

**THE RIGHT TO INFORMATION IN KENYA AND ITS POTENTIAL IMPACT ON
FOREIGN DIRECT INVESTMENT (FDI)**

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Declaration

I, JULIET AMBETSA SHISYA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

Date: 6/08/21

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

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Abstract

Information is a crucial component of any investment cycle. In an attempt to affirm this statement, this paper will discuss the ruling in the *Famy Care Limited* case. Arguing for the need to overturn the ruling, this paper will embark to illustrate its negative impact on foreign direct investment. It will show how the ruling severely limits the jurisprudence on the right to information in Kenya. Additionally, it will argue that the ruling fails to reflect the modern principles and trends on the right to information. From this, the paper will declare that the ruling undermines the attractiveness of Kenya as an investment location.

List of Abbreviations

1. GDP - Gross Domestic Product
2. FDI - Foreign Direct Investment
3. IMF - The International Monetary Fund
4. UN - United Nations
5. WTO - World Trade Organization
6. UNCTAD - United Nations Centre for Trade and Development
7. KEMSA - Kenya Medical Supply Agency
8. UDHR - Universal Declaration on Human Rights
9. ICCPR - International Convention on Civil and Political Rights
10. ACHPR - African Charter on Human and Peoples' Rights
11. TI - Transparency International
12. IP - Intellectual Property
13. RIA - Regional Integration Agreement
14. APEC - Asia-Pacific Economic Cooperation
15. ASEAN - Association of Southeast Asian Nations
16. MERCOSUR - Southern Common Market

List of Cases

1. *Famy Care Limited v Public Procurement Board and another* [2013] eKLR.
2. *Tinyefuze v Attorney General of Uganda* [1997] Court of Appeal of Uganda.
3. *Attorney General of Tanzania v Rev. Christopher Mtikila* [2010] Court of Appeal of Tanzania.
4. *In Re The Matter of Zipporah Wambui Mathara* [2010] eKLR
5. *Barcelona Traction, Light and Power Company Limited (New Application, 1962), Belgium v Spain*, Judgment, Merits, Second Phase, ICJ GL No 50, [1970] ICJ Rep 3
6. *Case of Claude Reyes et al v Chile, Claude Reyes v Chile*, Merits, reparations and costs, IACHR Series C no 151, IHRL 1535 (IACHR 2006), 19th September 2006, Inter-American Court of Human Rights [IACtHR]

List of Legal Instruments

1. Constitution of Kenya (2010)
2. Access to Information Act (No 31 of 2016)
3. Universal Declaration on Human Rights (UDHR)
4. International Convention on Civil and Political Rights (ICCPR)
5. African Charter on Human and Peoples' Rights (ACHP)

1. CHAPTER ONE

INTRODUCTION

1.1. Background

The basic goal of any state is to provide a good life for its citizens. This goal can only be achieved when the economy of that state can grow effectively.¹ According to the World Bank, the Gross Domestic Product (GDP) of Europe grew by approximately 1% compared to Africa's which grew by 5%.² This indicates that Africa's economy is growing at a faster rate than Europe. The global system is harmonizing standards across countries down to the lowest common denominator. This harmonisation has attracted multinational companies to invest in developing countries through Foreign Direct Investment (FDI).³

FDIs are investments made by a firm through the establishment of a base in another country that is not its own.⁴ The International Monetary Fund (IMF) provides that the purpose of the investment is to have an effective voice in the administration of the establishment.⁵

Research shows that FDI and economic growth have a causal relationship.⁶ A relationship that motivates countries focusing on growth to devote resources to the improvement of attractiveness vis-à-vis FDI.

Over the past few years, FDI has gained renewed importance as a vehicle for transferring resources and technology across national borders.⁷ Consequently, there has been a greater push by African countries to attract foreign investors. Some countries have succeeded while others have failed.

¹North D, *Institutions, institutional change and economic performance*, Washington University, St.Louis, 1992, 12.

²The World Bank, *Gross domestic product report*, Annual report, 2017, at <http://pubdocs.worldbank.org/en/908481507403754670/Annual-Report-2017-WBG.pdf>.

³Korten D, *When corporations rule the world*, Kumarian press, West Hartford 2005, 47.

⁴Alazzawi S, *Foreign direct investment and knowledge flows: Evidence from patent citation*, University of California, Mimeo, 2004, 18.

⁵The International Monetary Fund, *Balance of payments manual*, 5 ed, Washington DC, 1993, 22.

⁶Mebratu S, Renshui W, and Jihong L. 'Foreign direct investment and economic growth: The case of developing african economies' *Social indicators research*, 2015, 56 <https://ideas.repec.org/a/spr/soinre/v122y2015i1p45-64> on 1 March 2019.

⁷Shamsuddin D, Abul F, 'Economic determinants of foreign direct investment in less developed countries' 33 *The Pakistan development review* 1 (1994) 45.

In Kenya, after the disappointing period of the 1990s, the path to rapid economic growth resumed in 2002. Mwai Kibaki, the then Kenyan president, implemented the Economic Recovery Strategy paper.⁸ This strategy served for five years before it was replaced by Vision 2030: A vision launched to accelerate Kenya's transformation into a rapidly developing middle-income nation.⁹ Vision 2030 asserts that, to flourish and attract FDIs, the trade sector requires a policy environment that will increase competitiveness and improve the ease of doing business.¹⁰

Over the past years, in an attempt to improve the favourability and predictability of Kenya as an investment destination, the Government has assumed several policy reforms.¹¹ These efforts have however been futile as FDI inflows into the country remain significantly below its potential. In 2017, despite inflows to East Africa rising by 13%, FDI inflows to Kenya dropped by 36%.¹² Therefore, a continued effort to create and promote a conducive business environment remains of utmost importance to enable the promotion of FDI.

Considering this, one can argue that the ruling in *Famy Care Limited v Public Procurement Administrative Board & 5 others*¹³, is an impediment to FDIs. The ruling is counter-active to current efforts as it decreases the allure of Kenya to investors. This is due to the fact that it affords the right to information to Natural Kenyan citizens only.

1.2. Statement of Problem

A ruling such as the one in *Famy Care* alienates potential investors. It denies them useful information that would enable them assess risk and settle on Kenya as a potential investment destination. Furthermore, the ruling fails to positively differentiate Kenya from other East African countries competing for FDI. In general, the *Famy Care* ruling implies a lack of transparency that impedes trust and cooperation.

⁸Rasih R and Gachino G, 'Are foreign firms more productive and export- and technology-intensive than local firms in Kenyan manufacturing?' 33 *Oxford Development Studies* 2 (2005) 222.

⁹Government of the Republic of Kenya, Ministry of Planning and National Development and the National Economic and Social Council (NESC), Office of the President, *Vision 2030*, 2007. <https://vision2030.go.ke/>

¹⁰Government of the Republic of Kenya, Ministry of Planning and National Development and the National Economic and Social Council (NESC), Office of the President, *Vision 2030*, 2007. <https://vision2030.go.ke/publication/trade-2013-2017/>

¹¹Ateng' B and Arunga R, 'Constraints to foreign direct investment inflows to Kenya: Stakeholders' Perspective' 5 *International Journal of Education and Research* 10 (2017) 3.

¹²United Nations, World Investment Report: Investment and the Digital Economy, *Annual Report*, 2017,41. https://unctad.org/en/PublicationsLibrary/wir2017_en.pdf

¹³*Famy Care Limited v Public Procurement Board and another* [2013] eKLR.

1.3. Objectives of the study

This paper's main objective is to determine whether there is a need to overturn the decision made in the *Famy Care Limited* case.

The specific objectives are:

- I. To illustrate the implications of the ruling in the *Famy Care* case.
- II. To establish that transparency has a wide scope of effectiveness when it comes to increasing a country's attractiveness as an investment location.
- III. To establish that regional integration, although beneficial to the integrated area as a whole, requires the party states positively differentiate themselves to ensure favourable consideration during distribution among the member states.

1.4. Research questions

In the course of this study, this dissertation will seek to establish that the ruling in the *Famy Care* case should be overturned.

This will be done by answering the following questions:

- I. What are the implications of the ruling in the *Famy Care* case?
- II. What is the scope and effectiveness of transparency when determining the attractiveness of a location?
- III. What is the effect of regional integration and the role of positive differentiation in the competitive FDI market?

1.5. Significance of the study

Kenya's Vision 2030, coupled with President Kenyatta's Big Four Agenda, demand a large amount of capital investment. As of October 2019, Kenya's total public debt edged closer to the 6 trillion mark.¹⁴ Analysts from Citi Global Market provide that Kenya is one of the African countries receiving the largest pay-outs from China.¹⁵ The country has indulged in excessive borrowing and has amassed a huge debt for purposes of infrastructure and development. In order to prevent economic instability, it would be prudent to consider and promote other forms of funding to achieve these national goals. Forms of funding - such as FDIs - that will less harshly affect the economic lives of Kenyans.

1.6. Literature Review

1.6.1. Kenya's realities with regards to FDIs

In the 1970s, Kenya was considered one of the most favoured destinations for FDIs in East Africa.¹⁶ In recent years however, the country's appeal to investors has significantly decreased.¹⁷ The United Nations (UN) provided that this was significantly due to poor policies and inconsistent efforts at structural reforms.¹⁸ The former reason buttresses the hypotheses of this research. If Kenya has partly lost its attractiveness due to a policy problem, one can see how the *Famy Care* ruling adds to the issue. A denial of information to potential investors is a highly problematic policy as it implies a lack of transparency.

1.6.2. What do we understand by transparency in the context of inward FDI flow?

Forssbaeck and Oxelheim provide that transparency includes the effective communication of information on all things likely to affect investments.¹⁹

¹⁴ <https://www.centralbank.go.ke/public-debt/> on 26 November 2019.

¹⁵ Irungu G, 'Kenya debt passes Sh5.9 trillion mark' *Business Daily*, 15 October 2019 <https://www.businessdailyafrica.com/markets/capital/Kenya-debt-passes-Sh5-9-trillion-mark/4259442-5311388-12bs7d7z/index.html> on 26 November 2019.

¹⁶ Ochieng' W and Maxon M, *An economic history of Kenya*, East African Educational Publishers, Nairobi, 1992, 75.

¹⁷ Ngugi R, Nyang'oro O and Kenya Institute for Public Policy Research and Analysis: Private Sector Development Division, *Institutional factors and foreign direct investment flows: Implications for Kenya*, 2005, 41.

¹⁸ UNCTAD, *Investment policy review; Kenya*, October 2009, at <https://investmentpolicy.unctad.org/investment-policy-review>

¹⁹ Lehmann F and Tavares-Lehmann A, 'Transparency and inward investment incentives', in Forssbaeck J & Oxelheim L, *The Oxford Handbook of Economic and Institutional Transparency*, 1ed, Oxford University Press, 2014, 306.

Drabek and Payne on the other hand, approach transparency from the negative. They give the following definition of non-transparency: ‘Policies increasing the risk and uncertainty met by investors.’²⁰

The transparency feature highlighted above, taken with the definition of non-transparency, assert how crucial information is in dispelling risk and uncertainty. By upholding information as a salient feature of transparency, these provisions reinforce the hypotheses of this paper.

Additionally, the World Trade Organization (WTO) - while discussing barriers to trade - suggested that information ought to be coherent and easily available to all members.²¹ This need for information symmetry further confirms the relevance of information with regards to investment.

The United Nations Centre for Trade and Development (UNCTAD) asserts that transparency is closely attached to the objectives of the international investment framework. It is critical at different moments of the investment cycle: Pre establishment transparency assists investors in the decision-making process, while during operation, it ensures due process.²²

Having established information as a salient feature of transparency, the above discussion on its vitality in the pre-establishment stage, further supports the hypothesis of this paper.

1.6.3. How does transparency shape inward FDI-quantity and quality?

Generally, non-transparency has been held responsible for several financial crises. The IMF provides that it was both a feature in the build-up to the Mexican crisis of 1994-1995 as well as the market crisis of 1997-1998.²³ Accordingly, this has resulted in the promotion of

²⁰Drabek and Payne, ‘The impact of transparency on foreign direct investment’, World Trade Organization(WTO): Economic Research and Statistics Division, WTO Staff Working Papers ERAD-99-02, 2009, 14 <https://ideas.repec.org/p/zbw/wtowps/erad9902.html> on 28 January 2019.

²¹WTO, ‘Information sharing and transparency’, 2 September 2015, at http://mddb.apec.org/Documents/2015/SOM/DIA4/15_som_dia4_006.pdf

²²UNCTAD, *Towards a new generation of investment policies*, World Investment Report, 2012, at https://unctad.org/system/files/official-document/wir2012_embargoed_en.pdf

²³IMF, *Fiscal Policy and Macroeconomic Stability*, World Economic Outlook, 11 September 2011.

transparency among countries as well as numerous steps by international financial institutions to become more transparent in their operations.²⁴

Transparency is encompassed within a good institutional environment. It is an enabling condition of critical importance for the creation of a predictable stable and secure climate for foreign investment.²⁵

Mudambi and Navarra place a lot of emphasis on the importance of environment for FDI.²⁶ Equally, Smarzynska and Wei provide that a lack of transparency acts like a tax on foreign investors.²⁷ Oxhlein however, provides the basic argument explaining why transparency could affect inward FDI: He argues that a lack of transparency increases the risk and uncertainty encountered within the host country.²⁸ Investors faced with these liabilities would be willing to bet a relatively smaller stake of capital than otherwise under a more transparent setting.²⁹

In addition to dispelling risk and uncertainty, transparency attracts FDI as it enables one to identify potential opportunities and to inform market expectations. This creates credibility and accountability.³⁰ Empirical literature also arrives at the basic conclusion that less transparency leads to lower levels of FDI.³¹

1.6.4. Conclusion

Even though the exact percentage is debatable, literature recognises information as a salient feature of transparency and asserts its non-negligible effect on FDI inflows.

²⁴Gelos R and Wei S, 'Transparency and International Investor Behavior' National Bureau of Economic Research, Working Paper Number 9260, 2012, 2 <https://www.nber.org/papers/w9260> on 18 February 2019.

²⁵https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm on 28 September 2019.

²⁶Mudambi R and Navarra P, Institutions and International Business, 11 *International Business Review* 6 (2002) 663.

²⁷Smarzynska B and Wei S, 'Corruption and cross-border investment: firm-level evidence' William Davidson Institute at the University of Michigan, William Davidson Institute Working Paper Series Number 494, 2002, 6 <https://econpapers.repec.org/paper/wdipapers/2002-494.htm> on 10 August 2019.

²⁸Oxelheim L, Globalization, transparency and economic growth: The vulnerability of Chinese firms to macroeconomic shocks, 21 *Journal of Asian Economics* 1 (2006) 14.

²⁹Globerman S and Shapiro D, Governance infrastructure and US foreign direct investment, 34 *Journal of International Business Studies* 1 (2013) 29.

³⁰Seyoum B, Formal institutions and foreign direct investment, 51 *Thunderbird International Business Review* 2 (2009) 168.

³¹OECD, *Annual Report*, 29 April 2002, at <http://www.oecd.org/about/2080175.pdf>.

1.7. Theoretical Framework

This dissertation will rely on the Eclectic Approach Theory. It is the most widely accepted theory of FDI. It argues that a firm's investment in an economy other than its own is based on the configuration of ownership, location and internalization (OLI) conditions.³²

To begin with, investors require an ownership benefit when compared to local establishments. With regards to location, it must also be advantageous for investors to produce in the host country. Lastly, it should be attractive to investors to commence business activity within the host country; they should not be faced with strenuous obstacles.

In the context of this dissertation, the eclectic approach theory is crucial. The theory asserts that investors need to be certain of the advantages related to ownership, location and internalization. Considering the objective is to analyse the impact of non-transparency on FDI attractiveness, I will assume that the ownership advantages of firms are constant. My focus will be on the host country's location and internalization advantages: The ones responsible for creating a favourable business environment.

Considering the theory's assertion of the crucial nature of a favourable business environment, it is apparent that the *Famy Care* ruling places Kenya in a negative light. By denying potential investors the ability to confirm the presence of a suitable environment, it deters their interest to set up due to the uncertainty.

1.8. Research hypothesis

The following hypotheses will be proved or disproved by the end of this dissertation:

- I. That the ruling in the *Famy Care* case confines the jurisprudence on the right to information in Kenya and fails to reflect the contemporary principles and trends surrounding the right.
- II. That transparency has a wide scope of effectiveness when it comes to improving the attractiveness of a Country as an investment location

³² Dunning J, *Multinational Enterprises and the Global Economy*, Addison Wesley Publishing Co, Harlow, 1993, 97.

- III. That distribution of FDI among member states in an integrated region relies on how each state positively differentiates itself.

1.9. Assumptions

This paper works with the assumption that:

- I. Policies in transition economies have a wide scope of effectiveness with regards to FDI attraction
- II. Denial of information to non-citizens and corporations implies a lack of transparency openness and cooperation by a country.
- III. An absence of transparency is detrimental to a country's attractiveness as an investor destination.

1.10. Research design and methodology

By virtue of this dissertation being an investigative study, desktop research will be the primary means of data collection. Both primary and secondary sources of information will be relied on to establish truths on the practical aspects of the paper.

1.11. Statement of limitations

I anticipate the following challenges in the course of my research:

- I. *Inaccessibility of data*: Primary sources of information, such as the actual investors, would provide more credible information regarding what affects their choices of host countries. The apparent challenges in contacting these multinational corporations creates a barrier for attaining relevant data.
- II. *Time*: FDI is a phenomenon currently being discussed all over the world, therefore, there is a lot of material on the topic. Given the limited time frame, I expect to meet some challenges in collecting and effectively interpreting all the data suitable for my research.

1.12. Chapter breakdown

Chapter One: *Introduction*. This chapter comprises the background of study, statement of the problem, a review of existing literature, objectives of study, hypothesis and scope of the study. It is the introductory chapter of the dissertation.

Chapter Two: *An analysis of the ruling in Famy Care Limited case*. This chapter will provide a summary of the ruling in the *Famy Care* case. It will then attempt to illustrate that the ruling severely limits the jurisprudence on the right to information in Kenya and does not reflect the modern principles and trends on the right to access of information.

Chapter Three: *The scope and effectiveness of transparency in determining a country's attractiveness as an investor destination*. This chapter will attempt to illustrate that transparency has become a crucial component in finance and economics. It will highlight the role that transparency plays in attracting FDI and improving the attractiveness of a country as an investor location.

Chapter Four: *Regional Integration and FDI*. This chapter will embark on an analysis of the effects of integration to the integrated area, then, individually to the party states. It will also address how states within these integrated areas can further differentiate themselves to ensure that distribution accommodates their interests.

Chapter Five: *Conclusion and Recommendations*. This will be the final chapter of this dissertation. It will highlight the conclusions made after conducting the research. It will also provide concise recommendations as to how Kenya could promote FDI through the scrutiny of its policies and decisions.

2. CHAPTER TWO

AN ANALYSIS OF THE RULING IN THE FAMY CARE LIMITED CASE

2.1. Introduction to the case

2.1.1. Facts of the Famy Care Limited case

This case arose by virtue of a tender. A tender floated by the Kenyan Government for the supply of family planning commodities

Famy Care Limited, an international organisation situated in India, partook in the tender but failed to acquire it. Unable to understand the reasons for its unsuccessful bid, the organisation filed two applications seeking information. Relying on Article 35 of the Kenyan Constitution, the organisation sought information from both Kenya Medical Supplies Authority (KEMSA) and the Pharmacy and Poisons Board.

When the matter came up for hearing, a preliminary objection was raised by KEMSA who argued that Article 35 was not an entitlement the petitioner could seek. This objection was based on the country of incorporation of Famy Care Limited. The Court agreed with KEMSA and both applications were dismissed on the aforementioned grounds.

2.1.2. Summary of the Court's findings

The High Court's ruling presents two relevant holdings regarding Article 35 of the Kenyan Constitution.

1. That Kenyan Citizens are the only persons entitled to the right.
2. That Juridical persons are excluded from the enjoyment of the right.

2.2. The Bill of Rights and the Constitution

The right to information is one of the fundamental rights and freedoms highlighted in the 2010 Constitution. The same Constitution provides how the Bill of Rights should be enforced: Article 20(4) asserts that the courts should not only promote the spirit but also the objects of the Bill of Rights. Additionally, it provides for the need to uphold the values underlying a

democratic civilisation.³³ Article 20(3) then provides that courts adopt interpretations that develop the law and favor the application of rights.³⁴ It also stipulates that rights and freedoms should only be restricted by law, and only to a justifiable degree.³⁵ In fact, specific factors are provided for consideration when claiming to limit a right. Among them, is the importance of the purpose of the limitation.³⁶

Considering the above Constitutional provisions, the Court should to have addressed the purpose underlying the limitation. Was there any reasonable justification to deny the corporation information?

Furthermore, in its judgement, the Court acknowledged the importance of the Constitution being interpreted as whole.³⁷ As stated in *Tinyefuze v Attorney General of Uganda*, one particular provision should not destroy another, rather, it should sustain it.³⁸ This is the holistic approach buttressed in the *Rev. Christopher Mtikila* case.³⁹

In view of this principle, it is important to note that Article 33 of the Constitution also provides for the right to information.⁴⁰ In this article however, the words ‘every person’ are used. The Constitution then emphasizes the equality of every person before the law.⁴¹ It asserts that this equality encompasses equal enjoyment of all rights.⁴² As such, the Court’s interpretation ought to have advanced and not undermine the right to information.

Additionally, in accordance with article 19(1), the Court should have favored an interpretation that promotes the economic development of Kenya.⁴³

³³ Article 20(4), *Constitution of Kenya* (2010).

³⁴ Article 20(3), *Constitution of Kenya* (2010).

³⁵ Article 24(1), *Constitution of Kenya* (2010).

³⁶ Article 24(1), *Constitution of Kenya* (2010).

³⁷ [2013] eKLR.

³⁸ *Tinyefuze v Attorney General of Uganda* [1997] Court of Appeal of Uganda.

³⁹ *Attorney General of Tanzania v Rev. Christopher Mtikila* [2010] Court of Appeal of Tanzania.

⁴⁰ Article 33, *Constitution of Kenya* (2010).

⁴¹ Article 27(1), *Constitution of Kenya* (2010).

⁴² Article 27(2), *Constitution of Kenya* (2010).

⁴³ Article 19(1), *Constitution of Kenya* (2010).

2.3. Corporate Citizenship

The *Famy Care* ruling also gave rise to the question of corporate citizenship. Regarding this issue, the Court held that the constitutional provisions in the citizen chapter buttress that citizenship refers to natural persons.⁴⁴

However, contrary to this conclusion, the Constitution alludes to a company's ability to acquire citizenship: It provides for citizenship through birth or registration.⁴⁵ Since no parameters are provided by law for registration, it could include that under the Companies Act. One can therefore argue, relying on Article 13(2), that a company acquires citizenship once registration is done under the Companies Act. Furthermore, one of the definitions provided for a citizen in Black's Law Dictionary is an establishment incorporated and having its primary place of business within the respective country.⁴⁶

Considering the Constitution fails to give a direct definition of the term citizen, its use under Article 35 is *sui generis*. It should therefore not be purported to affect Article 13, especially if the result is the limitation of a right. Referring to corporations as citizens should not be understood literally, it simply means that the actions carried out by these establishments could be taken as being parallel to those of natural citizens.⁴⁷

2.4. International Law and Standards

Articles 2(5) and 2(6) of the Kenyan Constitution provide for international laws to form part of the laws of Kenya. The Constitution then further asserts that the Bill of Rights does not exclude other rights not found in it.⁴⁸

At the international level, the right to information has been codified in several instruments. This has created an international standard for persons entitled to the right. The right is provided for both in the Universal Declaration on Human Rights (UDHR)⁴⁹ and in the International

⁴⁴ [2013] eKLR.

⁴⁵ Article 13(2), *Constitution of Kenya* (2010).

⁴⁶ Black's Law Dictionary, 3 ed.

⁴⁷ Moon J, Crane A and Matten D, 'Can corporations be citizens? Corporate citizenship as a metaphor for business participation in society' 15 *Business Ethics Quarterly* 3 [2005] 12.

⁴⁸ Article 19(3), *Constitution of Kenya* (2010).

⁴⁹ Article 19, *UDHR*, 10 December 1948.

Convention on Civil and Political Rights (ICCPR).⁵⁰ These provisions assert that the right to seek and obtain information ought to be available to everyone.

By virtue of Kenya being a party to these treaties, it should afford the right to access information to everyone.

Although the Court did not consider the above provisions, it acknowledged that the African Charter on Human and Peoples' Rights (ACHPR) has been ratified by Kenya.⁵¹ The ACHPR recognizes and upholds the right to information: In it, the words 'every individual' are used to describe persons entitled to the right.⁵² Article 9, which provides for the right to information, is in fact nearly identical to Article 33 of the Kenyan Constitution. It would therefore not be unreasonable to declare that Article 33 also governs the right to information.

Apart from these treaties, Kenya is also a member of the WTO. One of its obligations, by virtue of this membership, is the principle of non-discrimination. It provides that members - in trade relations – should refrain from affording their nationals more favourable treatment compared to foreigners.⁵³ Therefore, by denying foreign investors information available to local investors, Kenya is in contradiction of this principle. Furthermore, this stance undermines the transparency pillar which requires states - for effective enforcement of commitment - afford information to all members.⁵⁴

From the above, it is apparent that Kenya is in contradiction of its international obligations thus sending disparate signals to its international trading partners.

2.4.1. *The monist/dualist debate*

The conclusion that Kenya violates its international obligations, although true, is based on the assumption that Kenya is a monist state. In its truest form, monism considers international law to not only have direct domestic application but also rank above contrary local law.⁵⁵ Despite the fact that Kenya is a monist state by virtue of article 2(5) and 2(6) which permit direct application of international law, arguments exist that article 2(1) and 2(4) entrench the principle of constitutional supremacy.⁵⁶

⁵⁰Article 19, *ICCPR*, 16 December 1966, 2200A XXI.

⁵¹[2013] eKLR.

⁵²Article 9, *ACHPR*, 2 November 1987.

⁵³<http://www.kenyalaw.org/kl/index.php?id=1904> on 15 January 2020.

⁵⁴Wolfe R, 'Regulatory transparency, developing countries and the WTO' 2 *World Trade Review* 2 [2014] 162

⁵⁵ Odour M, *The Status of International Law in Kenya*, 2 *Africa Nazarene University Law Journal* 2 (2014), 97.

⁵⁶ Article 2(1) and 2(4), *Constitution of Kenya*, 2010.

Supporters of this outlook argue that by placing the issue of international law within the supremacy clause, the supremacy of the Kenyan Constitution is affirmed vis a vis international law.⁵⁷ With respect to the interplay between international law and local statutes, as was seen in the *Wambui Mathara case*, international law may prevail over inconsistent provisions of a local statute.⁵⁸

Despite this argument on Constitutional supremacy, it is important to note that matters regarding human rights have often been considered an exception to the rule. This is due to the erga omnes nature of these obligations. As was provided in the *Barcelona Traction case*, such responsibilities concern all states due to the importance of the rights involved.⁵⁹ Furthermore, in the *Claude Reyes et al v Chile*, it was held that the right to information is a human right.⁶⁰ Therefore, although in practice, the Constitution generally supersedes international law, in this case, it fails to do so because of the nature of the right.

A different interpretation would revert the courts to the days when international law was anathema yet those are the days Kenya wanted to get away from by formally recognizing international law as one of the applicable laws. The international law regime, especially when it comes to human rights, is believed to encapsulate not only higher values and aspirations but also sound and fair principles which any progressive legal system should embrace.⁶¹

2.5. The Access to Information Act

The right to information has yet to be effectively realised. There ought to be an intricate legal document identifying not only persons entitled to the right, but also when, where and how they can access this information.⁶² The Access to Information Act serves a significant step towards the realization of the right.

⁵⁷ Orago N, The Monist Dualist Dilemma and the place of International Law in the Hierarchy of Valid Norms under the 2010 Constitution, *12 African Human Rights Law Journal* 2 (2014), 74.

⁵⁸ *In Re The Matter of Zipporah Wambui Mathara* [2010] eKLR

⁵⁹ *Barcelona Traction, Light and Power Company Limited (New Application, 1962)*, *Belgium v Spain*, Judgment, Merits, Second Phase, ICJ GL No 50, [1970] ICJ Rep 3

⁶⁰ *Case of Claude Reyes et al v Chile*, *Claude Reyes v Chile*, Merits, reparations and costs, IACHR Series C no 151, IHRL 1535 (IACHR 2006), 19th September 2006, Inter-American Court of Human Rights [IACtHR]

⁶¹ Oduor M, The Status of International Law in Kenya, *2 Africa Nazarene University Law Journal* 2 (2014), 97.

⁶² Warui J, 'Access to information in Kenya' 155 *Adili*, 2015, at <https://tikenya.org/wp-content/uploads/2017/06/adili-155-access-to-information-in-kenya.pdf>

With regards to whom the right is available, the Act re-iterates the word citizen as used in the Constitution.⁶³ The same Act however, when addressing limitations to the right, provides for disclosure of information where there is a significant public interest involved.⁶⁴ It further provides that regard for constitutional principles ought to be had when considering the public interest.

Looking at the provisions of this Act, it is apparent yet again that the use of the word citizen should not be interpreted literally. Such an interpretation undermines public interest and contradicts the Constitutional principles of accountability and transparency.⁶⁵

2.6. Constitutional provisions for the right to information

A constitutional provision is important for the recognition of access to information as a fundamental human right.⁶² South Africa is the country which has the broadest and most comprehensive constitutional provision regarding the right to information. In South Africa's Constitution, as is with numerous European states, the word 'every person' is used to describe those persons who are afforded the right to information.⁶³ These states therefore avert the interpretation burden placed upon the Kenyan courts in the *Famy care case*. The lack of a limitation enables these states to easily comply with international standards. Therefore, the manner in which the Kenyan Constitution provides for this internationally acknowledged human right clearly undermines its application.

2.7. Conclusion

Using the Constitution and International law, this chapter has analysed the *Famy Care* case. From these, it is ostensible that the holdings of the case limit and undermine the right to information in Kenya. The ruling does not reflect the current principles and trends regarding the right. Furthermore, it violates the national values in the Kenyan Constitution accentuated as principles of governance.

Also, important to note, is that the ruling is the first decision by the Courts defining who is eligible to access information in Kenya. Consequently, in accordance with the doctrine of

⁶² Section 4(1), *Access to Information Act* (No 31 of 2016).

⁶³ Section 6(4), *Access to Information Act* (No 31 of 2016).

⁶⁴ Article 10, *Constitution of Kenya* (2010).

⁶⁵ Constitutional Provisions for Access to Information at <https://www.access-info.org/2013-07-15/constitutional-provisions-for-ati/>

⁶³ Section 32, *The Constitution of South Africa*, 1996.

precedent, lesser courts will be bound by this interpretation whereas it will be influential to courts of concurrent jurisdiction. These implications alone, reveal the need for a less literal reading and interpretation of article 35.

3. CHAPTER THREE

THE ROLE AND SCOPE OF TRANSPARENCY VIS-A-VIS FOREIGN DIRECT INVESTMENT

3.1. Introduction

This chapter deals with the issue of transparency as it relates to inward FDI. FDI is a vital component of a functioning financial system and a key catalyst for progress.⁵⁹

Generally, a lack of transparency is alleged to defer the investments to a country.⁶⁰ Non-transparency exists where access to information is denied.⁶¹

Over the past few years, transparency has increased in popularity as a topic of discussion. Regardless of its novelty, it has become a ubiquitous topic in business and finance, as well as amongst businessmen and policy makers.⁶² The present value attached to transparency is largely due to the financial turmoil witnessed in both Mexico and Asia: These crises confirmed that the availability of timely and complete information is vital for the stability of economic markets. The IMF's former managing director: Michel Camdessus, proclaimed transparency as the "golden rule" prior to the novel international financial system.⁶³

Although its popularity has grown significantly in recent years, transparency has been enshrined for decades. In 1913, in an article entitled "What Publicity Can Do", Brandeis stated that 'sunlight is said to be the best of disinfectants'.⁶⁴

⁵⁹Sisili T, 'FDI and its determinants of India' 4 *International Journal of Scientific & Engineering Research* 1 (2013) 4.

⁶⁰Zhao J, Kim S and Du J, 'The Impact of Corruption and Transparency on Foreign Direct Investment: An Empirical Analysis' 43 *Management International Review* 1 (2003) 46.

⁶¹Vishwanath T and Kaufmann D, 'Toward Transparency: New Approaches and Their Application to Financial Markets' 16 *The World Bank Research Observer* 1, (2001) 51.

⁶²Drabek and Payne, 'The impact of transparency on foreign direct investment' World Trade Organization: Economic Research and Statistics Division, WTO Staff Working Papers ERAD-99-02, 2009, 7 <https://ideas.repec.org/p/zbw/wtowps/erad9902.html> on 28 October 2019.

⁶³Taken from his speech at the 24th Annual Conference of the International Organization of Securities Commission in Lisbon, on 25 May 1999.

⁶⁴<https://sunlightfoundation.com/2009/05/26/brandeis-and-the-history-of-transparency/> on 20 July 2019.

At the time, ‘publicity’ referred to both public relations as well as the exercise of availing information to the people.⁶⁵ The latter definition appears like what we now mean by transparency.

The concept of transparency is extremely broad. In this chapter however, this paper will only discuss and consider the features of transparency vis-à-vis governmental policies and processes.

3.2. Scope of Transparency in FDI: Norms and Process

Transparency can be associated with both the norms and processes of an investment location. Norms are principles that bind persons of a particular group and serve to regulate appropriate and acceptable conduct.⁶⁶ Up to the 1980s, norms were the primary tool used to show transparency.⁶⁷ However, in the 1990s, there was the creation of national agencies charged with the promotion of territories as FDI destinations.⁶⁸ This was due to the realization that the system still bore deterrents to FDI. This additional feature to transparency, moved FDI incentives beyond the realm of normativity and landed it in the realm of processes. A change that rendered the issue of transparency more complex.⁶⁹

3.3. The Top-down Nature of Incentives toward FDI and Respective Transparency Implications

For an investment to land in a specific location, it needs approval at all territorial levels.⁷⁰ Accordingly, just because transparency is achieved at the national level does not mean that the incentives that would ultimately permit its landing are respectful of that transparency.⁷¹

⁶⁵Stoker K, ‘Paradox in Public Relations: Why Managing Relating Makes More Sense Than Managing Relationships’ 26 *Journal of Public Relations Research* 4 (2014) 26.

⁶⁶Merriam Webster Dictionary, 4ed.

⁶⁷Lehmann F and Tavares-Lehmann A, ‘Transparency and inward investment incentives’, in Forssbaeck J & Oxelheim L, *The Oxford Handbook of Economic and Institutional Transparency*, 1ed, Oxford University Press, 2014, 303.

⁶⁸ Lehmann F *et al*, ‘Transparency and inward investment incentives’ 311.

⁶⁹Lehmann F *et al*, ‘Transparency and inward investment incentives’ 319.

⁷⁰Lehmann F *et al*, ‘Transparency and inward investment incentives’ 321.

⁷¹Lehmann F *et al*, ‘Transparency and inward investment incentives’ 321.

To further complicate the issue of multilevel transparency, an additional territorial jurisdiction operates on top of the national level.⁷² These blocs agree on a set of rules that regulate the incentives toward FDI. An example of these jurisdictions are the blocs forming the East African Community (EAC), the Asia-Pacific Economic Cooperation (APEC), the European Union (EU) and the WTO.

These blocs, however, remain aligned with the top-down approach of incentives. Here, a multilateral layer comes on top of the national level in organizing the incentives toward inward investment.

3.4. Origin of non-transparency in FDI

Generally, when it comes to FDI, a lack of transparency is attached to five different origins: (1) Corruption and Bribery, (2) Absence of property rights protection, (3) Bureaucratic Inefficiency (4) Disregard for the Rule of law and (5) Unpredictable policy variations.⁷³

3.4.1. Corruption and Bribery

These features serve as serious obstacles for investment. This is because they strengthen the bargaining position of the corrupt.⁷⁴ This bargaining power implies the corrupt nature of a country.

Transparency International (TI), a non-governmental organization, purposes itself with combating global corruption.⁷⁵ It serves two purposes in non-transparent countries: It deters corrupt officials and it reassures investors that the situation is under control.⁷⁶ The latter function indicates that investors, prior to investment, consider the opinion of TI. Considering this, TI's ranking of Kenya at 124 out of 180 countries⁷⁷, signals that the country is highly corrupt.

⁷²Lehmann F *et al*, 'Transparency and inward investment incentives' 321.

⁷³ Lehmann F *et al*, 'Transparency and inward investment incentives' 322.

⁷⁴ Reilly P, 'Negotiating bribery: Toward increased transparency, consistency, and fairness in pretrial bargaining under the foreign corrupt practices act' 10 *Hastings Business Law Journal* 2, (2014) 35.

⁷⁵ https://www.transparency.org/whoweare/organisation/faqs_on_transparency_international/9 on 10 August 2019.

⁷⁶ Lehmann F *et al*, 'Transparency and inward investment incentives' 326.

⁷⁷<https://www.transparency.org/en/countries/kenya#> on 18 January 2021.

Furthermore, corruption is not only detrimental to foreign investors, it also brings extra costs to host countries.⁷⁸

3.4.2. *Absence of property rights protection*

Industrialising countries are particularly susceptible to difficulties associated with protecting intellectual property (IP) rights.⁷⁹ Such inadequacies are argued to deter FDI. The National Economic Research Associates buttresses this assertion in a recent study. In the study, they argue that a strong protection of IP rights is beneficial to countries focused on development: Inward FDI is stimulated due to the reduced risk of expropriation of investment ideas.⁸⁰

3.4.3. *Bureaucratic Inefficiency and Disregard for the Rule of law*

When government services are unstable, the exposure to risk increases for investors. This serves as an impediment for investments.⁸¹ Non transparency is related to these aspects by virtue of it facilitating delays and the subjective application of rules.⁸²

3.4.4. *Unpredictable policy variations*

A lack of transparency is also associated with impulsive policy reversals. Reversals that are likely to damage, *inter alia*, privatization contracts of foreign investors.⁸³ When a country is not transparent, investors are troubled by the changes that could arise and affect them without their knowledge.

3.4.5. *Conclusion*

It is apparent that a lack of transparency comes with its own connotations; nuances that serve as deterrents to FDI. Therefore, where there is a lack of transparency, the implications are far more reaching than expected and the risk to investors increases. Given the relative

⁷⁸ Tanzi V and Davoodi H, 'Corruption, Public Investment, and Growth' International Monetary Fund, IMF Working Paper Number 97/139, 2006,14 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=882701 on 12 August 2019.

⁷⁹ Long C, 'Intellectual property rights in the developing world' 1 *The Federalist Society* 2, 1997, 20.

⁸⁰ Blomstrom M and Kokko A, 'Regional Integration and Foreign Direct Investment' National Bureau of Economic Research, NBER Working Paper Number 6019, 1997, 1 <https://www.nber.org/papers/w6019> on 18 December 2019.

⁸¹ OECD, *Managing across levels of Government*, 1997, at <http://www.oecd.org/governance/budgeting/1902308.pdf>

⁸² Lehmann F *et al*, 'Transparency and inward investment incentives' 328.

⁸³ Lehmann F *et al*, 'Transparency and inward investment incentives' 328.

irreversibility of FDI, the incentive would have to be immense for investors so as to undertake ventures where they perceive a high level of risk.⁸⁴

3.5. Why is transparency important for FDI?

Fundamental to the negative effect of non-transparency is the presumption that, *ceteris paribus*, investors are likely to choose an open national market.⁸⁵

3.5.1. *The cost-inducing nature of low transparency*

When firms must source information normally provided by the government, an extra cost arises.⁸⁶ Also, as previously discussed, low transparency increases the bureaucratic inefficiency of a country. This inadequacy can be translated into various potential hidden costs.⁸⁷ Given this cost-inducing nature of non-transparency, investors are likely to be deterred to more suitable areas.

3.5.2. *The legal implication of non-transparency to investors*

FDI represents a source of external capital to a country. Persons investing will therefore consider non-transparency as undermining their legal protection.⁸⁸ This will prevent them from committing in such markets.

3.5.3. *Low transparency implies high uncertainty*

When host governments are vague or evasive with information, uncertainty increases for potential investors. This enhanced uncertainty compounds the complexity of managing FDI in a foreign country. Also, due to the untraceable nature of non-transparency, its impacts often

⁸⁴ Serven L, 'Irreversibility, uncertainty and private investment: Analytical issues and some lessons for Africa' 6 *Journal of African Economies* 3 (1997) 241.

⁸⁵ The impact of corruption and transparency on foreign direct investment: an empirical analysis, 2014, 47 <https://www.thefreelibrary.com/The+impact+of+corruption+and+transparency+on+foreign+direct...-a0100880197> on 9 July 2019.

⁸⁶ Lehmann F *et al*, 'Transparency and inward investment incentives' 330.

⁸⁷ Lehmann F *et al*, 'Transparency and inward investment incentives' 330.

⁸⁸ Porta R, Lopez-De-silanes, Shleifer A and Vishny R, 'Legal determinants of external finance' 52 *The Journal of Finance* 3 (2012) 43.

fail to draw public attention.⁸⁹ These uncertainties elevate worries of inequitable treatment by investors.⁹⁰

3.5.4. *Transparent policies positively influence business attitudes*

Investors naturally pursue national markets with open policies: This is because they lessen the threats arising from unforeseeable surprises.⁹¹

3.5.5. *Transparency helps in tackling corruption*

Corruption hurts. Transparency can help tackle corruption by exposing the corrupt relationship to the knowledge of others. Corruption is illegal in all countries and therefore can only be effective in an environment of opacity. Transparency combats corruption by solving the information asymmetries in the market.⁹²

3.6. Conclusion

A host-country that lacks transparency increases information costs and deters business energies. This acts as a great deterrence for investors not privy to locally accessible information.

Transparency is a tool. It is not an end in itself: It enables the achievement of further goals.⁹³ Therefore, vis-a-vis FDI promotion, the goal is to reach a level of transparency that is conducive to maximize the quality and quantity of FDI.

A country that prioritizes the improvement of its policies vis-a-vis transparency can assume a substantial rise in the level of investments. A simulation exercise confirmed that a single-point increase in transparency ranking can result in a 40% increase in FDI.⁹⁴ Clearly, transparent policies are vital for foreign investors. Given an option between a transparent and a less transparent location, potential investors will always favour the former.⁹⁵

⁸⁹ Lehmann F *et al*, 'Transparency and inward investment incentives' 332.

⁹⁰ Lehmann F *et al*, 'Transparency and inward investment incentives' 332.

⁹¹ Drabek *et al*, 'The impact of transparency on foreign direct investment,' 5.

⁹² Lehmann F *et al*, 'Transparency and inward investment incentives' 331.

⁹³ OECD, *Implementation guide to ensure accountability and transparency in state ownership*, 3 March 2008, at <https://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/40096845.pdf>

⁹⁴ Drabek *et al*, 'The impact of transparency on foreign direct investment,' 2.

⁹⁵ Lehmann F *et al*, 'Transparency and inward investment incentives' 331.

Accordingly, there is a crucial need to create a transparent and comprehensive policy environment: One that promotes FDI by enabling investors. *Pari passu*, a state's need for investment compared to its neighbours may be more acute, however, due to its lack of transparency FDI will flow to the more transparent nation.⁹⁶

⁹⁶ Drabek *et al*, 'The impact of transparency on foreign direct investment,' 17.

4. CHAPTER FOUR

REGIONAL INTEGRATION AND FOREIGN DIRECT INVESTMENT

4.1. Introduction

In efforts to accrue benefits from FDI, countries have prioritized reforms that ensure competitiveness vis-à-vis FDI policy packages. These efforts have resulted in an aggressive rivalry to attract investment from all over the world.⁹⁷ Consistent with UNCTAD statistics, global FDI inflows are argued to have jumped by 48% as developing economies see inflows reach a new high.⁹⁸ In an attempt to ensure these inflows reach their areas, developing countries are working to increase their attractiveness as investment locations.⁹⁹

In the past few years, a deepening and widening of European Integration has been witnessed. In addition to this, the proliferation of new regional integration agreements (RIAs) has also been apparent.

Although political aspirations remain a consideration, economics is the main motivating force of most RIAs.¹⁰⁰ The short-term goal of integration is to encourage intra-regional trade and investment. Long term however, member states desire a boost in economic growth.¹⁰¹ Clearly, these blocs acknowledge how larger markets, tougher competition and efficient resource allocation will increase attractiveness.

This chapter will address the investment effects arising in the integrated region due to RIAs.

4.2. Regional Economic Integration and FDI into the integrating region

⁹⁷Hussain F and Hussain S, 'Determinants of Foreign Direct Investment (FDI) in Pakistan: Is China Crowding Out FDI Inflows in Pakistan?' *The Pakistan Development Review* (2016) 130
<https://www.jstor.org/stable/44986479> on 13 January 2020.

⁹⁸ <https://unctad.org/en/Pages/DIAE/FDI%20Statistics/FDI-Statistics.aspx> on 12 December 2019.

⁹⁹ Ngongang E, 'Foreign direct investment in regional integration: Comparative attractiveness in the CEMAC and UEMOA economic spaces' 1 *European Journal of Sustainable Development* 3 (2012) 426.

¹⁰⁰ Blomstrom M and Kokko A, 'Regional integration and foreign direct investment' National Bureau of Economic Research, NBER Working Paper Number 6019, 1997,11 <https://www.nber.org/papers/w6019> on 18 December 2019.

¹⁰¹ Blomstrom M *et al*, 'Regional integration and foreign direct investment,' 11.

RIAs have reduced trade barriers and significantly increased FDI within the integration region.¹⁰² Two known theories prescribe how economic integration effects investments: market size and fortress effects.¹⁰³

The former theory maintains that, investors are motivated to capitalise in a region due to an increase in the size of the market.¹⁰⁴ Before integration, the individual host country markets are likely too small. A problem that denies investors the internalization competitive advantage. Integration however, by increasing the size of the ‘local’ market, encourages and justifies investments. This theory aligns with studies that assert the significance of market size vis-à-vis FDI.¹⁰⁵

On the other hand, the fortress effects theory argues that economic integration increases the barriers to trade for outsiders. These barriers to competitors from non-member states increase the incentive for investment.¹⁰⁶ Foreign investors are encouraged by the assured low levels of competition.

Looking at the example of the Association of Southeast Asian Nations (ASEAN): It has transformed into a vehicle of harmonisation and collaboration. In the course of her presidential campaign, Hillary Clinton referred to it as the fulcrum of emerging architecture in the region.¹⁰⁷ In its absence, countries like Japan, China, South Korea, and India would not be able to get along.¹⁰⁸ It provides an extremely important leadership and convening power. Through its pivotal position, it helps encourage collaboration with the whole world on numerous issues. This inevitably improves the attractiveness of the region.¹⁰⁹

4.3. Regional Economic Integration and FDI into Member states

¹⁰² Eden L and Miller S, ‘Distance matters: Liability of foreignness, institutional distance and ownership strategy’ The Bush School of Government and Public Service, Bush School Working Paper Number 404, 2004, 23 <http://voxpof.com/eden/Publications/Eden-Miller-AIM-fnl-GBS-WP.pdf> on 15 January 2020.

¹⁰³ Feils D and Rahman M, ‘Regional economic integration and foreign direct investment: The case of NAFTA’ 48 *Management International Review* 2 (2009) 149.

¹⁰⁴ Feils D *et al*, ‘Regional economic integration and foreign direct investment: The case of NAFTA,’ 151.

¹⁰⁵ Globerman S, Shapiro D and Tang Y, ‘Foreign direct investment in emerging and transition european countries’ 6 *International Finance Review* 1 (2005) 21.

¹⁰⁶ Feils D *et al*, ‘Regional economic integration and foreign direct investment: The case of NAFTA,’ 151.

¹⁰⁷ <https://www.youtube.com/watch?v=2DO5s-Q3XIk> on 24 January 2020.

¹⁰⁸ Pitsuwan S and Yook K, ‘Working towards ASEAN Unity: An interview with Surin Pitsuwan’ 37 *Harvard International Review* 2 (2016) 55.

¹⁰⁹ Pitsuwan S *et al*, ‘Working towards ASEAN Unity: An interview with Surin Pitsuwan,’ 55.

Economic integration provides countries competing for FDI with additional location-specific advantages.¹¹⁰ Although the entire region will benefit from investment, the differentials among the member states are what determine the precise location of these foreign firms.¹¹¹ Not every member state will profit to the same degree. In fact, it is not improbable for members states to lose FDI to other partner countries.¹¹²

The decision on location within the integrated region depends on various advantages related to the business environment. Overall, while others miss out on investment, member states with comparatively superior advantages will always benefit from the regional integration.¹¹³

FDI into specific member states is driven by not only wide-ranging economic and technological forces, but also the ongoing liberalization of FDI and trade policies. With the intensified competition for investment, state policies are embodying a more welcoming stance.¹¹⁴ Foreign investors are bound to be enticed by “national treatment” that places them on an equal footing with domestic investors.¹¹⁵

4.4. Conclusion

RIAs have varied effects on the motivations for FDI. The overall impact however, is that the volume of FDI in integrating region will always increase over time.¹¹⁶ The distribution however, will be characterized by disparities between and within different countries of the integrated region. These variations arise from, inter alia, the national treatment towards investors within the member states. Therefore, member states with an intention to have FDI inflow into their areas should focus on positively differentiating themselves from other states.

¹¹⁰ Kreinin M, ‘Effects of regional integration on FDI: An empirical approach’ 19 *Journal of Asian Economics* 6 (2008) 449.

¹¹¹ Kreinin M, ‘Effects of regional integration on FDI: An empirical approach,’ 449.

¹¹² Feils D *et al*, ‘Regional economic integration and foreign direct investment: The case of NAFTA,’ 154.

¹¹³ Feils D *et al*, ‘Regional economic integration and foreign direct investment: The case of NAFTA,’ 154.

¹¹⁴ UNCTAD, *World Investment Report*, 2002, at https://unctad.org/system/files/official-document/wir2002overview_en.pdf

¹¹⁵ WTO, *Trade and foreign direct investment*, 1996, at https://unctad.org/system/files/official-document/wir1996_en.pdf

¹¹⁶ Gumilang H, ‘Economic and environmental impacts of trade liberalization: The case of Indonesia’ 28 *Economic Modelling* 3 (2011) 1035.

5. CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1. Introduction

The right to access information underpins the principles of governance set out in the Kenyan Constitution.¹¹⁷ Its interpretation should therefore pursue the promotion of Kenya's economic development. This is what is envisioned in article 19(1): A provision that declares the Bill of Rights an essential part of Kenya's economic policies.¹¹⁸

Predictability of the national regime arises when information is afforded to investors. This reduces uncertainty and instils confidence. Investors therefore delve into business activities more freely.

The limitation on the right to information is likely to result in grave consequences. It destabilises the system by which the state and its organs are held responsible. Additionally, the *Famy Care* ruling violates international trade obligations and lags behind on the emerging concept of corporate citizenship.

5.2. Restating the problem

Although the *Famy Care* case appears to protect the state's information, a closer look reveals negative implications for FDI.

Investors are unlikely to venture into a business environment they do not understand. The *Famy Care* ruling alienates potential investors by reserving the right to information to Natural Kenyan citizens. It denies investors information that would help them assess risk and settle on Kenya as a potential investment destination. Furthermore, the ruling fails to positively differentiate Kenya from other East African countries competing for FDI.

¹¹⁷ Article 10, *Constitution of Kenya* (2010).

¹¹⁸ Article 19(1), *Constitution of Kenya* (2010).

5.3. Findings

Challenged by the above problem, this paper set out to investigate one question: Whether there exists a need to overturn the ruling in *Famy Care Limited* case. This was preceded by the hypotheses that the case serves as an impediment for FDI.

Prior to addressing the above question, this paper tackled the questions below:

- I. What are the implications of the ruling in the *Famy Care* case?
- II. What is the scope and effectiveness of transparency when determining the attractiveness of a location?
- III. What is the effect of regional integration and the role of positive differentiation in the competitive FDI market?

5.3.1. The Implications of the ruling in the Famy Care case

The *Famy Care* decision extends restrictions on the right to access information. It neither considers nor reflects the current principles and inclinations surrounding access to the right. The ruling ignores national values and principles of governance and appears to undermine the International Standards set out in various treaties that Kenya is a party to.

5.3.2. The scope and effectiveness of transparency when determining the attractiveness of a potential investment location

Transparency appears to have a non-negligible effect on inward FDI quantities. Generally, a lack of transparency has been held accountable for economic crises in developing markets. Non-transparent host-countries raise the risk faced by investors. Therefore, it is irrefutable that a denial of locally available information acts as a deterrence to outsiders.

5.3.3. The effect of regional integration and the role of positive differentiation in the competitive FDI market

The volume of FDI in integrating regions will always increase over time, its distribution however, will be characterized by disparities between and within different countries of the

integrated region. These variations arise from, inter alia, the national treatment towards investors within the member states.

5.4. Conclusion

This chapter affirms the hypothesis of this paper: The *Famy Care* ruling serves as an impediment to FDI. It violates numerous principles that have a wide scope of effectiveness in increasing the attractiveness of a potential investment location. The *Famy Care* ruling, by undermining these values and principles, presents Kenya as a location riddled with uncertainty and overwhelmed with risk.

In addition to this, by virtue of being a member of the EAC, Kenya is faced with a possible paradox in terms of FDI attraction. The paradox being that although the volume of FDI will increase significantly over time in the community, its distribution among the member states is characterized by national treatment towards the investors. By virtue of the ruling upholding a reluctance to share information, Kenya negatively differentiates itself as lacking openness and unwilling to cooperate. This decision is highly likely to deter investors from Kenya to other member states.

5.5. Recommendations

An analysis of the *Famy Care* ruling reveals not only a tremendous disregard of international obligations by Kenya but also a detrimental effect on the attractiveness of Kenya as an investment location. A resolution to these findings would require the implementation of the following recommendations:

- I. *The ruling need be distinguished by a court of concurrent jurisdiction or overturned by a superior court.* As the first decision by the Courts defining who is eligible to access information in Kenya, lesser courts will be bound by this interpretation whereas it will be influential to courts of concurrent jurisdiction. Relief is however found in the fact that the High Court is not the highest and final court.

- II. *Article 35 of the Constitution need be amended.* The use of the words ‘every citizen’ gives rise to an implicit limitation. A limitation that leaves room for interpretations such as the one arrived at in the *Famy Care* case. An amendment will not only resolve this, but it will also ensure that further legislation enacted to espouse on the right to information reflects the current trends surrounding the right.

5.6. Recommendations for further Research

Owing to the restricted nature of this paper, it was impossible to explore supplementary questions that emerged. In the future however, researchers could address the emerging concept of corporate citizenship and its implications on the application of rights and freedoms.

To what extent can corporations be eligible for rights, obligations and privileges afforded to natural citizens?

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