international trade and foreign investments.

**Chapter Three** appraises the legislative framework governing international trade and foreign investments in Kenya. It reviews the laws that governs international trade and foreign investments in Kenya and evaluates their sufficiency, efficiency and effectiveness in addressing the subject of study.

**Chapter Four** provides summary of the findings, conclusion and recommendations. It addresses in summary the significance of a sound legislative framework governing international trade and investments in Kenya. It gives the summary of the findings as well as the overall summary of the study.

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<sup>99</sup> Ibid.

## CHAPTER TWO

### THE IDEAL LEGISLATIVE FRAMEWORK REGULATING INTERNATIONAL TRADE AND FOREIGN INVESTMENTS: A CASE STUDY OF CHILE, SINGAPORE, UK, USA AND SOUTH AFRICA

#### 2.0 Introduction

States under public international law are sovereign in determining the entry and stay of foreigners including foreign investors.<sup>100</sup> In the global market place, however, countries compete to attract high value added foreign investment and enhanced export portfolio as a key development tool for their economies.<sup>101</sup> In order to effectively make use of their sovereign rights and concurrently attract much needed intra-regional and other foreign investment, countries formulate international trade and foreign investment legislations to realize this objective.<sup>102</sup> This chapter gives a brief review of the legislative framework governing international trade and foreign investments in selected jurisdictions. Among the jurisdictions selected for study of the best practices were: Chile, Singapore, UK, USA, and South Africa. The choice of these jurisdictions was informed by the common trend in key thematic areas such as: Policy frameworks governing international trade and foreign investments; legislation and regulations; institutional frameworks and enforcement mechanisms; International Commercial Arbitration; Intellectual Property Rights Regime; Compliance and Active participation in the Bilateral and Multilateral Trade Regime; Judicial independence and; investment incentives. These thematic areas form the central point of discussion under this chapter. The World Bank Report on the ease of doing business and the UNCTAD report provides the various achievements and developments in the said jurisdictions, more importantly based on the said thematic areas, as contributor to sound legislative environment that promotes international trade and foreign investments.<sup>103</sup>

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100 Alexander Bohmer, 'New Generation of Foreign Investment Laws: MENA-OECD Good Practice and the NEW Iraq Investment Regime' <[www.oecd.org/mena/investment](http://www.oecd.org/mena/investment)> accessed 1 March 2016.

101 Ibid.

102 Ibid.

103 World Bank, 'Doing Business 2015: Going Beyond Efficiency-Comparing Business Regulations For Domestic Firms in 189 Economies' (A world Bank Group, 12th edn 2015).



## 2.1 Policy Frameworks

It is best practice for policy to precede law as most legislations including subsidiary legislation trace their foundation to agreed policy frameworks.<sup>104</sup> Quality legislations would therefore be informed by quality policy frameworks. An effective legislation is the cornerstone of any legal regime.<sup>105</sup> The United States, Singapore and South Africa for instance have elaborate Trade and Investment policy frameworks that inform the laws governing international trade and foreign investments. These Trade and Investment policies have helped these states:<sup>106</sup> Set and enforce rules of fair competition in the global economy, not only by lowering tariff barriers, but also improving the treatment of foreign investors and protection of intellectual property rights; enact quality legislations, develop regulations and establish institutional frameworks to effectively govern international trade and foreign investments within their jurisdictions;<sup>107</sup> realize that trade and investment policy must be part of the broader national effort to improve the capacity of their nationals to compete in the global economy; acknowledge the fact that Trade policy is intended to establish and enforce rules for the international exchange of goods and services that bring the greatest possible benefits to their nationals while promoting the larger foreign policy interests; develop open FDI policies as bases for multinational companies to engage in high end manufacturing and product development;<sup>108</sup> promote free, open and stable multilateral trading system and settlement of investment disputes;<sup>109</sup> recognize the complimentary relationship between trade and investment decision-making since trade is an outcome of investment and investment may be motivated by trade opportunities;<sup>110</sup> harness FDI to achieve the development objectives of host states as FDI can have critical impacts on economic development of the

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104 Kenya Law Reform Commission, 'A guide to the legislative process in Kenya,' (Kenya Law Reform Commission 2015) p. 11 and 26.

105 Kenya Law Reform Commission, 'Effective legislation is the cornerstone of Constitutionalism,' <<http://www.klrc.go.ke/index.php/media-center/563-press-release-launch-of-the-guide-to-the-legislative-process-in-kenya>>accessed 19 July 2016.

106 The US Council on Foreign Relations, 'US Trade and Investment Policy' (Council on Foreign Relations Press, 2011)<<http://www.cfr.org/trade/us-trade-investment-policy/p25737>>accessed 8 May 2016; See also WTO, Secretariat Report: Overview of Singapore's Trade Policy (WTO, 2007) P.7, 8 and 14; Republic of South Africa, 'South African Trade and Investment Policy'(Department of Trade and Industry 2015); Republic of South Africa, 'A South African Trade Policy and Strategy Framework,'(Department of Trade and Industry 2010).

107 Singapore for instance in 2005 enacted the Competition Act establishing the Competition Commission of Singapore. This greatly enhanced institutional transparency and provide a more even playing field for all businesses. The South Africa's Trade and Investment Policy formed the basis for the enactment of the International Trade and Administration Act, 2002 which established the International Trade Commission that deals with import and export business in South Africa. The South Africa's Promotion and Protection of Investment Act was also enacted, an Act which draws on a review of international experience as well as recent national experiences with a view to balance the interest of the host state and foreign investors in South Africa.

108 Ibid n101, (WTO Secretariat Report, 2007) P. 7-14.

109 Ibid.

110 Ibid n 101(South Africa's Trade and Investment Policy) P 21-32.

state;<sup>111</sup> implement policy measures that seeks to enhance adequate security and offer protection to all foreign investors;<sup>112</sup>and preserve the sovereign right to regulate international trade and foreign investments, in the public interest.<sup>113</sup> Chile for example has made FDI an essential part of its national development strategy.<sup>114</sup> Its sound, market-oriented policies have created significant opportunities for foreign investors to participate in the country's steady economic growth.<sup>115</sup> Kenya lacks a sound policy framework to govern international trade and foreign investments and therefore, it needs to borrow from a mix of these best practices in the formulation and review of its legislative framework governing international trade and foreign investments. This will help Kenya realize a sufficient, efficient and effective legislative framework governing international trade and foreign investments.

## **2.2 Legislations and Regulations**

As earlier mentioned in this study, an effective legislation is the cornerstone of any legal regime. Chile, Singapore, US, UK and South Africa all have strong legal system to support international trade and foreign investments. These countries' strong and sound competition legal system promotes international trade and investments and for instance Chilean foreign investors are not required to seek a ruling on the potential competition implications of a planned investment before investing.<sup>116</sup> Their competition legislations prohibits mergers or acquisitions that would prevent free competition in the industry at issue and establishes institutions with prosecutorial and enforcement mechanisms to render a free and fair market environment that promotes international trade and foreign investments.<sup>117</sup> Singapore's Competition Act, provides for an elaborate protection mechanisms for Intellectual Property Rights with the intention of promoting fair competition, innovation and creativity thereby enhancing economic growth and development.<sup>118</sup> These Competition laws have strengthened and enhanced the enforcement powers of the institutions that seek to promote fair trading practices.<sup>119</sup> These laws are strictly

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111 Ibid.

112 Ibid.

113 Ibid.

114 US Department of State, '2014 Investment Climate

Statement<<http://www.state.gov/documents/organization/229002.pdf>>accessed 1 March 2016.

115 Ibid.

116 Ibid.

117 Republic of Chile, Chilean Competition Act, 2009< <http://www.apeccp.org.tw/doc/Chile/Competition/Chilean-Version1.pdf>>accessed 19 March 2016; See also an analysis of the Chilean Competition Act at <http://www.apeccp.org.tw/doc/Chile/Competition/chilean-amemd.pdf>;

118 Singapore's Competition Act, 2004, S. 10 available at <<http://statutes.agc.gov.sg/aol/home.w3p>>accessed 25 March 2016.

119 The UK Competition Act, 1998 <<http://www.legislation.gov.uk/ukpga/1998/41/contents>>accessed 29 March 2016 for instance has strengthened competition law and enhanced the enforcement powers of the Office of Fair Trading (OFT) established under the Enterprise Act. Prohibitions under the Act relate to competition-restricting agreements and abusive

applied hence the strict enforcement and protection mechanisms abolishes abusive behavior by entities in dominant market positions and ensures that markets work well and in accordance with the law in enhancing international commerce and trade.<sup>120</sup> The South African Competition Act, 1998 as amended in 2009 creates a Competition Commission to act as investigator and prosecutor of anti-trust cases, a Competition Tribunal to consider and rule on the cases, and a Competition Court to act as the appeals body.<sup>121</sup> The strict application and enforcement mechanisms provide a viable and sound legislative environment to promote international trade and foreign investments in South Africa.

The foreign investment legislations enacted by these countries provide for a comprehensive foreign investments and investors protection as well as balancing the act of protecting foreign investment and domestic investment through the international law principle of equal treatment.<sup>122</sup>

The South Africa's Promotion of Investment Act, 2015 for example provides for all investors in South Africa, foreign and local, to enjoy the same status and protection.<sup>123</sup> It seeks to provide for the legislative protection of investors and the protection and promotion of investment in order to achieve a balance of rights and obligations that apply to all investors.<sup>124</sup> The Act states that the purpose and objective of the legislation is the protection of investments in accordance with the Constitution of the Republic of South Africa "in a manner which balances the public interest and the rights and obligations of investors".<sup>125</sup> It "affirms the Republic's sovereign right to regulate investments in the public interest" and "confirms the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic"<sup>126</sup> and applies to all investments in South Africa.<sup>127</sup> It further provides that foreign investors, or their investments, must not be treated less favorably than South African investors and have a right to property in terms of Section 25 of the Constitution.<sup>128</sup> It provides for foreign investors and their investments to "be accorded a level of physical security as may be generally provided to domestic investors

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behavior by entities in dominant market positions. The strict application of the statute enhances business transactions in the UK. The Enterprise Act, 2002 established the Office of Fair Trading (OFT) as an independent statutory body with a Board, and gives it a greater role in ensuring that markets work well and also, in accordance with EU law, if deemed in the public interest, transactions in the media or those that raises national security concerns may be reviewed by the Department of Business, Innovation and Skills.

120 UK Enterprise Act, 2002, Chapter 4 <<http://www.legislation.gov.uk/ukpga/2002/40/contents>>accessed 10 May 2016.

121 <[http://www.saflii.org/za/legis/consol\\_act/ca1998149/](http://www.saflii.org/za/legis/consol_act/ca1998149/)>accessed 31 March 2016.

122 See for example, Republic of South Africa, Pomotion of Investment Act, 2015, S.8. This Act is available at <<https://www.thedti.gov.za/gazettes/39514.pdf>>accessed 31 March 2016.

123 Protection of Investment Act, 2015, s.8 <<https://www.thedti.gov.za/gazettes/39514.pdf>>accessed 31 March 2016.

124 <[http://www.thedti.gov.za/business\\_regulation/legislation.jsp](http://www.thedti.gov.za/business_regulation/legislation.jsp)>accessed 31 March 2016.

125 Ibid n 121, Section 4.

126 Ibid.

127 Ibid, section 5.

128 <<http://ewn.co.za/2016/01/20/Zuma-quietly-signs-investment-bill-signed-into-l->>awaccessed 31 March 2016.

in accordance with minimum standards of customary international law and subject to available resources and capacity".<sup>129</sup>The Act lays down fair administrative treatment and dispute resolution mechanism including international arbitration.<sup>130</sup> This sets a level playing ground for all investors in compliance with international treaties and agreements on national treatment.

The foreign investment laws within these jurisdictions introduces a number of provisions to spur foreign investments:<sup>131</sup> They establish a series of rights for foreign investors such as remission abroad the transferred capital and the net profit generated by the investment;<sup>132</sup> reduction of bureaucracy involved in foreign investors entering foreign capital into the country of investment;<sup>133</sup> establishment of foreign investment promotion agencies to coordinate and promote foreign investment initiatives within their jurisdictions;<sup>134</sup> provides the executive branch of government, strategic involvement and strengthening of foreign investments with the President taking a key role in enhancing and promoting foreign investments and dispute resolution mechanisms including international commercial arbitration.<sup>135</sup> The US and South African Constitutions for example makes provision for an active role of the president or executive together with the legislatures in enhancing international trade and investments.<sup>136</sup>

Singapore has for instance received global recognition for its efficiency and integrity, least bureaucratic and the government regards access to law as a fundamental economic value, which is cherished and harnessed to enhance the country's reputation as a premier business centre and a leading legal hub in Asia.<sup>137</sup> Singapore's commercial legal system is renowned for its fairness and impartiality, making it the natural choice of venue for dispute resolution and international commercial arbitration.<sup>138</sup>

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129 Ibid.

130 Ibid n121 section 6 and 13.

131 Republic of Chile, New Foreign Investment Act, 2015. This Act Replaces the former statute known as the Decree Law 600 enacted in 1974 that has been regulating foreign investments in Chile since then <<http://www.carey.cl/download/newsalert/New-Direct-Foreign-Investment-Law.pdf>>accessed 19 March 2016.

132 Ibid.

133 Ibid

134 Ibid

135 The Chilean Investment Act, 2015 establishes as a task, for the President of the Republic of Chile, the development of a strategy for the promotion of Foreign Investment that includes among its main objectives: foreign investment promotion; positioning Chile at an international level and as a center for foreign businesses and investments; and facilitating collaboration between foreign investors and domestic companies. It creates a committee of Ministers, chaired by the Minister of Economy, Development and Tourism to advice the President on the promotion of foreign investment in the country.

136 US Constitution, Article III; See also the Constitution of the Republic of South Africa, Ss 4, 5 and 25.

137 <http://www.guidemesingapore.com/incorporation/foreign-company/why-foreign-companies-relocate-to-singapore><accessed 25 March 2016.

138 Ibid.

The Companies legislations in Singapore, UK, South Africa and Chile principally govern the registration and operations of companies.<sup>139</sup> As a general rule, any person may register a company upon payment of the prescribed fee and lodgment of the constitution of the proposed company together with such other documents and information as the Registrar may require.<sup>140</sup> The UK's companies Act's, main strong points for instance is the speed of formalities: only thirteen days are required to set up a company in the United Kingdom, compared to the European average of 32 days, which puts the country in first place in Europe and sixth place in the world.<sup>141</sup> The company constitution must state whether the liability of the members of the company is limited or unlimited.<sup>142</sup> A company's constitution is supposed to contain the regulations of the company and the <sup>143</sup>minister may prescribe model constitutions for private companies and companies limited by guarantee which may be adopted by such companies either in whole or in part.<sup>144</sup> Singapore for example has two other key legislations on economic torts that seeks to protect the name and business of a person from exploitation and outlines the law in relation to two groups of torts thus protection of a person against harm to his trade and economic interests resulting from the deliberate acts of another and defamation and malicious falsehood, which is concerned with the protection of one's reputation.<sup>145</sup> These legislations are the Defamation Act and the Competition Act thus, particular aspects of the common law on defamation have been modified by the Defamation Act , Cap 75, and the extent to which the law on economic torts regulates market competition is understood, in the light of the regulatory framework set out in the Singapore's Competition Act 2004 . The other aspects of companies' legislations in these jurisdictions are:<sup>146</sup> Transparency code of practice that is fully in accordance with international best practices that seeks to provide control regulations, and the efficient institutions.<sup>147</sup> The South Africa's Companies Act, 2008 for instance provides for clear, transparent regulations concerning the establishment and operation of businesses in South

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139 Ibid.

140 Ibid.

141 <<https://www.gov.uk/government/publications/entrepreneurs-setting-up-in-the-uk>>accessed 27March 2016.

142 Republic of Singapore's Companies Act, section 22(1). Available at <<http://statutes.agc.gov.sg/aol/home.w3p>>accessed 25 March 2016

143 Ibid section 35(1)

144 Singapore's Companies Act, sections 36 and 37.

145 Ibid.

146 The UK Companies Act, 2006 is an Act to reform company law and restate the greater part of the enactments relating to companies and make other provision relating to companies and other forms of business organizations, making provisions about directors' disqualification, business names, auditors and actuaries and to amend Part 9 of the Enterprise Act 2002. This Act can was accessed at [http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga\\_20060046\\_en.pdf](http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf) 28 March 2016.

147 Ibid.

Africa.<sup>148</sup> The Act provides a new legislative framework for the incorporation, registration and management of companies, to establish a Companies and Intellectual Property Commission (CIPC) and the Companies.<sup>149</sup> Foreign investments are organized under the same company rules and regulations as domestic firms, with the only exception being applied to foreign companies that choose not to form a firm in South Africa operate and as such referred to as "external companies" and external companies do not normally pay tax on undistributed profits, but share capital duty is based on the shares of the parent firm.<sup>150</sup> The legal liabilities of an external company are not limited. Foreign investors may normally buy into local firms without limitation.<sup>151</sup> No local equity requirements exist and in practice, foreign firms invite domestic participation when it is suitable for the business of the firm and it is not necessary for any shares in a firm to be held by a South African resident.<sup>152</sup> "*The Simplified Limited Company*" which allows a foreigner to create a business in Chile without needing a local partner is itself an attractive measure to woo foreign investors.<sup>153</sup> The foregoing presentation therefore, gives a clear, focused and comprehensive legislative framework on the best practices in regulating international trade and foreign investments in the said jurisdictions which Kenya can emulate to promote international trade and foreign investment

### **2.3 Institutional and Enforcement Mechanisms**

This section reviews the established institutional and enforcement mechanisms frameworks in the case study jurisdictions intended to protect, promote and spur foreign investments and international commerce. It will therefore address corruption, procedural transparency, integrity and bureaucracy and demonstrate how they influence international commerce and trade, and the best practices involved in resolving the negative influence. Efficient enforcement mechanisms are pursued through the following pillars: Efficient and transparent public service; strong institutional framework to combat corruption and other restrictive trade practices; Tough sanctions on money-laundering and terrorism finance; and efficient and effective system for the

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148 South Africa Investment & Business Guide Vol. 1: Strategic and Practical Information<<https://books.google.co.ke/books?id=zv7xCQAAQBAJ&pg=PA124&lpg=PA124&dq=South+Africa%27s+Companies+Act,+2008+provides+for+clear,+transparent+regulations+concerning+the+establishment+and+operation+of+businesses.&source=bl&ots=09n93taNtO&sig=JfsGsCJxF8ofbInFPptNZcOhLlw&hl=en&sa=X&ved=0ahUKewjLILLku-rLahUK2hoKHdpQBBsQ6AEIGjAA#v=onepage&q=South%20Africa%27s%20Companies%20Act%2C%202008%20provides%20for%20clear%2C%20transparent%20regulations%20concerning%20the%20establishment%20and%20operation%20of%20businesses.&f=false>>accessed 31 March 2016.

149 <[http://www.thedti.gov.za/business\\_regulation/legislation.jsp](http://www.thedti.gov.za/business_regulation/legislation.jsp)>accessed 31 March 2016.

150 <[http://www.aabf.org/southafr\\_inv\\_guide.htm](http://www.aabf.org/southafr_inv_guide.htm)>accessed 31 March 2016.

151 Ibid.

152 Ibid.

153 Ibid.

administration of international trade. Chile<sup>154</sup> for instance has an effective legislative framework in place that establishes a more efficient and professional civil service through performance-based incentives and a reduction in political appointee positions in public service positions.<sup>155</sup>

There is a law in place to regulate political party and candidate financing to further deter corrupt government practices and has signed and ratified a number of treaties to combat corruption such as, the Organization of American States (OAS) Convention against Corruption, United Nations Convention against Corruption and is a signatory to the OECD Convention on Combating Bribery and an active member of the Open Government Partnership (OGP).<sup>156</sup> The 2007 anti-corruption legislation provides protection for public employees who denounce irregularities or violations in accountability standards.<sup>157</sup> The Chilean 2009 transparency legislation obligates government offices to publish information about expenditures, employee salaries, and other fiscal data.<sup>158</sup> It also mandates that citizens be provided up-to-date information on how to access government services and request information. The law created an autonomous Transparency Council which is charged with implementing the requirements of the law.<sup>159</sup> The administration of President Piñera (2010-2014) launched a campaign to educate citizens about their right to access public information and created *Chile Atiende*, an online and in-person platform to streamline access to common government services.<sup>160</sup>

The United States Constitution divides foreign policy powers between the President and the Congress so that both share in the making of foreign policy.<sup>161</sup> The executive and legislative branches each play important roles that are different but that often overlap. Both branches have continuing opportunities to initiate and change foreign policy, and the interaction between them continues indefinitely throughout the life of a policy.<sup>162</sup> The President and the Congress therefore play a very active role in enhancing international trade and foreign investment. Such coordinated approach is worth emulating by Kenyan Parliament, Executive and the Judiciary in order to boost Kenya's foreign trade inflow.

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154 Chile ranked 22nd out of 177 countries in Transparency International's 2013 Corruption Perceptions Index.

155 U.S Department of State, Mobile<<http://m.state.gov/md204620.htm>>accessed 20 March 2016.

156 Ibid

157 Ibid

158 Republic of Chile, Transparency and Access to Public Information Act, 2009< <http://www.freedominfo.org/2009/04/a-landmark-day-in-chile-as-new-transparency-law-comes-into-effect/>>accessed 20 March 2016.

159 Ibid.

160 US Department of State, Chile Investment Climate Statement 2015<<http://www.state.gov/e/eb/rls/othr/ics/2015/241516.htm>>accessed 20 March 2016.

161 <<http://fpc.state.gov/6172.htm>>accessed 26 March 2016.

162 Ibid.



The countries have a number of legislations establishing agencies to carry out enforcement mechanisms and which as such regulate international trade and foreign investments. The US for instance has Anti-Money Laundering and Anti-bribery legislations, Antitrust regulations, intellectual property laws, Consumer protection laws and Immigration laws with tough sanctions against money laundering and bribing of government officials within and in foreign nations.<sup>163</sup> The US Patriot Act<sup>164</sup>, 2001 has provisions which seek to help prevent and detect international money laundering and terrorism financing and prosecute the responsible persons.<sup>165</sup> The Act requires financial institutions to monitor clients' accounts and report suspicious activity regarding the transfer of funds abroad especially in countries where there has been a history of money laundering or terrorism.<sup>166</sup>

The US Foreign Corrupt Practices Act<sup>167</sup>(FCPA), 1977 and the UK Bribery Act<sup>168</sup>, 2010 both establishes company liability for corrupt acts committed by persons acting on behalf of the company and<sup>169</sup>prohibits corrupt payments to foreign officials for the purposes of obtaining or keeping business.<sup>170</sup> This laws make it unlawful for a U.S. and UK person , or companies, to directly or indirectly make a corrupt payment or provide other things of value to a foreign official for purposes of obtaining or retaining business.<sup>171</sup> This Act also contains provisions on keeping of books and records of accounts which require companies to make and keep accurate books and records of their accounts which accurately and fairly reflect the transactions of companies with an adequate internal auditing control.<sup>172</sup> FCPA and UK Bribery Act also extends its application to Multinationals and individuals involved in furtherance of such corrupt payments while in the US or UK.<sup>173</sup>The US Department of Justice has strict enforcement mechanisms with enhanced and punitive fines and penalties imposed to both companies and

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163 Ibid.

164 This is An Act of the US Senate and House of Representatives, enacted to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.

165 US Patriot Act, 2001<<https://www.gpo.gov/fdsys/pkg/BILLS-107hr3162enr/pdf/BILLS-107hr3162enr.pdf>> accessed 26 March 2016.

166 Ibid at Title III.

167 This Act was enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to *foreign* government officials to assist in obtaining or retaining business.

168 This is an Act to make provisions for offences relating to bribery <<http://www.legislation.gov.uk/ukpga/2010/23/contents>>accessed 29 March 2016.

169 UK Bribery Act, 2010<<http://www.business-anti-corruption.com/about/about-corruption/uk-bribery-act-2010.aspx>>accessed 29 March 2016.

170 FCPA, Title 15<Available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/fcpa-english.pdf>>accessed 26 March 2016.

171 Ibid n163.

172 Ibid

173 Ibid.



individuals.<sup>174</sup> South Africa's International Trade Act, 2002 establishes the International Trade Administration Commission (ITAC) whose objective is to foster economic growth and development in order to raise incomes and promote investment and employment in South Africa and within the Common Customs Union Area by establishing an efficient and effective system for the administration of international trade.<sup>175</sup> It is responsible for customs tariff investigations, trade remedies and import and export controls.<sup>176</sup> The commission has a tariff investigations unit that is mandated to promote, in a complementary manner, domestic production, job retention and creation, and international competitiveness.<sup>177</sup> This is done by investigating applications submitted for grant of export and import permits and for rebate and drawback permits and for tariff relief and support which involves a rigorous application process that is evidence-based and includes extensive research, verifications, preparation of written submissions and assessment of the merit of the applications.<sup>178</sup> This comprehensive legal and institutional framework has promoted the growth and development of international trade and investments within these jurisdictions.

## **2.4 International Commercial Arbitration**

The US, UK, Singapore and Chile ranks as one of the top destinations for investors, boasting an open market economy, well-developed institutions that support financial growth and the strong rule of law.<sup>179</sup> The hallmark stability, transparency and competitiveness and excellent business prospects position these countries as the best destinations for foreign investment globally.<sup>180</sup> Chile and Singapore for instance have a straightforward and transparent business climate. Foreign investors receive treatment similar to Chilean and Singaporean nationals, and there is no overall economic or industrial strategy that has discriminatory effects on foreign investors or foreign-owned investments.<sup>181</sup> Arbitration and mediation are provided as attractive alternatives for resolving business disputes in these countries. They have all ratified the New York Arbitration Convention, 1958 and the International Centre for Settlement of Investment Disputes (ICSID) convention and the UNCITRAL Model Law on International Commercial

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174 Ibid.

175 Republic of South Africa, International Trade Administration Act, 2002, S.2  
<[http://www.gov.za/sites/www.gov.za/files/a71-02\\_0.pdf](http://www.gov.za/sites/www.gov.za/files/a71-02_0.pdf)>accessed 31 March 2016.

176 International Trade Administration Commission of South Africa, 'Enabling Trade' <<http://www.itac.org.za/upload/ITAC-Brochure.pdf>>accessed 31 March 2016.

177 Ibid.

178 Ibid.

179 US Department of State, '2014 Investment Climate Statement' <<http://www.state.gov/documents/organization/229002.pdf>>accessed 1 March 2016.

180 Foreign Investment Promotion Agency <<http://www.ciechile.gob.cl/en/porque-chile/>>accessed 19 March 2016.

181 Ibid.

Arbitration,<sup>182</sup>United Nations Convention on Contracts for the International Sale of Goods (CISG) among many Bilateral Investment Treaties (BITs) and Bilateral Free Trade Agreements(BFTAs).<sup>183</sup>

Singapore's strict case management and Alternative Dispute Resolution methods have reduced drastically the backlog of cases which had plagued both the Supreme Court and Subordinate Courts in the 1980s.<sup>184</sup> The setting up of the Singapore International Commercial Court and the Singapore International Arbitration Centre to hear transnational commercial disputes with a view to establishing Singapore as an international and regional hub for dispute resolution in commercial matters is regarded as a major innovation.<sup>185</sup>

The UK has a strong international commercial arbitration and other dispute settlement mechanisms which regulates disputes arising out of international commercial transactions. The London Court of International Arbitration and the International Chamber of Commerce's International Court of Arbitration are the leading administrators of international arbitrations.<sup>186</sup> Over 10,000 disputes a year take place in London, many with an international dimension, reflecting its strong position as an international center for legal services and worth emulating by Kenya, to enhance its competitive advantage in international trade and foreign investments.<sup>187</sup>

## **2.5 Robust Intellectual Property Rights Regime**

A robust Intellectual Property (IP) rights regime is essential to encourage innovation, creativity and economic growth and development.<sup>188</sup>The US, UK and Singapore have a robust intellectual property (IP) rights regime, backed by a trusted legal system and strong IP infrastructure.<sup>189</sup> The governments' IP policies are attuned with the aim of encouraging innovation, creativity and growth of industry and commerce in these jurisdictions.<sup>190</sup> The legal systems provides a high level of intellectual property rights (IPR) protection and enforcement mechanisms.<sup>191</sup> These countries' membership to major intellectual property rights protection bodies and agreements

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182 Ibid

183 <http://cil.nus.edu.sg/1965/1965-convention-on-the-settlement-of-investment-disputes-between-states-and-nationals-of-other-states-2/>>accessed 26 March 2016.

184 Singapore's Judiciary International Reputation< <http://www.singaporelaw.sg/sglaw/laws-of-singapore/overview/chapter-1/>>accesses 25 March 2016.

185 Ibid.

186 <<http://www.state.gov/documents/organization/228651.pdf>>accessed 29 March 2016.

187 Ibid.

188 Ministry of Law, Singapore Government< <https://www.mlaw.gov.sg/our-work/intellectual-property-policy.html>> accessed 25 March 2016.

189 Ibid

190 Intellectual Property Policy of Singapore. Available at <<https://www.mlaw.gov.sg/our-work/intellectual-property-policy.html>>accessed 25 March 2016.

191 Ibid

such as: The World Intellectual Property Organization (WIPO); the Bern Convention for the Protection of Literary and Artistic Works; the Paris Convention for the Protection of Industrial Property; the Universal Copyright Convention; the Geneva Phonograms Convention; and the Patent Cooperation Treaty is sure commitment to the protection of IP and the recognition of the same as a key aspect in promoting international trade and foreign investments.<sup>192</sup> These countries have taken drastic initiatives to reform their IP regime to realize the full potential of IP.<sup>193</sup>

The UK for instance has undertaken several steps to review the nation's IP framework. The Hargreaves Review, 2011, covers all aspects of how intellectual property (IP) is created, used and protected in the UK and indicates that the current UK IP framework impedes innovation and economic growth and outlines ten recommendations to make the UK a more competitive IP marketplace.<sup>194</sup> The Hargreaves Review is the fifth in a series of Intellectual Property Rights reviews in the UK since 2006: the Gowers Review (2006), the Creative Economy Programme (2007), the Digital Britain Review (2008-2009) and the Copyright Strategy (2009) involves other measures to reforms the intellectual property regime in the UK.<sup>195</sup>

They have reviewed their IP legislation to meet both regional and international obligations with regard to IP rights protection and enforcement. The UK Patents Act, 2004<sup>196</sup> for example, is designed to bring UK patent law in line with the European Patent Convention, 2000 and lifts restrictions on filing patent applications from abroad, with exceptions made for military technology and applications whose contents could affect UK national security.<sup>197</sup> The changes are designed to aid genuine attempts to settle infringement disputes while providing protection particularly to small and medium enterprises against frivolous threats.<sup>198</sup> The strong cooperation, enforcement and compliance mechanism between the UK and US intellectual property bodies has resulted to efficient utilization of such rights. The UK IPO and the U.S. Patent and Trademark Office (USPTO) as such cooperates in various ways (including a 2007 Patent Prosecution Highway (PPH) scheme) to allow U.S. or UK patent applicants who have received a

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192 Ibid

193 Singapore's IP regime for instance has been cited by the World Economic Forum's Global Information Technology Report 2012 as the top Asian regime for the protection of IP.

194 Ibid.

195 Ibid.

196 Patent Act, 2004: This is an Act to amend all the laws relating to patents.

<<http://www.legislation.gov.uk/ukpga/2004/16/contents>>accessed 29 March 2016.

197 Ibid

198 Ibid.

report by either the UK IPO or the USPTO to request accelerated examination of a corresponding patent application filed in the other country.<sup>199</sup>

One of the other key features in the UK IP law is the provision by Copyright, Designs and Patents Act<sup>200</sup> on the protection of computer programs and semiconductor internal circuit designs.<sup>201</sup> Under the terms of a 1988 EU Directive, databases are also protected in each EU-member country by the national legislation that implements the Directive.<sup>202</sup>

## **2.6 Judicial Independence and the Specialized Court Systems**

Specialized Courts, Judicial Independence, observance of the judgments of Foreign Courts and transparent legal and regulatory framework provides for effective means for enforcing property and contractual rights within the case study jurisdictions.<sup>203</sup> The governments regard access to law as a fundamental economic value, which is cherished and harnessed to enhance the countries' reputation as a premier business centres and a leading legal hubs globally.<sup>204</sup> US and Chile for instance have specialized tax and labor courts, coupled with a judicial system that is generally transparent and independent with low likelihood of government intervention in court cases.<sup>205</sup> Judgments of foreign courts and binding international arbitration rulings are generally recognized and enforced by local courts.<sup>206</sup>

Singapore's commercial legal system is renowned for its fairness and impartiality, making it the natural choice of venue for dispute resolution, especially mediation and arbitration, and trial in Southeast Asia.<sup>207</sup> Singapore's judicial system is regarded as one of the most efficient in the world. The great efficiency and strength of the Singapore Judiciary has won her several accolades and a strong international reputation.<sup>208</sup> The new Singapore Judicial College provides

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199 Ibid

200 The introductory part of the statute states that: An Act to restate the law of copyright, with amendments; to make fresh provision as to the rights of performers and others in performances; to confer a design right in original designs; to amend the Registered Designs Act 1949; to make provision with respect to patent agents and trade mark agents; to confer patents and designs jurisdiction on certain county courts; to amend the law of patents; to make provision with respect to devices designed to circumvent copy-protection of works in electronic form; to make fresh provision penalising the fraudulent reception of transmissions; to make the fraudulent application or use of a trade mark an offence; to make provision for the benefit of the Hospital for Sick Children, Great Ormond Street, London; to enable financial assistance to be given to certain international bodies; and for connected purpose.

201 Ibid

202 Ibid Section 3A.

203 Ibid

204 Ibid

205 The US and Chile have specialized tax courts for example the U.S. Tax Court through which tax payers can dispute an internal revenue service determination. This promotes efficiency in solving tax disputes and enhances business operations.

206 Ibid.

207 Growing Our Expertise in IP Alternative Dispute Resolution <<https://www.mlaw.gov.sg/our-work/intellectual-property-policy.html>>accessed 25 March 2016.

208 Singapore International Arbitration Forum 2015 <<http://www.siaf.sg/index.php/registration/about-singapore>>accessed 25 March 2016.

continuing training and development for the judges, and shares Singapore courts' experiences in the use of technology, organizational excellence and active case management with their counterparts in the region.<sup>209</sup> Retired judges of the Supreme Court with a wealth of judicial expertise and experience are appointed as Senior Judges of the Supreme Court to ease the hearing load and mentor younger judges.<sup>210</sup> The country has the world's first "paperless" electronic court filing system that supports speedier delivery of justice.<sup>211</sup>

The foregoing demonstrates organized judicial systems that are seized with opportunity to transform the countries' economic development through speedy dispute settlement mechanisms and how public trust and confidence in the judicial system is a key contributor to investor confidence.

The US Constitution under Article III, establishes the United States Court of International Trade (USCIT) as a national court which hears and decides international trade cases which arise anywhere in the United States.<sup>212</sup> It is also authorized to hold hearings in foreign countries.<sup>213</sup>

The Court has limited subject matter jurisdiction and hears only cases involving particular international trade and customs law.<sup>214</sup> Under the US Customs Courts Act<sup>215</sup>, 1980, USCIT has the jurisdictional authority to decide any civil action against the United States, its officers, or its agencies arising out of any law relating to international trade.<sup>216</sup> The USCIT has full powers in law and equity, similar to those enjoyed by Article III courts of the United States.<sup>217</sup> Accordingly, the court may grant any relief appropriate to the case before it.<sup>218</sup> To promote transparency and accountability, all decisions of the Court of International Trade are preserved and open to inspection. The court normally forwards copies of each decision to the Secretary of the Treasury or his designee and to the appropriate customs officer for the district in which the

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209 Ibid.

210 Ibid.

211 Political and Economic Risk Report 2013. See also

<<http://unpan1.un.org/intradoc/groups/public/documents/UNPAN/UNPAN031797.pdf>> accessed 25 March 2016.

212 <<http://system.uslegal.com/other-federal-courts/us-court-of-international-trade/>>accessed 26 March 2016.

213 Ibid.

214 Ibid.

215 This is an Act of the US to improve the Federal judicial machinery by clarifying and revising certain provisions of title 28, United States Code, relating to the judiciary and judicial review [S. 1654] of international trade matters, and for other purposes.

216 See the US Customs Courts Act, 1980 available at

<[http://www.jstor.org/stable/pdf/20692253.pdf?\\_id=1458992923897](http://www.jstor.org/stable/pdf/20692253.pdf?_id=1458992923897)>accessed 26 March 2016.

217 These are the Courts provided under the US Judicial system. Article III provides, "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

218 Ibid.

case arose and the Secretary publishes these decisions on a weekly basis.<sup>219</sup>This, coupled with less prevalence of corruption in the judicial system in the US, serves as a boost for international trade and foreign investments.<sup>220</sup> Kenya needs to adopt such best practices in these jurisdictions to boost its stake in international trade and foreign investments.

## **2.7 Effective Participation in the Bilateral and Multilateral Investment Systems**

The US, UK, Chile, Singapore and South Africa, have all entered into strategic bilateral and multilateral investment treaties, regionally and internationally to boost their competitiveness and access more markets for their products. The U.S-Chile Free Trade Agreement for example provides stability and security to investors.<sup>221</sup> It provides six basic forms of protection to foreign investors such as: Non-discriminatory treatment, based on national treatment and most-favored-nation treatment clause, for investors from either country; Freedom from performance requirements; Free transfer of investment funds; Expropriation only when consistent with international law; minimum standard of treatment in customary international law; and the ability to hire key managerial and technical personnel without regard to nationality.<sup>222</sup>

They have entered into strategic Double Taxation Agreements with their partners for: Avoidance of double taxes, lower withholding taxes, and preferential tax regime, all of which play an important role in minimizing the tax burden for a holding company structure.<sup>223</sup>The extensive network of double tax agreements (DTA) with countries across the globe, seeks to realize the above objectives and facilitates efficient and effective transactions in international commerce and booster to international trade and investments.<sup>224</sup>

## **2.8 Strategic Foreign Investment Incentives**

These governments have developed an improved legislative framework to spur the growth of international commerce such as the simplification of administrative procedures or the increased appeal for credit. Chile has a number of foreign investment incentives such as the “*Chile Competes Plan*.” The Plan includes an exemption from the income tax normally paid by institutional investors, such as mutual funds and pension funds, on earnings from the transfer of corporate stock that is publicly traded, or bonds or other publicly offered securities representing

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219 Ibid.

220 Transparent International Corruption Perceptions Index ranks the country as one with less corruptible activities hence this acts as attraction for foreign investments.

221 Article 3.2 of the US-Chile Free Trade Agreement< <http://wits.worldbank.org/GPTAD/PDF/archive/UnitedStates-Chile.pdf>>accessed 19 March 2016.

222 Ibid.

223 Ibid

224 <http://www.guidemesingapore.com/incorporation/foreign-company/why-foreign-companies-relocate-to-singapore><accessed 25 March 2016.

debt issued by the Central Bank of Chile, the Chilean Government, or by companies incorporated in Chile.<sup>225</sup> Chilean government has a USD 40 million program, known as “Start Up Chile,” whereby selected entrepreneurs receive a USD 40,000 grant and a Chilean work visa to develop a “start up” business in Chile.<sup>226</sup> Upon admittance into the program, an entrepreneur is given six months to develop a project and then promote it through a series of pitches and seminars at local universities, corporate meetings and other community outreach programs and foreign companies established in Chile can benefit from privileged access to regional markets through different free trade agreements.<sup>227</sup> This stimulates economic growth and country’s foreign investment initiatives.<sup>228</sup> Singapore’s tax system is viewed as “simple and investor friendly”.<sup>229</sup> The highest corporate tax rate on taxable income is 17%.<sup>230</sup>

The tax on capital gains and dividend income is 0%. No withholding tax is levied on post-tax dividends paid from Singapore. Equally important, all foreign-sourced income is tax exempt as long as the income has been subjected to tax in a country with a headline tax rate of at least 15%.<sup>231</sup> Singapore’s regulatory framework offers a level-playing field for foreign investors, with no foreign ownership restrictions and no foreign exchange controls.<sup>232</sup> Low taxation makes the environment investor-friendly and London is one of the world's leading finance capitals.<sup>233</sup> South Africa is ranked among the top international trade and foreign investment destination in Africa.<sup>234</sup> Foreign firms receive national treatment for various investment incentives such as export incentive programs, tax allowances and other trade regulations in view of promoting foreign investment and strengthening the country’s economy.<sup>235</sup>

## **2.9 ICT as an Effective Enabler to Enhanced International Trade and Foreign Investment**

Singapore, US and UK boast of world-class ICT infrastructure which serves as enabler to affordable business transactions. Singapore has been ranked by the World Economic Forum, in its Global Information Technology Report 2012, as one of the top economies in leveraging

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225 Doing Business in Chile <[http://www.kallman.com/shows/iftenergy\\_2012/pdfs/Doing%20Business%20In%20Chile%20-%202011%20Country%20Commercial%20Guide.pdf](http://www.kallman.com/shows/iftenergy_2012/pdfs/Doing%20Business%20In%20Chile%20-%202011%20Country%20Commercial%20Guide.pdf)> accessed 20 March 2016.

226 <<http://www.state.gov/documents/organization/229002.pdf>> accessed 20 March 2016.

227 Ibid

228 Ibid

229 Ibid

230 Ibid

231 Ibid

232 Ibid

233 Ibid n213.

234 World Bank Group, Doing Business 2016: Measuring Regulatory Quality and Efficiency (A world Bank Group Flagship Report, 13th edn 2016 <<http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB16-Full-Report.pdf>> accessed 20 March 2016.

235 Ibid.



information and communications technologies to boost its country competitiveness.<sup>236</sup> The recognition of ICT as a key contributor and enhancer to a sufficient, effective and efficient legislative framework governing international trade and foreign investments, has seen these countries FDI inflow and international trade portfolio grow by impressive margins.

## **2.10 Conclusion**

From the foregoing, it can be said that for any state to promote international trade and foreign investment, there is need for a sound legislative framework governing international trade and foreign investment. A strong legal system to enhance trade and investment is necessary, spanning from the constitution of the host state, other laws regulating trade and investment such as the Companies legislations, Intellectual Property laws, Investment promotion laws, international trade laws, and Anti-corruption laws and Standards regulations. International investment treaties, Conventions and Agreements form part of key international legal instruments in regulating foreign trade and foreign investments. International trade and foreign investment involves cross-border transactions, and as such domestic laws on international trade and international investments are informed by international trade and investment laws. An excellent relation between domestic laws and international investment laws is bound to result into a conducive business environment capable of promoting economic development in the participating states. Effective enforcement of the legislative framework governing international trade and foreign investments is very crucial in the realization of the objectives of international trade and investments.

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<sup>236</sup> World Economic Forum, 'The Global Information Technology Report 2012: Living in a Hyperconnected World'(Insight Report 2012)< [http://www3.weforum.org/docs/Global\\_IT\\_Report\\_2012.pdf](http://www3.weforum.org/docs/Global_IT_Report_2012.pdf)> accessed 25 March 2016.



**CHAPTER THREE**  
**AN APPRAISAL OF THE LEGISLATIVE FRAMEWORK GOVERNING**  
**INTERNATIONAL TRADE AND FOREIGN INVESTMENTS IN KENYA**

**3.0 Introduction**

This chapter gives an appraisal of the legislative framework governing international trade and foreign investments in Kenya. In order to appreciate a comparative analysis discussed in chapter two, and offer the best way forward for Kenya, this chapter is analyzed in thematic areas in order to demonstrate the insufficiency, inefficiency and ineffectiveness of Kenya's legislative framework governing international trade and foreign investments. This will then provide a basis for Kenya to review her international trade and foreign investments legislative regime in order to infuse international best practices aimed at enhancing and promoting international trade and foreign investments in Kenya.

**3.1 Policy Frameworks**

As discussed in chapter two, a quality legislative and regulatory framework is informed by a sound policy framework and it is best practice for policy to precede law.<sup>237</sup> Kenya does not have a sound policy framework on international trade and foreign investments<sup>238</sup>, instead her policy framework is founded on a number of sessional papers and national government plans such as Sessional Paper No. 1 of 1986 on economic management for renewed growth and Sessional Paper No. 1 of 1994 on recovery and sustainable development which policies emphasize on the increased role of the private sector in economic growth.<sup>239</sup> It is through these sessional papers that the country has undertaken key economic reforms with a view to promote both domestic and foreign investments which include abolishing export and import licensing, rationalizing and reducing import tariffs, liberalization of foreign exchange and price controls and partial liberalization of the capital markets among other measures.<sup>240</sup> Kenya's Trade and Investment policies are all at draft stages.<sup>241</sup> The National Anti-Corruption Policy and the National IP Policy are not in place hence the laws on corruption and IP are not founded on sound policy framework.<sup>242</sup> The ideal legislative framework highlighted elsewhere in this study elaborate

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237 Ibid n 100.

238 Respondent 5, 6, 9 and 10(18th July, 1st, 15th and 16th August respectively, Nairobi). They stated that Kenya does not have an international trade and Investments Policy but these policies are at draft stages.

239 World Trade Organization, 'Trade policy Review: Investment Policy,' <[https://www.wto.org/english/tratop\\_e/tpr\\_e/tp124\\_e.htm](https://www.wto.org/english/tratop_e/tpr_e/tp124_e.htm)>accessed 27 May 2016.

240 Ibid.

241 Ibid n 236.

242 Respondent 1 and 2 (2nd and 11 May 2016 in Nairobi).

Trade and Investment policy frameworks that should inform the laws governing international trade and foreign investments.<sup>243</sup> These policies have been the key pillars for the development of international trade and investment legal regime necessary to facilitate and promote international trade and foreign investments within these jurisdictions.<sup>244</sup>

### **3.2 Legislative Framework**

Kenya has enacted a number of legislations that seek to facilitate and promote international trade and foreign investments. They provide for the protection and creation of a viable environment for the development of international trade and foreign. Kenya's legislative framework governing international trade and foreign investments is anchored in: The Constitution of Kenya, 2010, Investments Promotion Act, Foreign Investments Protection Act, Companies Act, Competition Act, Business Registration Act, Public-Private Partnerships Act, Capital Markets Act, Investments Disputes Conventions Act, Arbitration Act, Nairobi Centre for International Arbitration Act, Anti-counterfeit Act, Economic Processing Zones Act, Special Economic Zones Act, Proceeds of Crime and Anti-Money Laundering Act and the Industrial Properties Act among others.

The Constitution provides that the general rules of international law, and treaties ratified by Kenya, form part of the laws of Kenya.<sup>245</sup> This brings international trade and investments treaties ratified by Kenya into focus and as such exemplify Kenya's position in international commerce. Article 159 of the Constitution enhances the practice of arbitration in Kenya as one of the principles guiding Kenyan courts in exercise of judicial authority.<sup>246</sup> Treaty Making and Ratification Act, 2012 gives effect to Articles 2(5) and 2(6) by laying down the procedure on how Kenya should make and ratify treaties.<sup>247</sup> These provisions are relevant in international trade and foreign investments regime since Kenya is part of the globalized market and such is party to various international trade and investment treaties and conventions such as the: General Agreement on Tariffs and Trade(GATT), Agreement Establishing the World Trade Organization(WTO), Convention on the Settlement of Investment Disputes between States and Nationals of Other States(ICSID Convention), UNCITRAL Model Law on International

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243 Ibid n101.

244 Ibid n 103.

245 Republic of Kenya, Constitution of Kenya, Art. 2(5) and (6).

246 Article 159 (2)(c).

247 Republic of Kenya, Treaty Making and Ratification Act, 2012, see preamble.

Commercial Arbitration and the New York Convention, 1958.<sup>248</sup> These conventions seek to establish a level playing ground in international commerce and investments by establishing legal, institutional and enforcement framework to advance global business. The Constitution as a grundnorm, by making such provisions, lays down a strong legal foundation upon which policy, legislative and institutional framework on Foreign Direct Investments is anchored. *“Kenya however has not domesticated WTO Agreements in specific national legislations to effectively govern her participation in global business. The laws on international trade are also not harmonized hence the myriads of laws on trade and investments create conflicts and overlapping in roles by institutions created therein.”*<sup>249</sup>

However, unlike the South African Constitution, which provides for the national treatment and protection of foreign investments under section 25, more importantly with regard to land and property ownership by foreign investors, the Constitution of Kenya 2010 approach to corporate citizenship in 65(3) adopts a conceptual requirement of “absolute domestic control.”<sup>250</sup> This is plain to the extent that the constitution provides that a body corporate will be regarded as a citizen only if that “... body corporate is wholly owned by one or more citizens.”<sup>251</sup> When construed in the negative sense, this provision means that where a company is not wholly owned by Kenyan citizens, it cannot own freehold land, and any leasehold interest in land would be limited to a maximum of 99 years, and subject to any conditions imposed by enabling legislation.<sup>252</sup>

Article 1, Section 8, Clause 3, of the US Constitution empowers Congress "to regulate Commerce with foreign nations, and among several States...."<sup>253</sup> This seeks to ensure that interstate commerce is free from local restraints imposed by various states.<sup>254</sup> When Congress deems an aspect of interstate commerce to be in need of supervision, it will enact legislation that must have some real and rational relation to the subject of regulation.<sup>255</sup> Congress may constitutionally provide for the point at which subjects of interstate commerce become subjects

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248 The Kenya Law’s website: [www.kenyalaw.org](http://www.kenyalaw.org) provides a database of treaties and conventions and shows that these treaties are ratified by Kenya < <http://kenyalaw.org/treaties/search> > accessed 22 May 2016.

249 Respondent 6 and 9 (1st and 15th August, 2016 in Nairobi).

250 Robert Kiugi and Mwenda Makathimo, ‘Non-citizens and Land Tenure in Kenya: Land Acquisition for Investment in a New Constitutional Era,’ Land Development and Governance Institute (2012).

251 Ibid.

252 Ibid; See also Section 107 of the Land Registration Act, No. 3 of 2012.

253 US Constitution, Article 1, S.8 (3).

254 <http://legal-dictionary.thefreedictionary.com/Commerce+Clause>

255 Ibid.

of state law and, therefore, state regulation.<sup>256</sup> Although the Kenya's Constitution provides for categories of taxation and their imposition under Article 209, it does not explicitly provide the active role of parliament in monitoring and evaluation to ensure that county governments do not enact legislation that hinder international trade and foreign investments.<sup>257</sup> Kenya's main objective of adopting a devolved system of Government for instance, was to bring services closer to the people and enhance development through development friendly legislation and policies. However, county governments have been enacting finance legislations that introduce multiplicity of taxes that not only hinder inter-county trade but also hinders the movement of goods from other EAC trading partners.<sup>258</sup> The lack of EAC Trade Policy also acts as a hindrance to efficient administration of trade within the EAC region.<sup>259</sup>

Kenya's Investment Promotion Act and the Foreign Investments Protection Act provide a legal framework for the promotion, facilitation and protection of local and foreign investments by streamlining the administrative and legal procedures with a view of creating a more attractive investment climate in Kenya.<sup>260</sup> The Investment Promotion Act's main objective is to boost and facilitate investment by assisting investors in obtaining the requisite documentation<sup>261</sup> for purposes of investment as well as providing other assistance and incentives.<sup>262</sup> This Act replaces the Investment Promotion Centre with the Kenya Investment Authority and also establishes the National Investments Council as key agencies in facilitating and coordinating local and foreign investments in the country.<sup>263</sup> Foreign Investments Protection Act's purpose is to protect certain approved foreign investments and creates investment incentives as well to attract foreign direct investments. It guarantees a foreign investor with regard to the capital repatriation and remittance of interests and dividends and as such foreign investors are free to convert and repatriate profits including un-capitalized retained profits.<sup>264</sup> Although these legislations create a viable climate

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256 Ibid.

257 Standard Digital Newspaper, 'Stop double taxation, Kenyan counties told' <<http://www.standardmedia.co.ke/business/article/2000186152/stop-double-taxation-kenyan-counties-told>>accessed 28 May 2016.

258 Mbugua, Frida W, 'Devolution And Its Impact on Regional Trade in East Africa: A Case Study of Kenya', <<http://erepository.uonbi.ac.ke/handle/11295/95299>>accessed 10 August 2016.

259 Respondent 5(18th July 2016).

260 Ibid.

261 Act No. 6 of 2004, Part II. This part lays down the procedures for the issuance of investment certificates to both local and foreign investors.

262 Republic of Kenya, Investment Promotion Act, 2004, long title.

263 Ibid, Ss. 14 and 26.

264 Republic of Kenya, Foreign Investments Protection Act, S. 7. This section among others states: "Notwithstanding the provisions of any other law for the time being in force, the holder of a certificate may, in respect of the approved enterprise to which such certificate relates, transfer out of Kenya in the approved foreign currency and at the prevailing rate of exchange—

for foreign investments, there is missing link between Kenya and the ideal legislative framework highlighted in chapter two with regard to fair administrative treatment, physical security of property of foreign investors and a clear dispute resolution mechanism.<sup>265</sup> The Companies Act, 2015 and the Business Registration Act and the Insolvency Act are meant to fast track the registration and operationalization of business in Kenya. These laws establish various institutions to facilitate the registration of both local and foreign companies and on matters of insolvency. The institutions established are discussed here under the institutional framework thematic area. The Companies Act however under sections 975 and 979 by making it compulsory for a foreign company to have at least one local representative poses a negative impact on foreign business operations in Kenya.<sup>266</sup> The relevant sections on registration of foreign companies states: “*The Registrar shall approve the application for registration and register the company by entering its name and other particulars in the Foreign Companies Register if the application- (a) contains the information prescribed by the regulations for the purposes of this section (b) is accompanied by the prescribed fee, if any, and the required documents; and (c) complies with the requirements of this Part with respect to the company's name and the appointment of a local representative. The Registrar may not register a foreign company under this Part unless the company has at least one local representative in relation to whom the foreign company has complied with the prescribed requirements of the foreign companies regulations relating to local representatives of foreign companies.*”<sup>267</sup> The Proceeds of Crime and Money Laundering Act lays down a legal framework to combat economic crimes and terrorism financing with a view to creating a peaceful country to attract foreign investments.<sup>268</sup> The Export Processing Zones and Special Economic Zones legislations are meant to attract foreign direct investment (FDI) and engender technological transfer, knowledge spill-over and demonstration effects that would act as catalysts for domestic entrepreneurs to engage in production of non-traditional products.<sup>269</sup> The Special Economic Zones Act however seeks to replace the Export Processing Act by creating

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the profits, including retained profits which have not been capitalized, after taxation, arising from or out of his investment in foreign assets: Provided that any increase in the capital value of the investment arising out of the sale of the whole or any part of the capital assets of the enterprise or revaluation of capital assets shall not be deemed to be profit arising from or out of the investment for the purposes of this Act.”; See also Ibid n 7. An un-capitalized retained profit refers to proceeds of an investment after payment of the relevant taxes and the principal and interest associated with any loan.

265 See for example the South Africa’s Protection of Investments Act, ss. 4, 5, 6, 8 and 13. This Act lays down a clear legislative framework for the promotion and protection of foreign investments.

266 <<http://www.businessdailyafrica.com/Kenya-shelves-ownership-clause-for-foreign-firms/-/539546/2946364/-/f6a0g3z/-/index.html>>accessed 2 July 2016.

267 Companies Act, No. 17 of 2015, ss. 975 and 979; Respondent

268 See ss. 21 and 52 of the Proceeds of Crime and Money Laundering Act.

269 <<http://siteresources.worldbank.org/intranettrade/resources/madaniepz.pdf>>accessed 2 July 2016.

more investment incentives with a view to attracting FDI in the Country.<sup>270</sup> The laws on international trade are as such sufficient the problem is with the overlapping of mandates among institutions created by such laws to enforce and implement them and hence the laws are not efficient.<sup>271</sup> The delay in adjudication of matters on counterfeits and the lack of knowledge in counterfeiting in Kenya is a hindrance to efficient implementation of the anti-counterfeit laws that then negatively impacts on international trade in Kenya.<sup>272</sup>

### **3.3 Institutional and Enforcement Mechanism**

Kenya's legislative framework governing international trade and foreign investments establishes institutions and enforcement mechanisms intended to bring about efficient implementation of the international trade and foreign investments regime. The Constitution of Kenya, 2010 under the Fourth Schedule allocates international trade function to the national government, a function implemented by the then Ministry of foreign affairs and international trade.<sup>273</sup> The ministry's strategy on economic cooperation, international trade and investment is premised on the fact that economic cooperation and international trade are central to Kenya's efforts to attain increased international trade and foreign investments.<sup>274</sup> The ministry seeks to achieve its strategic goals based on three key strategic thrust namely "promotion of export of Kenyan goods and services in traditional and emerging potential markets by developing a national export strategy, regional trade strategy and international trade policy; establishment of a Trade Remedy Regime to assist Kenyan domestic producers and exporters to confront international unfair trade practices and barriers in an effort to ensure that Kenyan producers and exporters remain competitive globally; setting out measures that will not only sustain the growth in quantity and quality of FDI inflows, but also promote investments by Kenyans in other countries."<sup>275</sup>

The Kenya Investment Authority and the National Investments Council are established under the Investment Promotion Act to: promote and facilitate investment in Kenya;<sup>276</sup> advise the government and government agencies on ways to increase investment and economic growth in

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270 <<http://www.theeastafican.co.ke/business/Kenya-s-special-economic-zones-to-attract-more-FDIs/-/2560/2897052/-/xacamgz/-/index.html> >accessed 2 July 2016.

271 Respondent 3 and 4(28th July 2016, Nairobi). Respondent 3 states that the competition laws are sufficient but it is inefficient due to lack of prosecutorial powers and inefficiency in regulation of mergers and acquisitions. Amendments to the competition Act as such has been proposed by the Competition Authority on this.

272 Respondent 4(28th July 2016, Nairobi).

273 Constitution of Kenya, 2010, Fourth Schedule, Para 1; See also the Ministry of Foreign Affairs and International Trade Strategic Plan, 2013/2014-2017/2018 available at <http://www.mfa.go.ke/>, accessed 30 June 2016. The International Trade function has since been moved to the Ministry of Industrialization, Trade and Cooperatives.

274 Ibid

275 Ministry of Foreign Affairs, Strategic Plan, (2013/2014-2017/2018 ) P. 43-44.

276 Investment Promotion Act, s. 15

Kenya;<sup>277</sup> and promote co-operation between the public and private sectors in the formulation and implementation of government policies relating to the economy and investment.<sup>278</sup>

The Business Registration Service established under the Business Registration Service Act is responsible for the implementation of policies, laws and other matters relating to the registration of companies, partnerships and firms, individuals and corporations carrying on business in Kenya.<sup>279</sup> It is intended to facilitate faster and efficient company registration in Kenya and enhance business operations in Kenya.

The Export Processing Zones Authority established under the Export Processing Zones Act is tasked among other things, with the development of all aspects of the export processing zones with particular emphasis on provision of advice on the removal of impediments to, and creation of incentives for, export-oriented production in areas designated as export processing zones; and the regulation and administration of approved activities within the export processing zones, through implementation of an administrative system in which the export processing zone enterprises are self-regulatory.<sup>280</sup>

The Kenya's Special Economic Zones Act establishes the Special Economic Zones Authority which administers a "one-stop" centre through which the special economic zone enterprises can channel all their applications for permit, approvals, licences and facilities not handled directly by Authority and coordinating with such other Government or private entities through agreements with the entities.<sup>281</sup> The Kenya Industrial Property Institute established under the Industrial Property Act is mandated with promoting and enforcing intellectual property rights in Kenya.<sup>282</sup> It is main agency in implementation and administration of IP in Kenya.<sup>283</sup> KIPI also engages other national, regional and international IP organizations in realizing best practices in intellectual property rights protection and enforcement.<sup>284</sup> There is lack of well-coordinated enforcement mechanism in IP in Kenya because of lack of a harmonized legislative framework.<sup>285</sup> Despite Kenya's elaborate institutional framework, there is lack of proper

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277 Ibid s. 27.

278 Ibid.

279 Business Registration Act, No. 15 of 2015, s. 1

280 Export Processing Zones Act, s. 9.

281 Special Economic Zones Act, s.11.

282 Industrial Property Act, s. 3.

283 Intellectual Property from a Kenyan Perspective: Summary of the Industrial Property Act, 2001,

<https://ipkenya.wordpress.com/2011/03/09/summary-of-the-industrial-property-act-2001/>, accessed 2 July 2016.

284 Ibid.

285 International Chamber of Commerce, 'Promoting and Protecting Intellectual Property in Kenya,' available at [https://ipkenya.files.wordpress.com/2013/03/valueofip\\_kenya\\_031113\\_lr.pdf](https://ipkenya.files.wordpress.com/2013/03/valueofip_kenya_031113_lr.pdf), accessed 2 July 2016.

coordination among institutions created under the varied IP legislative framework in the enforcement of IPRs in Kenya.<sup>286</sup>

Copyright is regulated by the Kenya Copyright Board whereas other IP rights are regulated by the Kenya Industrial Property Institute.<sup>287</sup> Kenya has consistently ranked poorly in international indices of IPRs enforcement.<sup>288</sup> The US Trade Representative has identified Kenya's 'lax enforcement' of IPR as a serious challenge for US businesses.<sup>289</sup> This therefore demonstrates that proper enforcement of the IP laws is key in promoting Kenya's economic growth. There is need for as well, a properly coordinated intra-agency enforcement mechanism whose lack, results into a poorly regulated IP system in Kenya posing a threat to the economic growth and scare away foreign investors.<sup>290</sup>

The Kenya Anti-Counterfeit Agency established under the Anti-Counterfeit Act<sup>291</sup> is tasked with:<sup>292</sup> enlightening and informing the public on matters relating to counterfeiting; combating counterfeiting, trade and other dealings in counterfeit goods in Kenya in accordance with the Act; devising and promoting training programmes on combating counterfeiting; and coordinating with national, regional or international organizations involved in combating counterfeiting.<sup>293</sup> The Act sets out enforcement mechanisms in anti-counterfeiting by providing for appointment of inspectors with powers among others; to inspect, verify, seize, detain, and, where applicable, remove for detention, all the goods in question found at, on or in such place, premises or vehicle.<sup>294</sup> The Agency's enforcement mechanisms are well set out under the Act but there is lack of proper inter-agency coordinating approach in fighting counterfeits and realizing the full enforcement measures hence this has a negative impact on international trade and foreign investment.<sup>295</sup> Also the Agency powers given to the inspectors are limited as they have to seek court's directions in counterfeiting disputes.<sup>296</sup> They do not have the ability to prosecute cases

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286 Respondent No. 1

287 Copyright Act, long title; Industrial Property Rights, long title

288 Braxides Shaluma Ongola, 'Efficacy of Anti-Counterfeit Laws In Kenya' (LL.M Thesis, University of Nairobi 2011)p.24.

289 Ibid.

290 International Chamber of Commerce, 'Promoting and Protecting Intellectual Property in Kenya,' available at [https://ipkenya.files.wordpress.com/2013/03/valueofip\\_kenya\\_031113\\_lr.pdf](https://ipkenya.files.wordpress.com/2013/03/valueofip_kenya_031113_lr.pdf), accessed 2 July 2016.

291 Anti-Counterfeit Act, s. 3.

292 Anti-Counterfeit Act, s. 4

293 Anti-Counterfeit Act, s. 4

294 Anti-Counterfeit Act, s. 22

295 <<http://www.standardmedia.co.ke/business/article/2000159299/kenya-loses-sh69-billion-to-counterfeit-goods-annually/?pageNo=1>>Accessed 2 July 2016; see also 'step up efforts in the fight against counterfeits, says KAM available at <<http://www.kam.co.ke/index.php/about-us/organisation-structure/kam-secretariat/management-team/12-profile/288-step-up-efforts-in-the-fight-against-counterfeits-says-kam>>accessed 2 July 2016.

296 Ibid n 269



that they have initiated.<sup>297</sup> Under section 30 (1) of the Anti-Counterfeit Act, the Director of Public Prosecutions appoints public prosecutors for the purposes of counterfeiting cases.<sup>298</sup> These prosecutors usually don't have hands-on experience and key facts to the cases hence this leads to poor prosecutions, loss of cases and poor enforcement system. *“The Agency has lost cases because of poor prosecution since the prosecutors at the DPP have to handle cases which they don't have clear ground facts, there is also lack of knowledge on matters counterfeiting, the overlapping of mandates between the Agency and other agencies like KEBS, KRA, KEPHIS, KIPI and the Pharmacy and Poisons Board as well as the lack of enough Anti-Counterfeit Inspectors to man entry points at the borders and the lack of adequate funding inspectors hampers the effective delivery of services by the Agency which then leads to entry of counterfeits to the Kenyan markets that then inhibits the growth of international trade in Kenya.”*<sup>299</sup>

Kenya also has an institutional framework on corruption, proceeds of crime and money laundering, political financing, competition and the public-private partnerships. The Ethics and Anti-Corruption Commission is charged with the responsibility of fighting corruption and enhancing ethical standards in Kenya.<sup>300</sup> The Commission however faces a number of challenges which hinders its enforcement measures against corruption and these include: the absence of a national anti-corruption policy to guide the fight against corruption and provide for harmonization of inter-agency cooperation in the fight against corruption.<sup>301</sup> This has affected investigation and asset recovery by EACC particularly in areas which require an integrated approach among all institutions which may be involved in the matter;<sup>302</sup> lack of political goodwill and government commitment;<sup>303</sup> lack of prosecutorial powers to be able to manage any given case from beginning to its logical conclusion.<sup>304</sup> Kenya suffers from poor inter-agency coordination in the fight against corruption.<sup>305</sup> The lack of a comprehensive national policy on corruption negatively impacts on the formulation of an efficient legal system on corruption in Kenya and investors fear investing in a country where corruption is rampant.<sup>306</sup> These challenges creates room for corruption to thrive in Kenya which then negatively impact on international

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297 Ibid

298 Ibid

299 Respondent 4(28th July 2016, Nairobi).

300 Ethics and Anti-Corruption Commission Act, s. 11; See also Article 252 of the Constitution of Kenya, 2010.

301 Ethics and Anti-Corruption Commission, 'Strategic Plan', (2013-2018) P.28; Respondent 2(1st May 2016, Nairobi)

302 Respondent 2(1st May 2016, Nairobi)

303 Adams Oloo, 'Challenges of Curbing Corruption in Kenya: A case of the Ethics and Anti-Corruption Commission,' available at <<http://politicalscience.uonbi.ac.ke/node/962>> accessed 2 July 2016.

304 Respondent 2(1st May 2016, Nairobi).

305 Respondent No. 2(5 May 2016, Nairobi).

306 Ibid.

trade and foreign investments since investors shy away from states where corruption is on the rise.

The Competition Authority<sup>307</sup> is responsible for realizing the objects<sup>308</sup> of the Competition Act thus, among its other functions, bringing national competition law, policy and practice in line with best international practices, promoting the competitiveness of national undertakings in world markets<sup>309</sup> and promotion and enforcement of compliance with the Act.<sup>310</sup> The Competition Tribunal is also established under the same Act with the mandate to hear appeals emanating from the decisions of the Competition Authority on matters of competition in Kenya.<sup>311</sup> The Authority faces challenges similar to other enforcement agencies discussed here, particularly the fact that the Authority has some overlapping roles with some of the sector regulators.<sup>312</sup> Although the Act provides that the Authority has primary jurisdiction in all competition and consumer welfare matters, lack of cooperation from some sector regulators has led to increased transactions costs for the regulator and also increasing the risk of contradictory decisions emanating from other government agencies.<sup>313</sup> The Competition Tribunal had not been constituted until recently when the chairman and members were appointed.<sup>314</sup> Parties affected by the decision of the Authority had to go straight to the High Court on appeal. The Authority also lacks prosecutorial powers to effectively prosecute cases.

The Financial Reporting Centre and the Asset Recovery Agency are institutions established under the Proceeds of Crime and Anti-Money Laundering Act with the principal objective of the assisting in the identification of the proceeds of crime and the combating of money laundering and the financing of terrorism and recovery of assets acquired through such criminal activities.<sup>315</sup> Finally, the Kenya's Public-Private Partnership Committee, Public-Private Partnership Units and the Public-Private Partnership Nodes are mandated to guide and provide for the participation of the private sector in the financing, construction, development, operation, or maintenance of infrastructure or development projects of the Government through concession and the regulation, monitoring and supervision of the implementation of project agreements on

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307 This Authority is established under section 7 of the Competition Act, Cap. 504 Laws of Kenya. Its functions are set out under section 9 of the Act

308 Competition Act, section 3 (g) and (h)

309 Competition Act, s. 3

310 Competition Act, s. 9

311 Competition Act, s. 71

312 Competition Authority of Kenya, 'Annual Report'( 2012/2013) P. 32

313 Ibid.

314 Respondent 3(28th June 2016, Nairobi).

315 Proceeds of Crime and Anti-Money Laundering Act, ss. 21 and 52.

infrastructure or development projects.<sup>316</sup>This creates more investment opportunities through which foreign investors participate in development of government projects. It is therefore evident that Kenya has sufficient institutional and enforcement mechanism but lags behind in terms of efficiency due to a number of reasons highlighted in this study.

### **3.4 International Commercial Arbitration Regime**

Kenya has in place a number of legislations governing both domestic and international commercial arbitration.<sup>317</sup>The Arbitration Act is the law that generally governs arbitration matters in Kenya. The Act provides for recognition of international arbitral awards. Domestic courts' recognition of such awards is a positive stride in attracting international commercial investments since foreign investors prefer jurisdictions where in the event of a commercial dispute, there is a viable commercial arbitral process. Section 36(2) of the Act provides that an international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.<sup>318</sup> In 2013, Kenyan Parliament enacted the Nairobi Centre for International Arbitration Act which seeks to nurture international commercial arbitration in Kenya.<sup>319</sup> The Act establishes the Nairobi Centre for International Arbitration<sup>320</sup> whose functions include to inter alia:<sup>321</sup> promote, facilitate and encourage the conduct of international commercial arbitration in accordance with the Act; administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; and ensure that arbitration is reserved as the dispute resolution process of choice.<sup>322</sup> The Act also establishes a Court to be known as the Arbitral Court.<sup>323</sup> The Court is to have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with the Act or any other written law and its decisions are to be final.<sup>324</sup> These provisions are useful in guaranteeing

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316 Public Private Partnerships Act, No. 15 of 2013, ss. 4, 11 and 16.

317 Kenya has enacted a number of legislations to govern both local and international commercial arbitration which includes; Arbitration Act, Nairobi Centre for international Arbitration Act and the Investments Conventions Act. Kenya's 2010 Constitution under Article 159 read together with Articles 2(6) brings into application in Kenya, International Conventions and treaties on International Commercial Arbitration. Kenya has ratified the New York Convention, 1958 and the international Convention on the Settlement of Investment Disputes(ICSID Convention).

318 Kaiuki Muigua, 'Nurturing International Commercial Arbitration in Kenya,' available at <<http://www.kmco.co.ke/attachments/article/128/Nurturing%20International%20Commercial%20Arbitration%20in%20Kenya.pdf>>accessed 3 July 2016. This demonstration Kenya's commitment to adopting international best practices in international investments arbitration in view of promoting international trade and foreign investments.

319 Nairobi Centre for International Commercial Arbitration Act, No. 26 of 2013, Laws of Kenya.

320 Ibid n300. See also Nairobi Centre for International Commercial Arbitration Act, s.4

321 Nairobi Centre for International Commercial Arbitration Act, s.5

322 Ibid.

323 Nairobi Centre for International Commercial Arbitration Act, s. 21.

324 Ibid.

confidentiality and non-interference by ordinary national courts.<sup>325</sup> In addition, Kenya has acceded to the New York Convention, 1958 on the Recognition and Enforcement of Arbitral Awards and to International Convention on the Settlement of Investment Disputes(ICSID) both of which deal with international commercial arbitration.<sup>326</sup> This is a demonstration of Kenya's efforts in adopting and engendering international best practices in settlement of international investment disputes and position herself as a top international investments destination. The Kenya's 2010 Constitution also lays down a constitutional underpinning and application of arbitration and other ADR mechanisms in Kenya.

International commercial arbitration in Kenya however faces a number of challenges which includes: Inadequate legal regimes and infrastructures for the efficient and effective organization and conduct of international commercial arbitration in Kenya;<sup>327</sup> Interference by National Courts.<sup>328</sup> Section 10 of the Arbitration Act provides: "Except as provided in the Act, no court shall intervene in matters governed by this Act."<sup>329</sup>The section as such limits the scope of the role of the court in arbitration only to situations that are contemplated under the Act.<sup>330</sup> Court interference intimidates investors since they are never sure what reasoning the court might adopt should it be called upon to deliberate on such disputes;<sup>331</sup> further, national Courts' interference is believed to be based on a national legal frameworks that is not conducive for the constitution of arbitral tribunals and to the conduct of arbitration, permitting the 'local court' to interfere unduly in arbitral proceedings.<sup>332</sup> Sometimes matters will be appealed all the way to the highest court of law on the land in search of setting aside of awards.<sup>333</sup> Parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending.<sup>334</sup> This delays finalization of the matter as well as watering down the perceived

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325 Ibid n 300.

326 Ibid n300. Kenya domesticated the ICSID Convention through the Investment Disputes Convention Act, Cap. 522 of the Laws of Kenya, whereas the New York Convention and the UNCITRAL Model Law on international Commercial Arbitration are adopted through the Arbitration Act, 1995.

327 Kariuki Muigua, 'Promoting International Commercial Arbitration in Africa', page 14, available at <http://www.kmco.co.ke/attachments/article/119/PROMOTING%20INTERNATIONAL%20COMMERCIAL%20ARBITRATION%20IN%20AFRICA.pdf>>accessed 3 July 2016.

328 Ibid n300

329 Arbitration Act, s. 10.

330 Ibid.

331 Ibid n300

332 Ibid. It should however be noted that all Arbitration laws have these provisions and it is therefore not only strange to Kenya. See for instance Singapore's Arbitration Act, 2001 available at <http://www.jus.uio.no/lm/singapore.arbitration.act.2001/>>accessed 25 October 2016.

333 Ibid.

334 Ibid

advantages of arbitration and ADR in general;<sup>335</sup> the corruption perception in Kenya paints a bleak image to the international community regarding the governance system in place in Kenya.<sup>336</sup> Perception is everything, foreign investors perceive Kenya as a corrupt nation hence this hinders FDI inflow as no investor would want to invest in a corrupt country. The laws on Arbitration are sufficient but they are not efficient in that much as the law provides that arbitration should be expeditious, practically it has not.<sup>337</sup> Terrorism also is a challenge since international commercial arbitrators would not prefer Kenya as an arbitral seat.<sup>338</sup> Kenya also lacks institutional arbitration framework like ICSID.<sup>339</sup> This works against the development of international commercial arbitration since, access to justice is likely to be frustrated in a corruptible environment and hence scaring away international investors. This then negatively impacts on the growth of international trade and foreign investments in Kenya.

### **3.5 Intellectual Property Rights**

Kenya has an elaborate Intellectual Property Rights legal regime that safeguards intellectual property rights.<sup>340</sup> A robust intellectual property rights regime is essential in international trade and foreign investment since such a regime grants foreign investors competitive advantage in their commercial activities.<sup>341</sup> These laws provide for the protection of a number of intellectual property rights such as: copyrights, trade marks, patents, traditional knowledge and other industrial property rights. They establish advanced legal and institutional frameworks discussed in the previous sections under this chapter. In addition to Kenya's robust IPRs regime, Kenya is also a member of most major international and regional organizations, treaties and Agreements on IP including:<sup>342</sup> World Intellectual Property Organization (WIPO), the Paris Convention for the Protection of Industrial Property (1883), the Trade Mark Law Treaty (1981), the TRIPS (1995), the Lusaka Agreement establishing African Regional Industrial Property Organization (ARIPO), the World Intellectual Property Convention 1970 and the International Union for the Protection of New Varieties of Plants (UPOV). Kenya also has specialized courts

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335 Ibid

336 Ibid.

337 Respondent 8 (10th August 2016, Nairobi)

338 Respondent 8 (10th August 2016, Nairobi)

339 Respondent 8 (10th August 2016, Nairobi)

340 The Kenya's Intellectual Property Rights regime is composed of; the Constitution of Kenya 2010 at Articles 40(5), 69(c) and (e) 260(c), the Industrial Property Act, the Trade Mark Act; the Copyright Act, the Trade Descriptions Act, the Seeds and Plant Varieties Act and the Anti-Counterfeit Act.

341 Ibid n 274.

342 International Chamber of Commerce, 'Promoting and Protecting Intellectual Property in Kenya,' page 15 available at <<http://www.iccwbo.org/Advocacy-Codes-and-Rules/BASCAP/International-engagemeny-and-Advocacy/Country-Initiatives/Promoting-and-protecting-IP-in-Kenya/>> accessed 3 July 2016.

including the Industrial Property Tribunal and the Registrar of Trade Marks, to deal with matters related to IP in Kenya.<sup>343</sup> While there is an elaborate IPRs regime in Kenya, in terms of advanced legal and institutional framework to ensure IP protection, there exist deficient enforcement mechanisms of the existing IP legislations.<sup>344</sup> There also lacks a comprehensive National IP Action Plan and National IP Policy to cover the full range of legal and policy reforms, technical assistance, capacity building measures and provide tools for strengthening IP enforcement practices.<sup>345</sup>

### **3.6 Judicial Independence and Specialized Court Systems**

Judicial independence is a key aspect in engendering investor confidence in a given state. The Constitution of Kenya, 2010 under Article 160 states: *“In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.”* There as such have been considerable steps towards judicial independence in Kenya as contrasted with the previous constitutional regime. Courts in international case study jurisdictions discussed under chapter two are free from government interference and there exists specialized court systems for tax, labour and international trade. Kenya’s judicial system also provide for specialized court systems such as the Tax Appeals Tribunal, Industrial Property Tribunal, Competition Tribunal among others that deals with specialized commercial disputes and whose decisions are appealable to the mainstream judicial courts. Kenya has the Judiciary Training Institute which provides continuing training and development to judges and other judicial officers. There is slow pace in adopting ICT system in the administration of justice in Kenya’s judicial system as compared to the international best practices.<sup>346</sup> Kenya unlike for instance the US, has no court of international trade and investments which is a specialized court to hear international trade disputes arising anywhere within Kenya.<sup>347</sup> Singapore has an established system in her judiciary where senior judges mentor young judges. This is not entrenched within the Kenyan Judicial administrative system yet it has the capacity help realize advanced and reliable jurisprudential decisions capable of offering positive economic directions and instill investor confidence in a country’s judicial system. Despite the Kenya’s judicial independence, cases take too long to be

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343 Respondent 1 (2 May 2016, Nairobi)

344 Respondent 1 (2 May 2016, Nairobi)

345 Respondent 1 (2 May 2016, Nairobi)

346 See Chapter two, Singapore paperless judicial electronic system

347 See Chapter two herein note 207.

finalized and corruption in the judiciary still hampers access to justice in Kenya.<sup>348</sup>

### **3.7 Effective Participation in Bilateral and Multilateral Trading Systems, Foreign**

#### **Investments Incentives and the use of ICT in Advancing International Trade**

Kenya has acceded to a great number of bilateral and multilateral investment treaties and agreements with a view to boost regional and international trade and investments.<sup>349</sup> This section analyses the effect of: Fidelity clauses in these treaties and agreements; capital structure; the principles of National Treatment and Most-Favoured Nation; and the framework arbitration clauses. Fidelity Clauses are usually included in international investments agreements to provide additional protection to investors by covering the contractual obligations in investments between the host states and foreign investors.<sup>350</sup> These clauses are therefore captured under different investment agreements signed between Kenya and different foreign investors.<sup>351</sup> Capital structure is the means by which an organization is financed.<sup>352</sup> It is the mix of debt and equity capital maintained by a firm.<sup>353</sup> Foreign firms would in most cases possess significant advantages over domestic firms hence increased uncoordinated FDI inflow can affect the output of domestic firms through FDI-linked spill-over effects.<sup>354</sup> The entry of foreign firms increases competition on the domestic market which can affect the profitability of domestic firms.<sup>355</sup> This is because where there is increased FDI inflow, domestic firms may shift to debt financing due to difficulties in raising equity capital in order to effectively compete with foreign firms.<sup>356</sup>

The principles of National Treatment and Most-Favoured Nation are standard non-discriminatory principles included in international investment treaties and agreements to provide fair competition in international commerce. They are principles of customary international law that

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348 <http://www.standardmedia.co.ke/article/2000131864/survey-reveals-reasons-behind-delay-in-court-cases>>accessed 13 August 2016; <http://www.nation.co.ke/news/Corruption-is-entrenched-in-courts/1056-3099136-1302nwvz/index.html>

349 [www.kenyalaw.org/treaties](http://www.kenyalaw.org/treaties): This website provide a database of all bilateral and multilateral treaties that Kenya has ratified. It is managed by the National Council for Law Reporting, a state Corporation within the Judiciary to revise the laws and provide platform for easy access to justice in promoting the rule of law. (Accessed for the purposes of verifying the investment treaties Kenya has ratified on 3 July 2016).

350 Katia Yanna-Small, 'Interpretation of the Umbrella Clause in Investment Agreements' <<https://www.oecd.org/investment/internationalinvestmentagreements/40471535.pdf>>accessed 26 October 2016.

351 Respondent 6 and 9 (1st and 9th August respectively)

352 John Kuria and Dr. Bernard Omboi, 'Relationship between the Capital structure and the financial performance of investment and banking firms listed at the Nairobi Securities Exchange in Kenya,' <<http://www.primejournal.org/BAM/pdf/2015/dec/Kuria%20and%20Omboi.pdf>>accessed 26 October 2016.

353 Ibid

354 Sajid Anwar and Sizhong Sun, 'Can the Presence of Foreign Investment Affect the Capital Structure of Domestic Firms?' <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2529879](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2529879)>accessed 26 October 2016.

355 Ibid

356 Ibid

advocates for Fair and Equitable Treatment Standard in International Investments.<sup>357</sup> On the other hand, Arbitration Clauses requires the parties to international investment agreements to resolve their disputes through an arbitration process as opposed to litigation. The conflict of laws principles are also captured within different international investment agreements between Kenya and respective foreign investors. There is no written international law to govern relationships between individuals, there are only domestic laws of nations to make balance between national sovereignty with international agreement.<sup>358</sup> Conflict of law will usually arise when there is a difference between the laws of two or more jurisdictions with some connection to a case, such that the outcome depends on which jurisdiction's law will be used to resolve each issue in dispute.<sup>359</sup> When Conflict of laws occurs, courts intervene in deciding which law will be followed to resolve the dispute.<sup>360</sup> These, are usually agreed upon between the host state and the foreign investor at the time of making the investment agreement. To regulate and monitor international commerce in Kenya, there are legislations in place which have captured the above international principles and such laws include the Kenya's Investment Protection Act, Companies Act, Arbitration Act, Nairobi Centre for International Commercial Arbitration Act among others which are discussed elsewhere in this study.

The success of international commerce in any given state is also dependent on other factors discussed in this study such as: low prevalence of corruption, strong legal and policy framework on international trade, judicial independence, strong international commercial arbitration regime and above all a strong enforcement mechanisms of the policy and legal frameworks under which the treaties operate. Kenya however ratified some of the trade and investment treaties without paying much attention to their implications to the domestic market and has not domesticated the WTO Agreements through specific international investment laws that could then help Kenya effectively compete in global commerce.<sup>361</sup> This is why there is in place a team to review all Kenya's BITs and MITs in order to provide room for renegotiation and as well decline the renewal of other Agreements whose terms have expired.<sup>362</sup> Kenya offers a number of investment

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357 Fair and Equitable Treatment Standard in International Investments

Law <<https://www.oecd.org/investment/internationalinvestmentagreements/40077877.pdf>>accessed 26 October 2016.

358 Conflict of Laws and International Contracts <<http://www.slideshare.net/AkashPatel69/conflict-of-laws-international-contracts>>accessed 26 October 2016.

359 <[https://www.law.cornell.edu/wex/conflict\\_of\\_laws](https://www.law.cornell.edu/wex/conflict_of_laws)>accessed 26 October 2016.

360 Ibid

361 Respondent 6 and 9 (1st and 9th August respectively)

362 Respondent 6 and 9 (1st and 9th August respectively)



incentives to foreign investors under the Income Tax Act<sup>363</sup>, Investment Promotion Act<sup>364</sup>, Foreign Investment Protection Act<sup>365</sup>, Special Economic Zones Act<sup>366</sup>, Export Processing Zones Act<sup>367</sup> and in immigration legislations.<sup>368</sup> Kenya is fast tracking the integration of ICT in international trade.<sup>369</sup> The establishment of Kenya Trade Network (Kentrade), a state Agency under the National Treasury that is mandated to facilitate cross border trade and establish, manage and implement the National Electronic Single Window System. KenTrade is the custodian of electronic single window system, which allows submission, receipting and processing of cargo documents electronically at a single entry point to speed up import and export trade.<sup>370</sup> This is a demonstration of Kenya's commitment to embracing ICT in transnational business transactions.<sup>371</sup> Kenya's internet connectivity however still rates lower as compared to international case study jurisdictions. Singapore's competitiveness in international trade is high because of embracing ICT in business transactions.<sup>372</sup>

Kentrade is however facing a number of challenges ranging from experiencing slow implementation of the National electronic single window system to stakeholders who are not embracing the system and the manual process of clearance and as such is still in place. The multiple government agencies a trader has to deal with, is also an impediment to efficient operations under the Kentrade ICT system.<sup>373</sup> The slow pace by the system in processing real time information as expected has hampered the single day clearance of goods at the port.<sup>374</sup>

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363 Income Tax Act, s. 4B ; See also Martin S.O. Gumo, 'The Effect of tax Incentives on Foreign Direct Investments in Kenya' (MBA Thesis, University of Nairobi 2013) p.15.

364 Investment Promotion Act, No. 6 of 2004, long title.

365 Foreign Investments Protection Act, s. 7

366 Special Economic Zones Act, long title

367 Export Processing Zones Act , long title

368 Kenya Citizenship and Immigration Act, 2011, Laws of Kenya.

369 <<http://www.kentrade.go.ke/index.php/about-kentrade/objectives-functions> >accessed 3 July 2016.

370 <<http://www.businessdailyafrica.com/State-firms-in-limbo-as-boards-fail-to-name-CEOs/-/539546/2670994/-/xk90ds/-/index.html> >accessed 3 July 2016.

371 Ibid.

372 See the discussion under chapter two.

373 Overcoming Challenges in the Implementation of Kenya Tradenet System by Kentrade <<http://www.termwarehouse.com/essay-on/Overcoming-Challenges-In-The-Implementation-Of/419157>>accessed 3 July 2016.

374 Ibid.

## CHAPTER FOUR

### SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

#### 4.0 Introduction

This chapter is the last part of this study. It outlines the research findings of the study after which recommendations are proposed based on the thematic areas analyzed in addressing the insufficiency and inefficiency existing, within the Kenya's legislative framework on international trade and foreign investments. This chapter ends with conclusion to the study.

#### 4.1 Summary of Findings

The findings of the study are discussed based on the thematic areas analyzed under chapters 2 and 3.

##### 4.1.1 Policy Frameworks

The study found out that countries like the US, UK, Chile, Singapore and South Africa, and which are cited in this study as countries with ideal legislative framework on international trade and investments, have in place sound policies on international trade and investments. These policies have enabled these states realize a number of objectives such as:<sup>375</sup> Setting and enforcement of rules of fair competition in the global economy, not only by lowering tariff barriers, but also improving the treatment of foreign investors and protection of intellectual property rights; enactment of quality legislations, regulations and establishment of institutional frameworks to effectively govern international trade and foreign investments within their jurisdictions; realization that trade and investment policy must be part of the broader national effort to improve the capacity of their nationals to compete in the global economy; acknowledgement of the fact that Trade policy is intended to establish and enforce rules for the international exchange of goods and services that bring the greatest possible benefits to their nationals while promoting the larger foreign policy interests; develop open FDI policies as bases for multinational companies to engage in high end manufacturing and product development; promote free, open and stable multilateral trading system and settlement of investment disputes; recognize the complimentary relationship between trade and investment decision-making since trade is an outcome of investment and investment may be motivated by trade opportunities; harness FDI to achieve the development objectives of host states as FDI can have critical impacts on economic development of the state; implement policy measures that seeks to enhance

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375 See Chapter two to this Study at page 27-28.

adequate security and offer protection to all foreign investors; and preserve the sovereign right to regulate international trade and foreign investments, in the public interest.

The study further found out that Kenya is currently working on the International Investments Policy but has a National Trade Policy in place.

#### **4.1.2 Legislations and Regulations**

The ideal legislative framework indicated that sound and sufficient legislative framework on international trade and foreign investment is an essential element in increasing the cross-border trade and foreign investment portfolio. The study established that Kenya has sufficient laws governing international trade and foreign investments but lags behind in terms of lack of strong institutional and enforcement mechanisms. It was further established that in the case study jurisdictions under chapter two, there is no requirement for local representation in foreign company registration as opposed to Kenya's company registration process which requires at least thirty percent local shareholding and at least one local representative. This is regarded as a discouragement to foreign investments. It was also noted in the case study jurisdictions, there exists an elaborate framework with regard to balancing the act of protecting foreign investment and domestic investment through the international law principle of equal treatment. This equality principle is not embraced in Kenya's international trade and investment framework. Foreign investors and local investors do not enjoy the same status and protection as the legal framework seems to favor foreign investors than local investors in terms of protection and investment incentives. It was also noted that despite the sufficient legal framework, Kenya does not have International Trade Act which would specifically deal with international trade affairs. Kenya has also not effectively domesticated the WTO Agreements such as Anti-dumping, Sanitary and Phytosanitary Measures in order to effectively compete in the global business without affecting the domestic market.

#### **4.1.3 Institutional and Enforcement Mechanisms**

The study found out that the ideal legal systems provide elaborate institutional and enforcement mechanisms in enhancing international commerce.<sup>376</sup> The study however found out that in the case of Kenya, there is an insufficient and inefficient institutional and enforcement mechanism on international trade and investments. It was observed that Kenya lacks strong institutions to administer institutional arbitration, Kenya Investment Authority has not yet established itself as a one-stop shop for foreign investors and therefore foreign investors deal with different players

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<sup>376</sup> See Chapter two at Pages 36-38.

depending on the industry, the Anti-Counterfeit Agency lacks prosecutorial powers to engender efficiency in prosecution of cases, Corruption and the delay of cases in courts hampers the access to justice hence a hindrance to efficient and effective enforcement mechanism. It was also pointed out the lack of prosecutorial powers by some key enforcement institutions and the lack of political goodwill and government commitment to fight graft hampers effective administration of the international trade and investments regime in Kenya.

#### **4.1.4 International Commercial Arbitration**

The study found out that the ideal legal systems have strong arbitration framework such as the London Court of International Arbitration, International Chamber of Commerce and the Singapore Court of International Arbitration among others.<sup>377</sup> These institutions have served as attraction of foreign investors since investors prefer to invest in jurisdictions where their matters can be heard and finalized faster in the event of a commercial dispute. In Kenya, the study established that the laws governing international commercial arbitration and mediation in Kenya are ; the Constitution of Kenya, the Arbitration Act, the Nairobi Centre for International Arbitration Act and the Kenya's Civil Procedure Act. It was also noted that in addition to the above domestic legal framework, Kenya has acceded to the New York Convention, 1958 on the Recognition and Enforcement of Arbitral Awards and to International Convention on the Settlement of Investment Disputes(ICSID) both of which deal with international commercial arbitration. It is therefore evident that Kenya has a sufficient arbitral legislative regime.

However, it was pointed out that international commercial arbitration in Kenya faces a number of challenges which includes: Inadequate infrastructures for the efficient and effective organization and conduct of international commercial arbitration; interference by national Courts. It was noted that, national Courts' interference is believed to be based on a national legal frameworks that is not conducive for the constitution of arbitral tribunals and to the conduct of arbitration, permitting the 'local court' to interfere unduly in arbitral proceedings. It was established that in Kenya sometimes matters will be appealed all the way to the highest court of law on the land in search of setting aside of awards. Parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending. This delays finalization of the matter as well as watering down the perceived advantages of arbitration and ADR in general; the corruption perception in Kenya paints a bleak image to the international community regarding the governance system in place in Kenya. This works against the

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<sup>377</sup> See Chapter Two at page 38 -39.

development of international commercial arbitration since, access to justice is likely to be frustrated in a corruptible environment hence scaring away foreign investors.

#### **4.1.5 Intellectual Property Rights**

It was noted that Kenya just like the ideal legislative framework discussed under chapter two, has an elaborate intellectual property rights legal regime that safeguards intellectual property rights.<sup>378</sup> It was pointed out that a robust intellectual property rights regime is essential in international trade and foreign investment since such a regime grants foreign investors competitive advantage in their commercial activities. It was as well established that in addition to Kenya's robust IPRs regime, Kenya is also a member of most major international and regional organizations, treaties and Agreements on IP including: World Intellectual Property Organization (WIPO), the Paris Convention for the Protection of Industrial Property(1883), the Trade Mark Law Treaty (1981), the TRIPS(1995), the Lusaka Agreement establishing African Regional Industrial Property Organization(ARIPO), the World International Property Convention (1970) and the International Union for the Protection of New Varieties of Plants(UPOV). It was also noted that Kenya has specialized courts including the Industrial Property Tribunal and the Registrar of Trade Marks, to deal with matters related to IP in Kenya. It was however noted that much as there is an elaborate IPRs regime in Kenya, in terms of advanced legal and institutional framework to ensure IP protection, there exists a deficient enforcement mechanisms of the existing IP legislations. There also lacks a comprehensive National IP Action Plan and National IP Policy to cover the full range of legal and policy reforms, technical assistance, capacity building measures and provide tools for strengthening IP enforcement practices.

#### **4.1.6 Judicial Independence and Specialized Court Systems**

The study observed that the Constitution of Kenya enshrines under Article 160, the principle of judicial independence and that the judiciary of Kenya past 2010 is more independent than it was before. It was established that Kenya just like in the ideal international framework, has the judiciary training institute to build training and development capacity for judges and other judicial officers. It was however noted that Kenya's judicial system has not fully embraced the 'paperless' ICT system to enhance the administration of justice. It was also observed that Kenya does not have a framework where senior judges mentor young judges and also Kenya unlike the

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<sup>378</sup> Intellectual Property Laws include: Constitution of Kenya, 2010, Industrial Property Act, the Industrial Property Act, the Trade Mark Act, the Copyright Act, the Trade Descriptions Act, the Seeds and Plant Varieties Act , the Anti-Counterfeit Act and the Food, Drugs and Chemical Substances Act.

US, does not have a specialized court on international trade and foreign investments. It was also noted that corruption still taints the image of the Kenya's judiciary and also cases still take too long to be finalized as opposed to the ideal legislative framework provided in this study at chapter two.<sup>379</sup>

#### **4.1.7 Participation in Bilateral and Multilateral Trading Systems, Foreign Investments**

##### **Incentives and the use of ICT in Advancing International Trade**

It was established that Kenya has acceded to a great number of bilateral and multilateral investment treaties and agreements with a view to boost regional and international trade and investments. Kenya has now realized that some BITs and MITs which she ratified are not beneficial to the domestic market and has put measures in place to reviews these treaties. It was also noted that Kenya offers a number of investment incentives to foreign investors under the Income Tax Act, Investment Promotion Act, Foreign Investment Protection Act, Special Economic Zones Act, Export Processing Zones Act and in immigration legislations. Further, it was pointed out that Kenya is fast racking the integration of ICT in international trade. It was observed that the establishment of Kenya Trade Network (Kentrade), a state Agency under the National Treasury that is mandated to facilitate cross border trade and establish, manage and implement the National Electronic Single Window System was a demonstration of Kenya's commitment to embracing ICT in transnational business transactions.

It was pointed out that Kentrade is however facing a number of challenges ranging from experiencing slow implementation of the national electronic single window system to stakeholders who are not embracing the system. The manual process of clearance which is still in place was also noted as part of the challenges facing Kentrade. The multiple government agencies a trader has to deal with in export and import business in Kenya was also cited as an impediment to efficient operations under the Kentrade ICT system.

#### **4.3 Conclusions**

This study sought to provide a critical appraisal of the legislative framework governing international trade and foreign investments in Kenya. The study objectives of the research have been met. The specific objectives of this study were to: Identify and assess the sufficiency, effectiveness and efficiency of the laws on international trade and foreign investment in Kenya; identify and discuss the possible issues and challenges brought about by the legislative

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379 <<http://www.standardmedia.co.ke/article/2000131864/survey-reveals-reasons-behind-delay-in-court-cases>>accessed 13 August 2016.

insufficiency and inefficiency on international trade and foreign investments and suggest reforms to the legislative framework.

To realize these objectives, three research questions were formulated. The first research question was to find out the current legislative framework on international trade and foreign investments in Kenya. The second research question was to enquire into the sufficient and efficiency of the legislative framework in promoting international trade and foreign investments and the third research question was to suggest reforms to the legislative framework if found inadequate.

The study appraised the ideal legislative framework governing international trade and foreign investments in key case study jurisdictions such as Singapore, UK, USA , Chile and South Africa. This informed a comparative analysis with Kenya's legal framework on international trade and investments and provided areas where Kenya can borrow to facilitate and enhance international trade and foreign investments in Kenya.

The study shows that Kenya has an elaborate legal framework on international trade and foreign investments. However, despite this elaborate legal framework, Kenya lacks a strong institutional framework to govern international trade and foreign investments. There also exist a number of gaps within this legislative framework. To realize an efficient and effective international trade and foreign investment system, there is need for: Strong policy framework, quality legislations, elaborate and harmonized intellectual property regime, strong international commercial arbitration, independent and a judiciary free from corruption as well as strategic participation in bilateral and multilateral investment treaties. It is bases on these thematic areas that this study appraised Kenya's legal framework on international trade and foreign investments.

This research concludes that a vibrant legislative framework on international trade and investments is essential in boosting Kenya's international trade and FDI inflows. Kenya should therefore initiate the necessary suggested reform measures in advancing its position in international commerce.

#### **4.4 Recommendations**

Following my research findings set and conclusion out above, I make the following recommendations on Kenya's legislative framework governing international trade and foreign investments:

#### **4.4.1 International trade and Investments Policy Frameworks**

Having found out that Kenya has no policy on international trade and international investments, and that it is best practice for policy to precede law, as most legislations including subsidiary legislation trace their foundation to agreed policy frameworks, I therefore propose that Kenya formulates two policies: International Trade Policy and Foreign Investments Policy to positively impact on her international trade flows, enhance FDI inflows and inform the enactment of or reform of quality, comprehensive and efficient laws governing international trade and foreign investments. It is also a matter of international best practice to have sound policy framework upon which quality trade and investment laws are hinged as demonstrated in the ideal legal systems discussed under chapter two to this study.<sup>380</sup>

#### **4.4.2 Legislations and Regulations**

There is need to reform the laws governing international trade and foreign investments such as the Investment Promotion Act, to capture international best practices such as the equal treatment principle where foreign and local investors are treated equally. I also propose for the amendment of the Companies Act, 2015 particularly sections 975 and 979 by deleting the requirements for the thirty percent local shareholding and at least one local representative. These provisions are impediment to FDI inflows in Kenya. Kenya also need to specifically enact international trade legislation to particularly guide the export, import and customs management by establishing an international trade commission<sup>381</sup> that will deal with all international trade matters. I also recommend that Kenya specifically domesticates the WTO Agreements through specific domestic laws. I also recommend that Kenya harmonizes the different laws effecting international trade in order

#### **4.4.3 Institutional and Enforcement Mechanisms**

The legislative framework on Kenya's international trade and investments establishes an elaborate institutional framework but the problem is the enforcement mechanisms and functional conflict between the established institutions. The Kenya Anti-Counterfeit Agency for instance would clash with the Pharmacy and Poisons Board when it comes to enforcement of its rules with regard to counterfeit drugs, since the Board has the mandate in terms of regulating drugs and related activities. There is need therefore to harmonize the institutional framework to avoid clash in functional administration. Kenya also need to give prosecutorial powers to key

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380 See Chapter two of this study at p.27.

381 See for instance the South Africa's International Trade Administration Act, available at <[http://www.gov.za/sites/www.gov.za/files/a71-02\\_0.pdf](http://www.gov.za/sites/www.gov.za/files/a71-02_0.pdf)> accessed 3 July 2016.



institutions such as the Ethics and Anti-Corruption Commission, the Anti-Counterfeit Agency and the Competition Authority to effectively manage cases and effectively manage trade related aspects of international trade and investments. The grant of prosecutorial powers would promote efficiency in case handling and result into effective and efficient administration of the international trade and foreign investment framework in Kenya. There is also need for Kenya to establish a strong and harmonized institutional framework on international trade to deal with trade matters just like the Kenya Investment Authority which deals with investment affairs in the country.

#### **4.4.4 International Commercial Arbitration Regime**

There is need by Kenya to reform her international Commercial Arbitration legal regime by operationalizing the Arbitral Court established under the Nairobi Centre for International Arbitration Act and build capacity of the Nairobi Centre for International Arbitration in order to promote regional and international commercial arbitration and position Kenya as a leading centre for International commercial arbitration. This will boost investor-confidence and positively impact on FDI inflows. To minimize court interference in arbitral matters, and create room where matters will be appealed all the way to the highest court of law on the land in search of setting aside of awards, the Arbitral court established under the Nairobi Centre for International Arbitration should be the court of finality in international commercial arbitration matters. This is because parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending. This delays finalization of the matter as well as watering down the perceived advantages of arbitration.

#### **4.4.5 Intellectual Property Rights**

Despite Kenya's elaborate IPRs regime, in terms of advanced legal and institutional framework to ensure IP protection, there exists a deficient enforcement mechanism of the existing IP legislations. Kenya therefore needs to enhance the capacity of Kenya Industrial Property Institute by establishing an effective enforcement directorate under the Institute to deal with strict compliance with the IP legislations and prosecution of IP infringers. There is need to also formulate a comprehensive National IP Action Plan and National IP Policy to cover the full range of legal and policy reforms, technical assistance, capacity building measures and provide tools for strengthening IP enforcement practices.

#### **4.4.6 Judicial Independence and Specialized Court Systems**

Kenya's Judiciary needs, as a matter of priority, adopt the paperless ICT filing system to fast track the administration of justice. This will speed up the filing and disposition of cases, reduce corruption and increase people confidence in the judiciary. Kenya to adopt the Singaporean approach where there is a judicial framework under which senior judges mentor young judges to enrich jurisprudential disposition by the judiciary and as well establish a specialized court on international trade and foreign investments. To effectively deal with corruption in the Judiciary, there is need for it to engage a special entity such as Transparency International and the Ethics and Anti-Corruption Commission to track corruption within Kenya's judicial system. Those found guilty to be dismissed from the judicial service and face prosecution as laid down under the law.

#### **4.4.7 Kenya's Participation in Bilateral and Multilateral Trading Systems, Foreign**

##### **Investments Incentives and the use of ICT in Advancing International Trade**

Kenya should, as observed in chapter two where the ideal international case study jurisdictions are active members in bilateral and multilateral trading systems, increase her strategic participation in such systems, increase the capacity of the Kenya Trade Network in terms of enhanced ICT facilities for it to effectively realize its mandate and boost international trade in Kenya. Kenya should also effectively review her BITs and MITs in order to create room for renegotiation in view of obtaining greater value for the domestic market and decline to renew investment treaties which are not advantageous to Kenya.

## **APPENDICES**

### **APPENDIX A: STUDENT INTRODUCTION LETTER**

SIKUTA MOSES

P.O BOX 10443-00100

NAIROBI

Dear Sir/Madam,

#### **RE: INTERVIEW FOR ACADEMIC RESEARCH PURPOSES**

I am a student at the University of Nairobi, School of Law pursuing a Master of Laws Degree in International Trade & Investments Law. As part of my course, I am required to carry out and submit a research project on the analysis of the legislative framework governing international trade and foreign investments in Kenya.

To achieve this objective, I kindly request you to take a few minutes to answer the attached interview questions. Should the findings of this research project be of interest to you or your organization, a copy will be available at the University of Nairobi School of Law Library.

Your kind support is deeply appreciated.

Yours sincerely,

Sikuta Moses.

## **APPENDIX B: LIST OF CATEGORIZED INTERVIEWEES**

### **OFFICERS- GOVERNMENT AGENCIES**

1. Head of Department, International Trade – Ministry of Industry, Trade and Cooperatives
2. Manager; Research, Policy and Advocacy – Kenya Investment Authority
3. Trade Mark Examiner – Kenya Industrial Properties Institute
4. Legal Officer– Ethics and Anti-Corruption Commission
5. Assistant Director, Research – Anti-Counterfeit Agency
6. Head of International Law – Attorney General’s Office
7. Legal Officer – Competition Authority

### **SPECIALISTS - PRIVATE SECTOR ORGANIZATIONS**

8. Head of Policy, Research & Advocacy – Kenya Association of Manufacturers.
9. Head of Trade and Investments– Kenya Private Sector Alliance
10. Dr. Kariuki Muigua –Expert in International Commercial Arbitration

**APPENDIX C: QUESTIONNAIRES**

**PART A: QUESTIONNAIRE [FOR HOD, MINISTRY OF INDUSTRIALIZATION, TRADE AND COOPERATIVES]**

The questionnaire below was used between the month of May and August, 2016 in conducting interviews for this study. The same was administered personally by the author to the respondents.

**Section A: Background Information**

- 1. Please state your Gender  
Male  Female
- 2. What is your occupation? [.....]
- 3. Educational Background (Tick where appropriate)  
Legal  Others (specify) [.....]
- 4. Organization  
Export/Import  Others (specify) [.....]
- 5. Type of organization  
Manufacturing  Service Industry  Umbrella Body

**Section B: International Trade and Foreign Investments**

- 6. Do you think the legislative framework governing international trade in Kenya is sufficient, effective and efficient? YES  NO  Give reasons for your answer  
.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....

7. Does Kenya have an International Trade Policy? YES [ ] NO [ ] Give reasons for your answer.

.....  
.....  
.....  
.....

8. What legal and policy suggestions would you make to enhance international trade and foreign investment in Kenya.....

.....  
.....  
.....

9. Please briefly state your suggestions that would seek to enhance international trade and foreign investment in Kenya.....

.....  
.....

10. Any other comment(s) you may deem relevant to the study

.....  
.....

Thank you for your cooperation

**PART B: QUESTIONNAIRE [FOR ASSISTANT DIRECTOR, ANTI-COUNTERFEIT AGENCY]**

The questionnaire below was used between the month of May and August, 2016 in conducting interviews for this study. The same was administered personally by the author to the respondents.

**Section A: Background Information**

- 1. Please state your Gender  
Male  Female
- 2. What is your occupation? [.....]
- 3. Educational Background(Tick where appropriate)  
Legal  Others (specify) [.....]
- 4. Organization  
Export/Import  Others (specify) [.....]
- 5. Type of organization  
Ministry  State Corporation  Public Company

**Section B: International Trade and Foreign Investment**

- 6. Is Anti-Counterfeit Agency Law relevant in international trade? YES  NO  Give reasons for your answer  
.....  
.....  
.....
- 7. Is there in place effective, related- inter-agency coordination in the fight against counterfeit trade in Kenya? YES  NO  Give reasons for your answer  
.....  
.....  
.....
- 8. In your opinion do you think the Court affects the work of Anti-Counterfeit Inspectors?  
.....  
.....  
.....

- 9. Is the lack of prosecutorial powers a hindrance to effective prosecution of counterfeit cases?.....  
.....  
.....
- 10. How does the lack of provision on an arbitral process in the Anti-Counterfeit Act affect international trade and foreign investments  
.....  
.....  
.....
- 11. Any other comment(s) you may deem relevant to the study  
.....  
.....

Thank you for your cooperation



**PART C: QUESTIONNAIRE [FOR A TRADE MARK EXAMINER, KENYA  
INDUSTRIAL PROPERTY INSTITUTE]**

The questionnaire below was used between the month of May and August, 2016 in conducting interviews for this study. The same was administered personally by the author to the respondents.

**Section A: Background Information**

- 1. Please state your Gender  
Male [ ] Female [ ]
- 2. What is your occupation? [.....]
- 3. Educational Background(Tick where appropriate)  
Legal [ ] Others (specify) [.....]
- 4. Organization  
Export/Import [ ] Others (specify) [.....]
- 5. Type of organization  
Ministry [ ] State Corporation [ ] Public Company [ ]

**Section B: International Trade and Foreign Investment**

- 6. What is your understanding on international trade and foreign investments?.....  
.....
- 7. Do you think Kenya has a sufficient and efficient IP legal system?.....  
.....  
.....
- 8. What is your view on IPRs enforcement mechanism in Kenya?  
.....  
.....  
.....
- 9. Do you think there is a proper inter-agency coordination in the implementation and enforcement of IPRs? [YES] [NO]. Give your answer.  
.....  
.....  
.....

10. Is there a clear policy framework on IP in Kenya? [YES] [NO]. Give your answer

.....  
.....  
.....

11. In your opinion do you think IP laws influences international trade and foreign investments?.....

.....

12. Any other comment(s) you may deem relevant to the study

.....  
.....

Thank you for your cooperation

**PART D: QUESTIONNAIRE [FOR A LEGAL OFFICER, ETHICS AND ANTI-CORRUPTION COMMISSION]**

The questionnaire below was used between the month of May and August, 2016 in conducting interviews for this study. The same was administered personally by the author to the respondents.

**Section A: Background Information**

1. Please state your Gender  
Male  Female
2. What is your occupation? [.....]
3. Educational Background (Tick where appropriate)  
Legal  Others (specify) [.....]
4. Organization  
Export/Import  Others (specify) [.....]
5. Type of organization  
Ministry  State Corporation  Public Company

**Section B : International Trade and Foreign Investment**

6. What is your understanding on international trade and foreign investments?.....  
.....  
.....  
.....  
.....  
.....
7. Do you think Kenya has a sufficient and efficient Anti-corruption legal regime?.....  
.....  
.....
8. How does corruption affect international trade and foreign investments?  
.....  
.....  
.....  
.....

9. Do you think there is a proper inter-agency coordination in the implementation and enforcement Anti-corruption legal framework? [YES] [NO]. Give your answer.

.....  
.....  
.....  
.....  
.....

10. Is there a proper policy framework on corruption in Kenya? [YES] [NO]. Give your answer

.....  
.....  
.....

11. In your opinion do you think there political goodwill and government commitment in fighting corruption in Kenya?.....

.....  
.....

12. How does the lack of prosecutorial powers by EACC affect enforcement mechanism in fighting corruption in Kenya?.....

.....  
.....

13. Any other comment(s) you may deem relevant to the study

.....  
.....  
.....  
.....  
.....

Thank you for your cooperation



8. Is the legal framework governing foreign investment in Kenya sufficient, effective and efficient? YES [ ] NO [ ] Give reasons for your answer

.....  
.....  
.....

9. How effective and strategic is Kenya in participating in Bilateral and Multilateral International Investments and tradeAgreements?.....

10. What reform measures would you suggest in the legal framework governing international trade and foreign investments in Kenya?.....

11. Any other comment(s) you may deem relevant to the study

.....  
.....

Thank you for your cooperation

## **APPENDIX D: INTERVIEW SCHEDULES**

### **PART A: KENYA INVESTMENT AUTHORITY**

#### **Section A**

##### **Introduction**

I am a student at the University of Nairobi, School of Law pursuing a Master of Laws Degree in International Trade & Investments Law. As part of my course, I am required to carry out and submit a research project on the “*Critical Appraisal of the legislative framework governing international trade and foreign investments in Kenya.*”

To achieve this objective, I kindly request you to take a few minutes to answer the attached interview questions. Should the findings of this research project be of interest to you or your organization, a copy will be available at the University of Nairobi School of Law Library.

Your kind support is deeply appreciated.

#### **Section B**

##### **Demographic Information**

- a) Name (optional):
- b) Organization:
- c) Designation/Work:

#### **Section C**

##### **Interview Questions**

- a) In your view, what do you understand by the terms ‘International Trade and Foreign Direct Investments’?
- b) Do you think Kenya’s legal framework on International Trade is sufficient and efficient?
- c) Do you think Kenya’s legal framework on Foreign Investments is sufficient and efficient?
- d) Are these policies in place?
  - (i) International Investment Policy
  - (ii) International Trade Policy
- e) How would you describe the working relation between the Kenya Investment Authority and other sector regulators like KIPi, ACA, Ministry of Industrialization and Trade? Is there any overlapping of roles?
- f) How important are the private sector players or umbrella bodies such as KEPSA, and KAM in influencing government policy and law on international trade and investment and how does the Authority engage them?

- g) Does the Authority have prosecutorial powers and criminal jurisdiction in the enforcement of the foreign investment legislations?
- h) What are the challenges if any, that the Authority faces in its effort to regulate both local and foreign investments in Kenya?
- i) How does Kenya's Investment law ensure the application of the National Treatment Principle in both local and foreign investments? In your view do you think Kenya's investment laws favours foreign investors more than local investors? If so what solution would you suggest?
- j) How does the Authority deal with the application of EAC investment policies and laws in Kenya? Is there any conflict of law issues between the EAC investment legislation and the Kenya's investment laws?
- k) What are the legal and policy suggestions in your view that may contribute to an effective international trade and foreign investment regime in Kenya?
- l) What else would you want to add?

**THANK YOU**



## **PART B: COMPETITION AUTHORITY**

### **Section A**

#### **Introduction**

I am a student at the University of Nairobi, School of Law pursuing a Master of Laws Degree in International Trade & Investments Law. As part of my course, I am required to carry out and submit a research project on the “*Critical Appraisal of the legislative framework governing international trade and foreign investments in Kenya.*”

To achieve this objective, I kindly request you to take a few minutes to answer the attached interview questions. Should the findings of this research project be of interest to you or your organization, a copy will be available at the University of Nairobi School of Law Library.

Your kind support is deeply appreciated.

### **Section B**

#### **Demographic Information**

- a) Name (optional):
- b) Organization:
- c) Designation/Work:

### **Section C**

#### **Interview Questions**

- a) In your view, what do you understand by the terms ‘International Trade and Foreign Investments’?
- b) What is the relevance of the Competition law in international trade and foreign investment?
- c) How would you describe the working relation between the Competition Authority and other sector regulators like the KIPi, ACA, and the Competition Tribunal? Is there any overlapping of roles?
- d) Is there a competition Policy that may have informed the formulation of the Competition Act?
- e) Do you think Kenya’s legislative framework on competition is sufficient and efficient?
- f) How does the lack of prosecutorial powers and criminal jurisdiction by the Authority affect the enforcement of the Act?
- g) What other if challenges if any, does Competition Authority face in its effort to regulate competition with regard to international trade and foreign investments in Kenya?

- h) How does the Authority deal with the application of EAC Competition Act in Kenya? Is there any conflict of law issues between this legislation and the Kenya's Competition Act?
- i) What are the policy suggestions in your view that may contribute to an effective international trade and foreign investments regime in Kenya?
- j) What else would you want to add?

**THANK YOU**

## **PART C: KENYA PRIVATE SECTOR ALLIANCE**

### **Section A**

#### **Introduction**

I am a student at the University of Nairobi, School of Law pursuing a Master of Laws Degree in International Trade & Investments Law. As part of my course, I am required to carry out and submit a research project on the “*Critical Appraisal of the legislative framework governing international trade and foreign investments in Kenya.*”

To achieve this objective, I kindly request you to take a few minutes to answer the attached interview questions. Should the findings of this research project be of interest to you or your organization, a copy will be available at the University of Nairobi School of Law Library.

Your kind support is deeply appreciated.

### **Section B**

#### **Demographic Information**

- a) Name (optional):
- b) Organization:
- c) Designation/Work:

### **Section C**

#### **Interview Questions**

- a) In your view, what do you understand by the terms ‘International Trade and Foreign Direct Investments’?
- b) Do you think Kenya’s legal framework on International Trade is sufficient and efficient?
- c) Do you think Kenya’s legal framework on Foreign Investments is sufficient and efficient?
- d) What challenges do your member organizations experience as a result of the implementation of the laws regulating international trade and foreign investments in Kenya?
- e) What are the policy suggestions in your view that may contribute to an effective international trade and foreign investments regime in Kenya?
- f) What else would you want to add?

**THANK YOU**

## **PART D: KENYA ASSOCIATION OF MANUFACTURERS**

### **Section A**

#### **Introduction**

I am a student at the University of Nairobi, School of Law pursuing a Master of Laws Degree in International Trade & Investments Law. As part of my course, I am required to carry out and submit a research project on the “*Critical Appraisal of the legislative framework governing international trade and foreign investments in Kenya.*”

To achieve this objective, I kindly request you to take a few minutes to answer the attached interview questions. Should the findings of this research project be of interest to you or your organization, a copy will be available at the University of Nairobi School of Law Library.

Your kind support is deeply appreciated.

### **Section B**

#### **Demographic Information**

- a) Name (optional):
- b) Organization:
- c) Designation/Work:

### **Section C**

#### **Interview Questions**

- a) In your view, what do you understand by the terms ‘International Trade and Foreign Direct Investments’?
- b) Do you think the legislative framework governing international trade in Kenya is sufficient, effective and efficient?
- c) Do you think the legislative framework governing foreign investments in Kenya is sufficient, effective and efficient?
- d) What is the role of KMA in enhancing international trade and foreign investments in Kenya?
- e) How would you describe the working relation between the Kenya Manufacturers Association with other government trade and investment sector regulators like the KIPi, ACA, Kenya Investment Authority and Ministry of trade? Do you think there are any overlapping of roles between these agencies?
- f) What are the challenges do your members experience as a result of the implementation of international trade and investment laws in Kenya?

- g) Do you think Kenya's foreign investment laws offer a balanced protection to both local and foreign investors?
- h) What are the legal and policy suggestions in your view may contribute to an effective international trade and foreign investments regime in Kenya?
- i) What else would you want to add?

**THANK YOU**

## **PART D: INTERVIEW WITH DR. KARIUKI MUIGUA**

### **Section A**

#### **Introduction**

I am a student at the University of Nairobi, School of Law pursuing a Master of Laws Degree in International Trade & Investments Law. As part of my course, I am required to carry out and submit a research project on the “*Critical Appraisal of the legislative framework governing international trade and foreign investments in Kenya.*”

To achieve this objective, I kindly request you to take a few minutes to answer the attached interview questions. Should the findings of this research project be of interest to you or your organization, a copy will be available at the University of Nairobi School of Law Library.

Your kind support is deeply appreciated.

### **Section B**

#### **Demographic Information**

- a) Name (optional):
- b) Organization:
- c) Designation/Work:

### **Section C**

#### **Interview Questions**

- a) In your view, what do you understand by the terms ‘International Trade and Foreign Direct Investments’?
- b) Do you think Kenya’s legal and institutional framework on international commercial arbitration is sufficient, effective and efficient?
- c) How does International Commercial Arbitration impact international trade and foreign investments or where is the link between international commercial arbitration and international trade and foreign investments?
- d) What are the challenges facing international commercial arbitration in Kenya?
- e) How do these challenges affect international trade and foreign investments in Kenya?
- f) What else would you want to add?

**THANK YOU**

**APPENDIX E: CONSENT FORM**

**UNIVERSITY OF NAIROBI  
SCHOOL OF LAW  
CONSENT FORM**

**NAME:** Sikuta Moses Wanjala

**REGISTRATION NO.:** G/62/82785/2015

**DESIGNATION:** Master of Laws Student, School of Law

**CONTACT ADDRESS:** Nairobi

**MOBILE NO.:** 0725688111

**PROJECT TITLE:** A Critical Analysis of the Legal Framework Governing International Trade  
and Foreign Investments in Kenya

**Please Tick**

- |  |                          |
|--|--------------------------|
| 1. I confirm that I have read and understand the information in the above study and have had the opportunity to ask questions. | <input type="checkbox"/> |
| 2. I understand that my participation is voluntary and that I am free to withdraw at any time, without giving reason.          | <input type="checkbox"/> |
| 3. I agree to take part in the above study.  | <input type="checkbox"/> |
| 6. I agree to the use of anonymised quotes in publications   | <input type="checkbox"/> |

_____	_____	_____
Name of Participant	Date	Signature

_____	_____	_____
Name of Researcher	Date	Signature

## **APPENDIX F: LIST OF RESPONDENTS**

1. Respondent 1: Trade Mark Examiner, Kenya Industrial Property Institute, 2<sup>nd</sup> May 2016, Nairobi.
2. Respondent 2: Legal Officer, Ethics and Anti-Corruption Commission, 11<sup>th</sup> May 2016, Nairobi.
3. Respondent 3: Legal Officer, Competition Authority of Kenya, 28<sup>th</sup> June 2016, Nairobi.
4. Respondent 4: Assistant Director Research, Anti-Counterfeit Agency, 28<sup>th</sup> July, 2016 Nairobi.
5. Respondent 5: Head of Trade and Investment, Kenya Private Sector Alliance, 18<sup>th</sup> July, 2016, Nairobi.
6. Respondent 6: Manager - Policy, Research and Advocacy, Kenya Investments Authority, 1<sup>st</sup> August, 2016, Nairobi.
7. Respondent 7: Head of Policy, Research and Advocacy- Kenya Association of Manufacturers, 3<sup>rd</sup> August, 2016, Nairobi.
8. Respondent 8: International Commercial Arbitration Expert & Law Lecturer, University of Nairobi, 10<sup>th</sup> August 2016, Nairobi.
9. Respondent 9: Head of International Trade, State Law Office, 15<sup>th</sup> August, 2016 Nairobi.
10. Respondent 10: Trade Officer, Ministry of Industrialization, Trade and Cooperatives, 16<sup>th</sup> August 2016, Nairobi.



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