The problem of the unwarranted concentration of economic power in foreign investment: the case of Section 3(e) and Section 50 of the Competition Act

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Declaration

I, VICTORIA NYAWIRA GITAU, 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: ....

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

Signed: ....

Dr. Isaac Rutenberg

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Chapter One

Abstract

Competition law is instrumental in regulating markets in any jurisdiction. In Kenya, the Competition Act states the objectives of the regulation of competition which includes creating a conducive environment for both local and foreign investment. This however, has not been realized as there are other legal measures and policies in the investment sector that favor FDI over local investment. While this may lead to economic progress in the short run, which some state is debatable in itself; in the long run it results in the unwarranted concentration of economic power in FDI to the detriment of local investment which causes it to be underexploited. This leads to overdependence on FDI which is risky due to its volatility as investors are susceptible to retracting from the host country whenever the investment climate declines. Economic sustainability can be enhanced by generating legal and policy incentives that would utilize the principles of competition law to enhance local investment while continuing to sustain FDI.

List of abbreviations

The following abbreviations shall be utilized in this study:

BITs	Bilateral Investment Treaties
CA	Competition Act.
FDI	Foreign Direct Investment. It has been used synonymously with 'foreign investment'
FIPA	Foreign Investment Protection Act
KIPA	Kenya Investment Protection Act
IIA	International Investment Agreement

MIGA Multilateral Investment Guarantee Agency

MFN Most Favored Nation Treatment

OECD Organisation for Economic Co-operation Development

List of cases

1.*Glamis Gold v United States of America* (2009), Arbitral Tribunal constituted under Chapter 11 of the North American Free Trade Agreement.

2. *Neer v Mexico,* (1926), General Claims Commission.

List of legal instruments

1.*Constitution of Kenya* (2010).

2.*Competition Act*, (No. 12 of 2010).

3.*Foreign investments Protection Act,* (No 35 of 1964).

4.Declarations of special arrangements for the reciprocal promotion and protection of investments, Special gazette supplement, (No 46 of 2017).

5.*Kenya Investment Promotion Act*, (No 6 of 2005).

6.*Promotion of Investments Act,* (South Africa).

7.*Public Partnerships Act*, (No 15 of 2013).

8. *Decree No. 2010-858 of 23 July 2010 on the publication of the agreement between the Government of the French Republic and the Government of the Republic of Kenya on the Reciprocal Promotion and Protection of Investments,* Nairobi December 4, 2007.

9. *Protocol to the Agreement on the Promotion and Reciprocal Protection of Investments between the Government of the Slovak Republic and the Government of Republic of Kenya,* 2011.

10. *Agreement between the Swiss Confederation and the Republic of Kenya on the Promotion and Reciprocal Protection of Investments,* 2009.

11. *Protocol to the treaty between the Federal Republic of Germany and the Republic of Kenya concerning the Encouragement and Reciprocal Protection of Investments*, 2000.

12. Government of Kenya, *Vision 2030*, 2007.

1.1 Introduction

1.11 Background of the problem

Kenya, in the fashion of many developing countries is in the race of attracting and sustaining FDI as part of its long term economic goals.[1] This can be attributed to many things, *inter alia,* that up till 1964 the colonial power Britain had been at the forefront of controlling the polity and the economy. While political independence was imminent in 1964, economic independence was, and some argue still is, at bay.[2] Upon the attainment of internal self-governance and prior to gaining Republic status, almost to denote the end of a fairy-tale, Kenya joined the United Nations, the largest intergovernmental Organisation. The end of the story was however far from near.

One may be tempted to think that the genesis of competition law in Kenya as regards Foreign Direct Investment (FDI) is the enactment of the Competition Act, 2010 but this is false. A deeper look into her colonial legacy may suggest otherwise. With reference to FDI, competition law was a topic of discussion in the determination of Kenya's foreign policy and was reflective of the political tensions at the time. Unlike some African countries that resorted to the adoption of African socialist policies such as Tanzania which had the Ujamaa policy, '*the new Kenyan Government agreed with the African nationalist economic policies, but opted for a* ***mixed economy that was market based, supportive of the already existing private sector (European settlers), and open to foreign investment.'***[3] ***(emphasis mine).***[4]

With the shackles of colonization fresh in some Kenyans' minds, some people strongly disagreed with maintaining such close connections with the western world as in their

[1] Government of Kenya, *Vision 2030*, 2007, 15.
[2] Mutua M, 'Kenya must break shackles from former colonial rulers, forge own path', The standard, 29 March 2015, -< https://www.standardmedia.co.ke/article/2000156473/kenya-must-break-the-shackles-from-former-colonial-rulers-forge-own-path>- on 25 January 2019.
[3] In this instance, foreign investment refers to FDI exclusive of that which was sourced from the European settlers.
[4] UNCTAD, Voluntary peer Review on Competition Policy in Kenya, 2004, 4.

view, it was benevolent colonization in the making. This faction of individuals believed that the country needed to progress economically from its own resources and refrain from relying on foreign intervention. Other individuals however disagreed with this notion and demonstrated great optimism towards making and sustaining partnerships with the world at large in a bid to catapult the economy to greater heights. These two trains of thought soon grew to political ideologies that were meticulously divided to the then opposition party KADU and the leading party KANU respectively.[5]

KADU argued that FDI, which then majorly consisted of the input of the settlers and colonial investors, would be structurally and economically skewed to their favour; and would unduly disadvantage competition in the investment sector for the locals. This was especially true as the settlers ***still*** controlled the means of production.[6] Many legal and policy changes ensued and much to the aptness of their predictions, the current state of FDI in Kenya is at an all-time high due to said laws and policies.[7] Kenya has been committed to attracting and sustaining FDI in her economy as is evident in her economic goals. The conflict however, is that she has gone above and beyond to attract FDI but does not equally stimulate local investment activities which do not enjoy the many incentives and protection granted to FDI.

1.2 Statement of the problem

Section 3(e) of the Competition Act states that the objectives of the Act, include creating a conducive environment for both local and foreign investment.[8] In the same vein, Section 50 of the Act empowers the Competition Authority to control the unwarranted concentration of economic power.[9] It states that the authority shall continually review the structure of distribution of goods and services so as to determine where there may be an unwarranted concentration of economic power that may have a detrimental effect on the economy.[10] It is further empowered to '*take a sectoral approach in doing so by compelling any participant in that sector to grant it or any person authorized in writing*

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[5] Savage D, 'Kenyatta and the development of African Nationalism in Kenya' 25(3), *International Journal*, 1970, 526.
[6] UNCTAD, Voluntary peer Review on Competition Policy in Kenya, 2004, 5.
[7] Ndolo D, 'Determinants of Foreign Direct Investment in Kenya', unpublished, University of Nairobi, Nairobi, 2017, 2 and 7.
[8] Section 3(e), *Competition Act*, (No. 12 of 2010).
[9] Section 50, *Competition Act*, (No. 12 of 2010).
[10] Section 50(1), *Competition Act*, (No. 12 of 2010).

by it access to records relating to patterns of ownership, market structure and percentages of sales.'[11]

The section 3(e) objective is however not supported by the current legal and policy framework of Investment law in Kenya which zealously creates a conducive environment for foreign investment but does not afford local investment a similar opportunity; resulting not only in the unwarranted concentration of economic power in FDI but also in an economy that is bent on stimulating FDI in spite of the resultant cost and burdens on the economy. This creates little leg room to focus on local investment as it is treated as an afterthought. The end result is the creation of the unwarranted concentration of economic power on FDI over local investment.

1.3 Purpose or aims of the study

This study is aimed at proving that while FDI has stimulated economic development by increasing investment activity in Kenya, it is evident that an increase in FDI has resulted in a decrease in local investment; because there is an increasingly conducive legal and policy environment that unduly favors FDI at the expense of local investment causing the unwarranted concentration of economic power in foreign investment; and to some extent, monopolistic advantage. [12]

This study seeks to further demonstrate that if this subsists, Kenya will be over-dependent on FDI which is unsustainable due to its costly nature to the country. Furthermore, Kenya will not have sufficient local investment to supplement the economy in spite of having increasingly been reckoned unfavorable by foreign investors in the recent past due to the relatively low rates of FDI; a state that will lead to economic decline in the country. This affirmation lays the basis for the overarching aim of this study which is to propose an overhaul of the investment laws in Kenya using the underpinnings of (fair) Competition Law.

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[11] Section 50(2), *Competition Act*, (No. 12 of 2010).

[12] Ndolo D, 'Determinants of Foreign Direct Investment in Kenya', unpublished, University of Nairobi, Nairobi, 2017, 22.

1.4 Hypothesis

The section 3(e) objectives of the Competition Act have not been met as the current legal and policy framework for investment law unduly favors foreign investment over local investment causing the unwarranted concentration of economic power in FDI.

1.5 Statement of research objectives

This study seeks to analyse the state of the unwarranted concentration of economic power on FDI in Kenya by use of research objectives. This is because this study is aimed at addressing the core problem by breaking it into the constituent legal and policy factors that enable it; and demonstrate how they each contribute to the unwarranted concentration. To attain this, the following research objectives shall be used as segmented below:

RO1. To establish that the legal language of the BITs signed by Kenya is investor-centred which favors FDI at the expense of local investment even when exclusions can be availed resulting in the unwarranted concentration of economic power on FDI.

RO2. To demonstrate the negative effects of the excessive tax exemptions granted to foreign investors on the economy by Kenya.

RO3. To demonstrate that utilizing the principles of fair competition as a guiding principle in the Investment sector will fulfil the Section 3(e) objectives of the CA of creating a conducive environment for both local and foreign investment, which in turn will promote sustainable economic development.

1.6 Justification of the study

The rationale of this study is to provide a backdrop of the events that have preceded the current investment culture in Kenya that favors FDI over local investment contrary to the principles of Competition law in general; as well as the objectives of Section 3(e) of the Competition Act in particular. In doing so, this study seeks to prove that such an investment culture is not sustainable for the Kenyan economy in the long term; because FDI incentives are not only costly, but also unsustainable for economic growth in the receiving country without the existence of local investment in the country. This study essentially seeks to prove that the economy is increasingly jeopardized when Kenya excessively prioritizes and incentivizes FDI over local investment due to the high cost factors involved in FDI. Therefore, the economy would benefit from utilizing the principles of competition law in order to rework the economic policy of Kenya so as to make the Kenyan economy more sustainable by equally incentivizing local investment to this end.

1.7 Scope and limitations of this study

1.71 Scope of this study

This study shall take an in depth look at the investment laws in Kenya and the economic thought that informs them. Furthermore, this study shall seek to demonstrate that Kenya's overinvestment in FDI at the expense of local investment is unsustainable for the Kenyan economy. In doing so this study shall critically examine the international regime of Bilateral Investment Treaties (BITs) and provide an analysis of the standards and best practices that they have internationally. Subsequently, from the general understanding of standards established in a BIT, an analysis of the BITs contracted between Kenya and other countries shall be carried out in order to weigh in on what Kenya stands to benefit from the various agreements and whether such investments are economically efficient for Kenya's local investment sector.

To prove the second limb of this study, the study shall demonstrate that the tax holidays provided to foreign investors so as to attract FDI are inefficient as they are not only not one of the key determinants of FDI but also lead to a punitive amount of revenue loss for Kenya. The same are not provided for local investors which speaks to the blatant unwarranted concentration of economic power on FDI over local investment. Finally, this study seeks to demonstrate the place of competition law policy in reworking Kenya's Investment laws so as to come up with an investment law policy that strikes an equilibrium between local and foreign investment.

1.72 Limitations of this study.

1.This study shall meet its key claim that Kenya has created the unwarranted concentration of economic power on FDI over local investment in its investment law sector by mainly looking at the various BITs signed between herself and other states; and by analyzing the tax exemptions granted to foreign investors. These shall be used as the main yardsticks in assessing the current levels of economic cooperation Kenya has with other states in the investment sector which increased FDI and the consequent tax waivers granted as a result of the same FDI.

2.This study shall only rely on the principles of Competition law to provide a solution for the problem herein in spite of recognizing that there are other solutions in the field of economics that play a part in creating a sustainable economic environment for a country.

3.Finally this study is limited in that it shall make one overarching proposal that is the reworking of the economic policy as a main solution in spite of recognizing that there are other possible solutions present. This is because this is the proposal endorsed by the theoretical framework of this study.

1.8 Outline of the dissertation and its flow of argument

The leading premise of my study, as highlighted above, is Section 3(e) of the Competition Act. It states that the Act is aimed at creating a conducive environment for local and foreign investment.[13] The Act cannot be viewed in isolation as there are other laws and policies that determine how fair the competition is in the investment markets. While I concede that the legal framework for FDI is not the most stellar,[14] I posit that relative to those that incentivize local investment, it is miles ahead.

One such law in Kenya is the Foreign Investment Protection Act (FIPA). Section 8B of the same is a provision geared towards providing incentives towards promoting and protecting investments. It provides that through gazette notices, the minister[15] of finance may promote and protect the investments of any foreign country in Kenya. [16] ***At face value,*** this provision which speaks to the principle of national treatment as shall be discussed later in this study seems to give both local investors and foreign investors equal footing. However, it is imperative to understand that local investors unlike foreign

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[13] Section 3(e), *Competition Act*, (No. 12 of 2010).
[14] Sikuta M, 'A critical appraisal of the legal framework governing International trade and foreign investments in Kenya', unpublished, University of Nairobi, Nairobi, 2015, 3.
[15] Now Cabinet Secretary.
[16] Section 8B, *Foreign investments Protection Act,* (No 35 of 1964).

investors are relatively economically disadvantaged as they are operating in a sector whereby their competitors have '*strong financial muscle*', while they themselves often suffer cash crunches that impede their investment activities.[17] Within the real estate investment sub-sector in particular, it has been noted that foreign investors are dipping their toes in the Kenyan markets while local real estate is continually dwindling greatly due to the reluctance of banks is granting local realtors credit facilities for their projects.[18]

One may be tempted to think that foreign and local investment are not adversarial in nature however this is not the case. The aforementioned scenario extends beyond real estate investment and indeed in almost all sectors of investment, the foreign investors who seek to invest in the Kenyan markets have more economic power than local investors in the same sector.[19] This, as shall be demonstrated later within this study, succinctly demonstrates the unchecked ***indirect discrimination*** that is at play whenever the Kenyan government grants a national treatment incentive.

There is no law that makes such an explicit provision for local investments by empowering the Cabinet Secretary of finance to provide incentives towards promoting and protecting ***local*** investments, let alone that which exclusively caters to it. In fact, the Kenya Investment Promotion Act (KIPA)[20] should ideally cater to both local and foreign investment but there exists acute asymmetry in the investment policy for local investment and FDI.[21] Undoubtedly, the government has attempted to create a more conducive environment for local investment in recent years but Kenya is and has been unduly focused on the attraction of FDI which causes unwarranted concentration in the sector and brings about the need to achieve an equilibrium between the two. This is especially true because local investment has been the reserve of elitist local investors as the few

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[17] Muiruri P, 'Global firms find opportunities where local investors burn their fingers', Ths Standard, July 2019, _< https://www.standardmedia.co.ke/business/article/2001333453/why-foreign-firms-are-investing-heavily-as-local-outfits-struggle on Mar 16 2019.
[18] Kariuki J, 'Kenya: Real estate on the decline despite key foreign investment' The Business daily, < https://allafrica.com/stories/201906100065.html> on Mar 16 2019.
[19] The Kenya Foreign Investment Survey, 2018,< https://www.knbs.or.ke/foreign-investment-survey-2018/> on the 16 Mar 2020.
[20] *Kenya Investment Promotion Act*, (No 6 of 2005).
[21] Munyoki C, 'The role of Kenya Investment Authority in attracting Foreign Direct Investment in Kenya' unpublished, University of Nairobi, Nairobi, 2011, 27.

existent legal and policy incentives are more often than not out of reach for the small scale investor.[22]

For instance, in 2013 Kenya enacted the Public Private Partnerships Act.[23] This law was enacted with the objective of internalizing the efficiencies of the private sector in the public sector as well as incentivizing foreign investment in Kenya by foreign private firms.[24] Furthermore, fairly recently, the Companies Act was amended in 2015. It initially had a provision stating that a foreign investor was compelled to retain 30% of its capital to Kenyan citizens. This has been suspended due to the suspicion that it would lead to large scale foreign investor withdrawal. Moreover, Kenya has taken the initiative to sign various Bilateral Investment Treaties (BITs) with countries such as China, Germany, the United Kingdom, the Netherlands, Belgium, China and South Africa. Most FDI inflows are directed to the telecommunications industry, given the high investment that Kenya has made in fiber-optics. Other major players in FDI include the Mining Industry and Tourism.[25]

Needless to say, FDI has contributed to economic growth through the introduction of foreign products and services as well as foreign capital,[26] but this is threatened by extraneous factors such as its expensive economic costs and long term uncertainty.[27] Some however have argued that FDI is not a worthy investment for Kenya as it negligibly contributes to the GDP of the country which is dismal and inefficient considering the time, resources and effort put into incentivizing it especially through Kenya's signing of BITs with many a country.[28] This is further buttressed by the fact that FDI inflows have

[22] Ministry of Industry, Trade and Cooperatives, 2018, 'Doing Business in Kenya, a handbook for local investors', -http://www.industrialization.go.ke/index.php/downloads/216-doing-business-in-kenya-a-handbook-for-local-investors- on 25 January 2019.

[23] Preamble, *Public Partnerships Act*, (No 15 of 2013). See also: Ministry of Finance, *Public private Partnerships in Kenya*, -< http://trademission.kenyagreece.com/wp-content/uploads/Public-Private-Partnership-in-Kenya.pdf>- on 27 January 2019.

[24] Santander Trade, 'Kenya: Foreign Investment', December 2018, -< https://en.portal.santandertrade.com/establish-overseas/kenya/investing>- on 25 January 2019.

[25] Santander Trade, 'Kenya: Foreign Investment', December 2018, -< https://en.portal.santandertrade.com/establish-overseas/kenya/investing>- on 25 January 2019.

[26] Sadimmbah G, 'Effect of Foreign Direct Investments (FDI) inflow in Kenya on Economic Growth (GDP), Exports and Balance of payments(BOP)', unpublished, United States International University-Africa, 2014, 10.

[27] Wasseja M, Mwenda S, 'Analysis of the determinants of Foreign Direct Investments in Kenya', 3(4), Journal of Multidisciplinary Scientific Research, 2015, 17.

[28] Ongonge L, 'Why Kenya should not sign any more bilateral investment treaties', Institute of Economic Affairs, -< http://www.ieakenya.or.ke/blog/why-kenya-should-not-sign-any-more-bilateral-investment-treaties>- on 25 January 2019.

begun to experience inconsistency through the oscillation of its rates between steady increase and decrease in Kenya in spite of the government's consistent efforts.[29]

The conflict is that FDI in Kenya, much like anywhere else in the world, is susceptible to the whims of the investor. Kenya has faced said whims due to threatened political stability. One prime example is the 2008 post-election violence whose aftermath resulted in economic decline. During such times, the strides that have been made in the economy plummet significantly and the economy often takes a while to recover given the high rate of investor withdrawal.[30]

The most recent example was the 2017 presidential elections that took up a significant share of the budget; after which the economy dwindled significantly. Furthermore, there was a run-off that yet again cost the country an arm and a leg.[31] During the political fiasco, the economy was at an all-time low with investors ready to see themselves off which led to more economic vulnerability. Needless to say FDI rates dwindled in July prior to the first election due to political uncertainty with the then upcoming August elections; and further dwindled after the election results were announced and a petition was filed in the Supreme Court challenging the validity of the presidential elections, after which a run off was ordered for by the court. This situation threatened the occurrence of a social, economic and political crisis. [32]

As such, Kenya should generate policies that inform laws and practices geared towards increasing local investment. This is because in spite of having the local resources, the economic and political powers of foreign investors often lead to major economic and power asymmetries that disadvantage locals in the host country if left economically disenfranchised.[33] For instance, even in situations whereby FDI has allowed for local content; say through the previously mandatory provision of the Companies Act that stated that 30% of the capital of a foreign company ought to be held by Kenyan citizens by birth.

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[29] Sadimmbah G, 'Effect of Foreign Direct Investments (FDI) inflow in Kenya on Economic Growth (GDP), Exports and Balance of payments(BOP)', unpublished, United States International University-Africa, 2014, 4.

[30] Sadimmbah G, 'Effect of Foreign Direct Investments (FDI) inflow in Kenya on Economic Growth (GDP), Exports and Balance of payments(BOP)', unpublished, United States International University-Africa, 2014, 4.

[31] United Nations Development Programme, 'Unravelling the impact of the political impasse on the Kenyan government', October 2017, 2-4.

[32] United Nations Development Programme, 'Unravelling the impact of the political impasse on the Kenyan government', October 2017, 2-4.

[33] UNCTAD, Voluntary peer Review on Competition Policy in Kenya, 2004, 4.

This has been frustrated through interference by the international community which has led to the suspension of the same. [34]

The principles of competition law should be adhered to in order to amend the KIPA, FIA, vision 2030, the foreign policy, tax laws and inform the legal language in BITs as competition policy plays a major role in economic development.[35] Indeed the interests of the host country and that of the foreign investors ought to be balanced in order to create the best possible outcome.[36] For instance, in South Africa the Promotion of Investments Act states that all investors, foreign and local have the same status and protection in order to enhance fair competition.[37] Furthermore, this study agrees with Wang who states that States should regulate FDI using domestic law and in this case, competition law and policy. This is because FDI should not crowd out local investment if appropriate competition laws are enacted.[38] Moreover, one of the objectives of competition law is the equalization of wealth amongst market players and dispersal of economic power as well as the protection of competitors in the market.[39] Further, the public interest role of competition law and policy can be invoked as it can be used as a means of driving economic growth through the protection and inclusion of local investments.[40] The same thus be achieved on the Kenyan front.

1.9 Summary of overall results

The findings of this study are summarized as follows:

1. The current legal and policy regime of Investment Law favors FDI over local investment contrary to the objectives of section 3(e) of the Competition Act which seeks

[34] The government of the United States of America raised concerns over the local content provision in the Companies Act of 2015 citing that the 30% local content provision was inconsistent with the obligations that Kenya has under the WTO. See: 'Kenya- Openness to, and Restrictions upon Foreign Direct investment', 22 November 2017, -< https://www.export.gov/article?id=Kenya-openness-to-foreign-investment>- on 25 January 2019.
[35] Roberts S, 'The role of competition policy in economic development: The South African Experience' 21(1), *Development Southern Africa,* 227-243.
[36] Sikuta M, 'A critical appraisal of the legal framework governing International trade and foreign investments in Kenya', unpublished, University of Nairobi, Nairobi, 2015, 20.
[37] Section 4, *Promotion of Investments Act,* (South Africa).
[38] Sikuta M, 'A critical appraisal of the legal framework governing International trade and foreign investments in Kenya', unpublished, University of Nairobi, Nairobi, 2015, 14.
[39] Whish R, Bailey D, '*Competition Law*', Oxford University press, Oxford, 2015, 20 and 21.
[40] 'Antitrust overhaul: South Africa to amend Competition Act today', February 12 2019, -https://africanantitrust.com/category/public-interest/- on 12 February 2019.

to ensure that there exists no unwarranted concentration between both local and foreign investment.

2.The Kenyan government has an extravagant investor-centred approach for the attraction of FDI through tax exemptions and investor-centred BITs which causes unwarranted concentration of economic power in FDI to the detriment of local investment.

3.The Kenyan economy suffers double fold through the inefficient tax incentives which cause economic loss; and fail to create conducive conditions for local investment which would assist the attainment of sustainable economic development.

1.10 Summary of overall conclusions

1.The over-incentivizing of FDI at the expense of local investment leads to economic inefficiency as local investment has the comparative advantage of low risk and high market stability which is needed for a sustainable economy; unlike FDI which is prone to risk and large scale foreign investor pull out.

2.The solution that would lead to fair competition between FDI and local investment pursuant to meeting the objectives of the Competition Act would be an overhaul of the Investment Law regime at a national level.

1.11 Chapter summary

The objectives of Competition law in Kenya intermarry the Investment Law regime by authoritatively stating that one of the objectives of the Act includes ensuring that there is a conducive environment created for both FDI and local investment. This is however impossible in the climate of the current Investment Law legal and policy regime which goes contrary to the Competition Act by advancing for conditions conducive to the attraction of FDI in a manner that is detrimental to local investment. This leads to the excessive economic loss accessory to FDI through large scale loss of revenue in taxes and negligible growth in the same; and minimal incentivizing of local investment which risks the stability, longevity and sustainability of the Kenyan economy. This has been proved in this study throughout the various chapters summarized below:

Within this first chapter, the first premise of this study is laid as follows. Section 3(e) of the competition Act states that one of the objectives of the Act is the creation of a conducive environment for both local and foreign investment. Through an analysis of the ideological differences with regard to FDI between KANU and KADU in post-independence Kenya; the first chapter demonstrates that the roots of competition between foreign and local investment in Kenya lie in the formation of Kenya's economic and trade policy. Kenya favored capitalism and supported the entry of foreign capital so as to fast-track economic growth.

This study hypothesizes that Kenya favors foreign investment at the detriment of local investment contrary to the objectives of the Competition Act. This is evident in the examination of the legal framework of Investment Law. Through the enactment of the Kenya Investment Protection Act (KIPA) Kenya undertakes to promote local and foreign investment. A general reading of the KIPA however demonstrates that the legal language favors the protection and promotion of foreign investment. Moreover, Kenya has enacted the Foreign Investment Protection Act (FIPA) which exclusively caters to the promotion of foreign investment.

The second chapter gives the theoretical lens utilised by this study. It demonstrates that Haas' theory of neo-functionalism advocates for the furtherance of international trade and concludes that foreign investment is beneficial for all parties involved. This is juxtaposed by Kofi's theory of Pan-African economics which demonstrates that given the historical injustice of colonization faced by African countries such as Kenya. It proposes that African countries ought to build their economic capacities through local investment and jointly partner amongst themselves to strengthen their economic ties as they are the only ones who can act in their best interests. Conversely, it advises against foreign investment and treats it with skepticism. As a middle ground, the anti-trust theory which will inform the recommendations of this study, is proposed. It proposes that using the principles of fair competition, both foreign and local investment can be incentivized in order for Kenya to enjoy optimal economic benefit from both sectors.

The third chapter analyses the crux of the study. It seeks to prove the hypothesis of the study that contrary to the objectives of the Competition Act, Kenya only creates a conducive environment for foreign investment at the detriment of local investment. In doing so, it analyses the general workings of a BIT in order to analyse the standard clause of national treatment in the BITs signed by Kenya. This is because BITs are a key instrument in the incentivizing of FDI. This is compounded by analyzing the tax incentives afforded to foreign investors once they invest in Kenya. The chapter demonstrates that in spite of making very expensive trade-offs for FDI at the expense of local investment; tax incentives afforded to foreign investors are not determinants of FDI and therefore the revenue lost through them signals that they are not suitable trade-offs to make in the attraction of FDI. They are not only economically detrimental, but also add to the unwarranted concentration in the foreign investment sector as they are not afforded to local investors.

The fourth chapter of this study analyses the evidence of the study. This is done through an analyses of the evidence found by this study that support the assertion that foreign investment is unfairly advantaged vis-à-vis local investment which goes contrary to the objectives of the Competition Act which seeks to create a conducive environment for both of them in the economy. This analysis is carried out through a demonstration that in spite all the effort made by the State to foster FDI, it only minimally contributes to the GDP of the nation. As such, it is rendered an economic inefficiency.

The fifth and last chapter gives the conclusion that the Kenyan government favors FDI over local investment and provides recommendations through which the playing field of the investment sector can be levelled through creating an equilibrium of laws, policies and incentives in both the foreign and local investment sectors.

Chapter Two

2.0 Conceptual Framework and Methodology

2.1 Conceptual framework

This study has delegated to utilize a tripartite conceptual framework rather than a singular theoretical framework. This is because while the latter would be useful, the best lens using which one can view the topic of this study would necessitate that it looks at the problem present in this study using three points of view in order to have a holistic appreciation of the data.

The theories are as follows: Kofi's theory of Pan African ideology which makes a case for the mercantilist furtherance of local investment; Haas' theory of neo-functionalism which demonstrates the need for nations to participate in international trade in order to increase economic efficiency within themselves; and finally the anti-trust theory which demonstrates that the entrenchment of the tenets of fair competition in the law is the only way in which states can experience equilibrium between the foreign and local investment sectors resulting in economic sustainability .

2.11 Theory one: Pan African economic ideology

Kofi's Pan-African economic ideology propounds that African economies are unique owing to their colonial legacy as they were used as a means of production by the colonial powers and more often than not have not reached full recovery.[41] As such they cannot develop to their full potential through unchecked partnership with the west as they cannot thrive through the same system of monopoly capitalism that reinforced their systemic inequality and uneven development[42] because the *'Roots of underdevelopment in the black world lie in the historical evolution of the world market economy'*. [43]

Kofi posits that for African economies to thrive, they should ***guard against expansionist movements in the African investment markets in order to obtain and preserve economic emancipation.*** [44] ***(Emphasis mine)*** He advocates for the economic protectionism of Africa by proposing that African markets should be as self-sufficient as possible with as minimal foreign investment as possible.[45] This has been reinforced by other opinions on FDI that state that foreign investors naturally wish to gain economic benefit and are not keen on the same for the host country.[46] Evidently, for Kofi and the compatriots in his school of thought, investment law and policy is not only about trade but also about a political statement. It thus evidences towards the furtherance of a (neo) colonial political agenda.

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[41] Kofi T, 'The need for and principles of Pan-African economic ideology' 26(3) *Institute de Sociologie de l'Universite' de Bruxelles,* 1976, 205.
[42] Kofi T, 'The need for and principles of Pan-African economic ideology' 205.
[43] Kofi T, 'The need for and principles of Pan-African economic ideology' 206.
[44] Kofi T, 'The need for and principles of Pan-African economic ideology' 206.
[45] Kofi T, 'The need for and principles of Pan-African economic ideology' 205.
[46] Cotula L, *Legal Empowerment for local resource control: Securing local resource rights within foreign investment projects in Africa*, Russel Press, Edinburgh, 2007, 24.

Adyanga opines that Africa's economic development should be reconstructed with Africans as the key architects. [47] He further opines that the '*lived experiences'* of the continent should inform its decisions in its participation in the world markets and in international trade.[48] Giving the example of Rwanda, he opines that Rwanda's local investment and business environment have increased as a direct consequence of the reformation of the internal trade policies.[49]

Kofi's theory relates to this study as it espouses the manner in which an African nation should participate in trade and investment on a local and global scale. As such, it would naturally opine that Kenya should reinforce the local investment sector and prioritize it to the extent that it would be on the same level as FDI or even better. This would be the only surefire way to bring about economic sustainability as FDI would further the interests of foreign investors and hence would not be exclusively economically sustainable for Kenya.

Last but not least, Kofi's theory pre-empts some critiques to and limitations of this study. The most prominent critique is that it may not be feasible for an African nation such as Kenya to cease incentivizing FDI by turning down potential investors; so as to fully provide legal and policy incentives for local investment in order to bring about fair competition in the investment sector. Indeed, one may argue that in spite of FDI being prone to large scale investor pull out in dire situations; local investors are few and far between and hence would be unable to shoulder the economy and create sustainable economic growth which would essentially take the nation back to square one. This theory and this study however do not propose that Kenya should cut out FDI unceremoniously. On the contrary, Kofi's theory as is used in this study suggests that Kenya should create legal and policy incentives that would create a conducive environment for local investment to thrive with longevity in the economy. This matter directs this study to the next ambit of the conceptual framework.

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[47] The word reconstruction, rather than construction has been used deliberately as reconstruction here refers to the post-colonial economic recovery of African states.

[48] Adyanga F, 'Regional Integration, a prospect for development: Lessons from Rwanda's experience in the East African Community' in Dei G, Adjei P, 1st ed, *Emerging perspectives on African development*, Peter Lang Publishing Incorporated, New York, 2014, 128.

[49] Adyanga F, 'Regional Integration, a prospect for development: Lessons from Rwanda's experience in the East African Community', 133.

2.12 Theory 2: Neo functionalism

The second theory is the theory of neo-functionalism. Haas's theory of neo-functionalism proposes that states should open up to international markets through international trade.[50] It proposes that the introduction of new blood into local markets enhances competition between local and foreign markets which incentivizes both into optimal efficiency and ensures that markets have a wide array of goods and services available to the consumer.[51]

It states that when States collaborate on one front, it leads to integration and interaction on another front which leads to further integration in the future.[52] The theory of neo-functionalism has been used to justify FDI in Kenya. Sikuta states that the theory has effectively justified the case of FDI in Kenya and her participation in international trade.[53]

The two theories are juxtapositions of each other and hence not only offer critique to each other but shall be used in my study to propose a middle-ground. The theory of neo-functionalism brings into perspective the fact that Kenya is not an island and should continue to pursue FDI; while the theory of Pan-African economics proposes placing checks on FDI as well as creating legal and policy measures for local investment so as to ensure that there is fair competition between FDI and local investment.

2.13 Theory 3: Anti-trust law theory

The third ambit of my theoretical framework relies on the underpinnings of competition law which originated in the United States of America in the 1800's.[54] In the American context, competition law is referred to as Anti-trust law. The theoretical foundations of anti-trust law are that efficient markets should encourage fair competition and prevent the monopoly of one particular player in the market; or the oligopoly of one particular group.[55] This is due to the fact that at its inception, anti-trust law was a branch of law that sought to bring down the oligopoly which companies called 'trust companies' had built

[50] Haas E, 'The Uniting of Europe Political Economic and Social forces', 1958,16.
[51] Haas E, 'The Uniting of Europe Political Economic and Social forces', 1958,16.
[52] Haas E, 'The Uniting of Europe Political Economic and Social forces', 1958, 19.
[53] Sikuta M, 'A critical appraisal of the Legal framework governing International trade and Foreign Investments in Kenya' unpublished, university of Nairobi, Nairobi, 2015, 7.
[54] Stigler G, 'The origin of the Sherman Act' *The Journal of Legal Studies,* 9(1989), 1.
[55] Stigler G, 'The origin of the Sherman Act', 4.

in the markets.[56] Despite the heavy critique that has been made on the benevolence of the Sherman Act,[57] this was its primary objective.[58]

Trust companies were big companies which operated in various markets and due to their large size in capital and shareholding, would monopolize sections of the economy by ensuring that the markets were saturated with their products.[59] The first attempt at combating the unwarranted economic power brought about by trust companies was the enactment of the Sherman Act in 1890 which prevented price fixing.[60] Subsequently, other laws such as the Clayton Act which prevented mergers and acquisitions of companies that would stifle competition; and the Federal Trade Commission Act which set up an authority tasked with checking unfair trade practices were put in place.[61]

The origins of competition law in the American context demonstrate that from the get-go, it was aimed at ensuring that all players in the market had an equal playing field; and any inequalities were addressed by introducing laws and structures that would support fair competition. The deliberate creation of a robust anti-trust law regime was instrumental in ensuring that fair competition would not only be an aspirational objective of the law but a real and tangible phenomenon on the ground by bringing about executive and administrative accountability.[62]

Using this aforementioned lens, Section 3(e) of the Competition Act in Kenya would demonstrate that one of the objectives of the Competition Act is creating a conducive environment for both local and foreign investment. When viewed holistically, in spite of the Section 3(e) objectives of the Act, the Kenyan law unlike the American Acts do not have sufficient structures in place in order to fulfil this objective. As it stands, investment law and policies favour foreign investment to local investment as they provide for ample incentives for foreign investment; while not offering as lucrative of incentives for local investment. This has created the unchecked and unwarranted concentration of economic power on FDI to the detriment of local investment in the Kenyan economy. This third

[56] Gellhorn E, *Antitrust Law and Economics in a nutshell,* 2 ed, West Publishing Company, Minnesota, 1981,22.
[57] Bradley R, 'On the Origins of the Sherman Antitrust Act', *Cato Journal* 9(3), 1990, 737.
[58] Gellhorn E, *Antitrust Law and Economics in a nutshell,* 23.
[59] Federal Trade Commission Factsheet: Antitrust Laws: A brief History, 1.
[60] Federal Trade Commission Factsheet: Antitrust Laws: A brief History, 1.
[61] Federal Trade Commission Factsheet: Antitrust Laws: A brief History, 1.
[62] Gellhorn E, *Antitrust Law and Economics in a nutshell,* 23.

ambit of my theoretical framework seeks to find a link that strikes a balance between the first two theories of neo-functionalism and of Pan-African economics seeing as there is a statutory obligation on the state to ensure that there exists fair competition between local and foreign investment.

While Haas' theory of neo-functionalism advocates for international trade and the opening up of markets and a consequent increase in FDI inflows; and Kofi's theory of Pan-African economics advocates for a vigilant mercantilist trade and investment policy for the advancement of local investment; the underpinnings of competition law in the United States of America demonstrate that in efficient markets, all market players can co-exist in the same markets as long as the necessary legal structures and policy measures are put in place to ensure that there exists fair competition between them. In this context, further legislation on the creation of fair competition between both foreign and local investment as well as the incentivizing of local investment would create the much needed equilibrium between local and foreign investment.

2.2 Methodology

The primary method of research employed in this study is that of desktop research. This has been done through an application of the tool of sampling of sources through literature review. The samples derive from a variety of sources such as books, journal articles, institutional reports and Acts of Parliament. This has been achieved through an analysis of these sources/samples in subsequent section of this study. To achieve this end, the primary method of research employed in this study is that of desktop research.

The method of desktop research has been selected due to the variety of resources available that benefit the core thesis of this study. This study does not employ any methods of data collection due to the limitation in time and scope of the study. As such, there is no time carved out for carrying out fieldwork nor any sections dedicated to the collection and analysis of data. Therefore, this study has granted preferential treatment to qualitative analysis and hence utilizes a number of qualitative sources in the legal field as well as the field of economics which form the substance of my study. A second reason as to why qualitative research has been preferred over quantitative research is because this study seeks to prove that the legal framework for investment law goes against fair competition. As such, the sources used in this study to prove this shall emanate from the analysis of the law and to a minimal extent from an analysis of the number of BITs signed by Kenya. These claims necessitate the analysis of secondary data which this study executes in subsequent sections

Chapter 3

3.0 An analysis of the legal incentives introduced by Kenya for the advancement of FDI

This chapter shall focus on the legal incentives Kenya has institutionalized that favour FDI in favour of local investment contrary to the objectives of the Competition Act. This shall be executed by carrying out a general analysis of BITs as a typology of International Investment Agreements (IIAs); a particular analysis of some the BITs signed by Kenya and a demonstration on how they further the unwarranted concentration of economic power on FDI over local investment. A literature review of the common clauses present in standard BIT practice shall inform the narrowed down analysis of the clause of National Treatment as identified in different BITs signed by Kenya.

The creation of tax exemptions for foreign investors shall be analysed as an offshoot of the general objective of BITs which is to foster mutual foreign investments.[63] The evidence provided for this shall lie in the tax laws and salient exemptions of Kenya. This is because as this study seeks to prove, the tax exemptions are not explicitly provided for in BITs but their large scale use is as a result of the presence of foreign investors whose going concerns are based on the existence of BITs. As such both the BITs and the surrounding legal environment jointly foster the unwarranted concentration of economic power on FDI to the exclusion; and at the expense of local investment.

In making the analyses, this chapter shall sample data[64] from the different BITs contracted by Kenya and other states as well as from aspects of Kenya's tax law and policy. These include the BITs signed with France, Slovakia, Switzerland, Germany and Qatar[65]. This study shall **not** use the case study method by using only one BIT signed by Kenya so as to more comprehensively express the thesis on a grander scale.

3.1 A preliminary literature review of the workings of a BIT

As described by UNCTAD, BITs are one of the twofold categories of IIAs which a state can be party to; the other being Treaties with Investment Provisions (TIPs).[66] In affirmation of the same, Dolzer and Stevens assert that BITs are crucial in the modern investment world not only due to the '*extensive network of rights and obligations'* [67]that they grant the state parties concerned but also due to the current global recognition they enjoy as arguably the most vital instruments in foreign investment.[68] Dolzer and Stevens detail that the initial steps taken towards the recognition and protection of foreign investments were made on a *multilateral level* in 1988 with the formation of the

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[63] Mwega F, Ngugi R, 'Foreign Direct Investment in Kenya', in Foreign Direct Investment in Sub-Saharan Africa: Origins, targets, impact and potential, African Economic Research Consortium, 2006, 120.
[64] This is done through the simple random sampling of various BITs that Kenya has contracted.
[65] As mentioned earlier in this study.
[66] 'International Investments Agreements Navigator', Investment Policy Hub, UNCTAD website, https://investmentpolicy.unctad.org/international-investment-agreements, on the 20 September 2019.
[67] Dolzer R, Stevens M, The International Centre for the Settlement of International disputes, *Bilateral Investment Treaties*, Martinus Njihoff Publishers, The Hague, V.
[68] Dolzer R, Stevens M, *Bilateral Investment Treaties*, 1.

Multilateral Investment Guarantee Agency (MIGA) by the World Bank. The MIGA was formed to meet the need of establishing a financial institution which would push the FDI agenda by providing insurance and financial guarantees to investors against political and non-commercial risk in developing countries.[69]

The operational regulations of the agency stated that in the underwriting of decisions, that is the process of deciding whether or not to insure a particular investor against the aforementioned risks; one of the factors the agency ought to consider was whether the investing country and the host country had signed a BIT; in which case the presence of a BIT would be held to be as adequate legal protection of the resultant investment activities.[70] Therefore, BITs encouraged the agency to underwrite the investing country and consequently encouraged and legitimized FDI on a global scale. In a similar vein, in 1992 the World Bank Guidelines on the treatment of Foreign Direct Investment made a partial reliance on a study of BITs to formulate the minimal standards of BITs that would foster the global growth of FDI.[71]

3.11 An illustration on the role of BITs

Guided by the World Bank's definition, FDI inflows refer to the foreign capital that is invested into the host country while FDI outflows refer to the net profits that are derived from the said investment. This definition can be used as follows to aid the comprehension of the role of a BIT in FDI using the following hypothetical example is used. When two countries contract a BIT, say country **A** and country **B**, it means that the investors of country **A** can invest in country **B** and enjoy the legal protections and consequent economic waivers and benefits that they otherwise would not have benefited from without the treaty and vice versa. When the investors of country **A** invest in country **B**, the income they generate from the said investments is regarded as profit for the investors of country **A** as well as the FDI ***inflows*** of country **A** and the FDI ***outflows*** of the host country **B**.[72]

[69] Dolzer R, Stevens M, *Bilateral Investment Treaties,* V.
[70] Dolzer R, Stevens M, *Bilateral Investment Treaties,* V.
[71] Dolzer R, Stevens M, *Bilateral Investment Treaties,* V.
[72] The World Bank, 'What is the difference between FDI net inflows and FDI net outflows?' https://datahelpdesk.worldbank.org/knowledgebase/articles/114954-what-is-the-difference-between-foreign-direct-inve on the 20 September 2019. The FDI inflows refer to the foreign capital that is invested into the host country while outflows refer to the net profits that are derived from the said investment.

When investors from country **B** invest in country **A**, then the income generated from the said investments are regarded as profit for the investors of country **B** as well as the FDI inflows of country **B**; and the FDI outflows of country **A** which is the host in that instance. From this basic structure, it is evident that FDI is of most economic benefit to a country when the country has FDI outflows. is noteworthy that developing countries such as Kenya take up a large amount of the total global amount invested as FDI inflows. This implicitly means that their participation in FDI is essentially role of facilitating foreign investors from developed countries to obtaining more income for themselves while the developing countries only minimally profit from the same.[73]

As aforementioned in the hypothetical example above, BITs should ideally advance the interests of both state parties but this is not always the case. In fact, this would be the case whereby both countries had an equal economic capacity to carry out mutual FDI which would ensure that both countries benefit on the ground. At face value, by virtue of signing a BIT both state parties involved ***can*** enjoy the legal protections and guarantees provided in the treaty; but it is not a guarantee that both state parties ***will*** enjoy the said protections virtue of their low economic power and therefore their relative inability to participate in carrying out foreign investment in the other state. Noorbakhsh and Paloni evidence that developing countries such as Kenya which are often capital importing countries tend to have more FDI inflows than outflows.[74] Therefore, in a situation whereby the developing country **A** signs a BIT with developed country **B**; the capital-rich **B** is more likely to invest in **A** and hence will be the only one who yields profit as a result of the BIT.[75]

In addition, Knoerich observes the effect of outward foreign direct investment in contributing to the economies of less advanced host countries as detrimental to the host counties. He asserts that it causes the systematic economic undermining of developing countries such as Kenya when they contract BITs; as they continually (almost) exclusively participate in FDI through obtaining FDI inflows rather than outflows.[76] This,

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[73] Noorbakhsh F, Paloni A, Youssef A, 'Human capital and FDI inflows to Developing countries: New empirical data', 29(9), *World Development,* 2001, 1593.
[74] Noorbakhsh F, Paloni A, Youssef A, 'Human capital and FDI inflows to Developing countries: New empirical data', 1593.
[75] Noorbakhsh F, Paloni A, Youssef A, 'Human capital and FDI inflows to Developing countries: New empirical data', 1593, 1594. Moreover, from the following report on authored by UNCTAD, the top 10 investor economies all consist of developed countries such as the Netherlands. See: United Nations Conference on Trade and Development, '*World Investment Report 2019*', 2019, 54.
[76] Knoerich J, 'How does outward Foreign Direct Investment contribute to economic development in less advanced home countries', 45(4), *Oxford Development Studies,* 2017, 452.

according to Munyoki goes contrary to the objectives of international trade and neo-functionalism which proposes the promotion of international trade through the internalizing of the efficiencies of comparative advantage. Contrary to neo-functionalism the current investment regime in Kenya advocates for the systemization of the unwarranted concentration of economic power on FDI over local investment through promoting FDI inflows in Kenya at the expense of local investment.[77] This study shall demonstrate that the said unwarranted concentration as evidenced in the BITs and the law are not efficient for the Kenyan economy because they are expensive; yet they only minimally contribute to the GDP in spite of the great efforts made in fostering FDI.

In this grand scheme of things, BITs carry out the primary function of undertaking to protect the foreign investors who seek to carry out foreign investment in the host country.[78] Therefore, there exist minimal standard features that a BIT has to have that create the said protections. These standards are legal protections which not only legally bind both state parties to the treaty; but also grant economic incentives to foster the success of the treaty concerned through increased FDI as further detailed below.

3.2 The minimum standards of a BIT

Yalkin posits a working definition on the minimum standards of a BIT stating that they refer to the salient features that a BIT has that essentially make it the cardinal instrument for the advancement of FDI as widely accepted in International customary law.[79] These international customary laws standards are marked by the presence of certain clauses that a BIT must have that weigh in heavily on the economic impact of the investment both to the investor and to the host country.[80] In developing nations such as Kenya, the general attitude adopted in the contracting of BITs is largely investor driven as is made manifest in the language of the law. The said legal language according to this study and the findings

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[77] Munyoki C, 'The role of Kenya Investment Authority in attracting Foreign Direct Investment in Kenya' unpublished, 27.
[78] A general reading of a typical standard clause in a BIT demonstrates that the state parties are entrenching their trade relations so as to benefit symbiotically. See Dolzer R, Stevens M, *Bilateral Investment Treaties,* 20.
[79] Yalkin T, 'International Minimum Standard and Investment Law: The proof is in the pudding', *Blog of the European Journal of International Law*, 2009, https://www.ejiltalk.org/author/tyalkin/ on 12 September 2019.
[80] Yalkin T, 'International Minimum Standard and Investment Law: The proof is in the pudding', *Blog of the European Journal of International Law,* 2009, https://www.ejiltalk.org/author/tyalkin/ on 12 September 2019.

of Chege, is extravagant in some instances.[81] This, according to the Institute of Economic Affairs results in clauses that overly incentivize foreign investment at the exclusion of local investment, at the expense of the economy of the host country; [82] and contrary to the objective of fostering fair competition between local and foreign investment as envisioned in a joint reading of section 3(e) and section 50 of the Competition Act.[83]

Dolzer states that the standard clauses directly speak to the treatment that the investors shall receive upon setting up shop in the foreign host country. They include but are not limited to the following. The first clause is the applicability clause which is ordinarily a pre-ambular statement in the BIT that states that the state parties to the BIT shall cooperate in fostering mutual foreign investment and that they shall each ensure that they create conducive conditions on a state level for each other's nationals to participate in foreign investment. It may also include the assertion that the agreement will stimulate foreign investment to the benefit of both states.[84]

The second typical clause is the fair and equitable treatment standard. This clause fundamentally states that the host state undertakes that the legal framework regulating investments shall be '*stable and predictable and shall meet the reasonable expectations of the investors*'.[85] This is achieved through a guarantee of the legitimate expectations of the investors' right to transparency, non-denial of justice and prohibition of coercion and harassment.[86] This particular clause as held in the landmark case of *Glamis v United States*. In the said case, a Canadian mining company claimed that the state had disregarded its legitimate expectation under the fair and equitable treatment standard by expropriating its mining rights through the establishment of a regulation which implicated its mining activities in the California Desert Conservation which was an area of cultural concern. The regulation's implications included the closure and backfilling of the

[81] Chege E, 'Safeguarding the state's regulatory autonomy: Rethinking Bilateral Investment Treaties in Kenya', Unpublished LLM Thesis, University of Nairobi, Nairobi, 2017, 21.
[82] Institute of Economic Affairs, 'Why Kenya should not sign any more Bilateral Investment Treaties', http://www.ieakenya.or.ke/blog/why-kenya-should-not-sign-any-more-bilateral-investment-treaties on the 17 August 2019.
[83] Section 3(e), *Competition Act*, (No. 12 of 2010).
[84] Dolzer R, Stevens M, *Bilateral Investment Treaties*, 21.
[85] Nishith Desai Associates, 'Bilateral Investment Treaties and India',2.
[86] Yalkin T, 'International Minimum Standard and Investment Law: The proof is in the pudding', *Blog of the European Journal of International Law*, 2009, https://www.ejiltalk.org/author/tyalkin/ on 12 September 2019.

claimant's mines and the claimant stated that the state's actions of enacting the said regulation went contrary to its legitimate expectation.

The arbitral tribunal held that the fair and equitable standard was held to be a high standard and hence required sufficient proof by the claimant that the host state did not fulfil its contractual obligations in the BIT. As such, the claimants lost the case due to a lack of satisfaction that the state fair and equitable treatment had denied them '*there had been a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons*' occasioned by the state.'[87] Therefore, if a foreign investor would seek to enforce their right to fair and equitable treatment against the state, then they would have a high standard of proof that they would need to satisfy to the court to demonstrate that the state was absolutely unfair to them. In the same vein, in spite of the obligations imposed on the state due to the fair and equitable standard; the state is not precluded by it to take part in policy changes that favour its local investment sector. Nonetheless, a state is still obliged to adhere to the BIT's provisions in spite of any policy changes in favor of local investment without fail as demonstrated in the *Neer case* whereby the standard of fairness and equity was held by the arbitral tribunal to be '*egregious and shocking'* and hence still imposing a burdenon the state .[88]

Other standard clauses as affirmed by the OECD include the non-discrimination clause which prescribes that foreign investors should be accorded fair treatment and the expropriation clause which details the manner in which a host state may expropriate the foreign investment.[89]

Finally, there exist the national treatment clause, the dispute resolution clause and the clause on tax waivers. With regard to the Kenyan experience, this study shall make reference to select standard features due to their pertinence in the next section of this study. These will be the national treatment clause, the dispute resolution clause and the clause on tax waivers. These clauses are major markers on proving that BITs and

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[87] *Glamis Gold v United States of America* (2009), Arbitral Tribunal constituted under Chapter 11 of the North American Free Trade Agreement.
[88] *Neer v Mexico,* (1926), General Claims Commission.
[89] Organisation for Economic Co-operation Development, 'Non-discrimination in Bilateral tax conventions', 1996.

consequently FDI has major economic costs that are incommensurate to the benefit that they have on the nation's economy.

3.3 The Kenyan experience of BITs

Kenya, as observed by the Institute of Economic Affairs is one of the countries in '*the arms race for the attraction of FDI*'[90] a race which Gumo has described as as a '*race to the bottom*'[91] and to this end she is party to numerous BITs as well as TIPs;[92] due to the scope of this study however, I shall only focus on BITs due to their direct impact on the treatment of investors in the country. As aforementioned BITs typically mutually bind the two signatory states by providing numerous legal protections and incentives to both signatory states.[93] More often than not, these incentives come in the form of national treatment clauses and tax exemptions as shall be analysed further in this study. While national treatment clauses are derived directly from BITs, tax exemptions are introduced by Kenya in order to capitalize on the foreign investors who have be attracted or who Kenya hopes to attract to herself ***virtue of*** the signed BITs.

The Constitutional legitimization of BITs in Kenya lies in Article 2 of the Constitution which states that any treaty signed or ratified by Kenya shall form part of the laws of Kenya.[94] As such BITs are enforceable treaties which mutually and constitutionally empower investors to carry out their investment activities in Kenya which is no small feat. Kenya has signed a total of 19 BITs, 12 of which are in force and only one between herself and Italy which has been terminated.[95]

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[90] Institute of Economic Affairs, 'Why Kenya should not sign any more Bilateral Investment Treaties', http://www.ieakenya.or.ke/blog/why-kenya-should-not-sign-any-more-bilateral-investment-treaties on the 17 August 2019.
[91] Gumo M, 'The effect of tax incentives on Foreign Direct Investments in Kenya, Project for the Masters of Science in Finance', The university of Nairobi, 2013, 53.
[92] 'International Investments Agreements Navigator', Investment Policy Hub, UNCTAD website, https://investmentpolicy.unctad.org/international-investment-agreements/countries/108/kenya , on the 20 September 2019.
[93] Dolzer R, Stevens M, *Bilateral Investment Treaties*, 21.
[94] Article 32, *Constitution of Kenya* (2010).
[95] 'International Investments Agreements Navigator', Investment Policy Hub, UNCTAD website, https://investmentpolicy.unctad.org/international-investment-agreements/countries/108/kenya , on the 20 September 2019.

3.31 The national treatment clause present in the BITs signed by Kenya

The national treatment principle is a clause in the practice of BITs that states that the goods and services of a foreign investor are to be governed under the same regulatory framework as those of local investors; and should not be discriminated against simply due to their foreign nature.[96] The principle is an ambit of the school of thought of progressive liberalization of FDI which advocates for the *laissez faire* treatment of foreign investors in local markets; rather than a stringent approach which advocates for the skeptical treatment of foreign investors.[97]

The progressive liberalization of FDI takes various models. The first is whereby there is a total *laissez faire* approach for both local and foreign investment and hence none is more regulated than the other; while the second model is that of absolute minimum standards for both local and foreign investors whereby they each have their own minimalistic regulatory framework that is tailored to suit their unique nuances.[98] This serves to have laws that are both neutral yet not too bulky to the point of being unduly disadvantageous to either foreign or local investors. Lastly there is also a no discrimination model which is tailored to carry out national treatment or accord the foreign investor the Most Favored Nation status (MFN) contingent on which one suits them better.[99]

In Kenyan BIT practice, in all instances whereby the law invokes national treatment, MFN treatment is included within the same scope.[100] This not only speaks to the treatment of foreign investments and the resultant income that is derived by the investors; but also

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[96] Dolzer R, 'National Treatment: New Developments', Making the Most of International Investment Agreements: A common agenda, Organised by ICSID, OECD and UNCTAD, Paris, 12 December 2005, 1.

[97] Wallace J, Bailey D, 'The Inevitability of National Treatment of Foreign Direct Investment with Increasingly Few and Narrow Exceptions *National Treatment of Foreign Investment: Exceptions and Conditions' Cornell Law Journal,* 31, 1998, 619.

[98] Wallace J, Bailey D, 'The Inevitability of National Treatment of Foreign Direct Investment with Increasingly Few and Narrow Exceptions *National Treatment of Foreign Investment: Exceptions and Conditions' Cornell Law Journal,* 620.

[99] Wallace J, Bailey D, 'The Inevitability of National Treatment of Foreign Direct Investment with Increasingly Few and Narrow Exceptions *National Treatment of Foreign Investment: Exceptions and Conditions'* 621.

[100] Waruhiu P, 'Kenya's Bilateral Investment Treaties: Rethinking the vaguely drafted substantive provisions', Unpublished LLM Thesis, University of Nairobi, Nairobi, 2019, 53.

the '*management, use, enjoyment or disposal of investments*'[101]. As pointed out earlier, Kenya has extravagantly accorded foreign investors incentives that go beyond the legal standard present in section 3(e) of the Competition Act of '*creating conducive conditions for… foreign investment*' which in turn works to the detriment of local investment. The BIT contracted between Kenya and the Netherlands for instance, goes beyond national treatment by stating that parties should endeavor to accord investors from the other state MFN treatment with respect to the payment of taxes, fees or charges and to the enjoyment of fiscal deductions and exemptions.[102] It is noteworthy that the Netherlands is one of the countries whose nationals are at the forefront of carrying out FDI in Kenya.[103]

As it is used in all BITs contracted by Kenya,[104] a similar feature is present in the National treatment clause in the Qatari BIT. It stipulates a national treatment clause which protects the interests of Qatari investors by treating them, their property and their investments '*no different than those of Kenyan nationals*' in order to promote their investments in Kenya.[105]

The effect of the wide use of national treatment clauses is that while they heavily stimulate the activities of foreign investors in Kenya, they undercut the ability of local investors to participate in local investment. This is because they propagate indirect discrimination of local investors. Cottier and Oesch succinctly report that national treatment is a WTO doctrine and that its roots lie in creating equal conditions for competition among domestic and foreign products.[106] The expected situation is that domestic products and investments are at an advantage but this is not the Kenyan situation as foreign investments are at an advantage. Most foreign investors are more capital rich than local investors as observed by the Kenya National Bureau of Statistics[107] and hence placing them on the same playing

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[101] Moloo R, Grema Y, 'Investment Treaty Arbitration: Kenya', *Global Arbitration Review*, 2015, 4, https://www.gibsondunn.com/wp-content/uploads/documents/news/Moloo-Grema-Investment-Treaty-Arbitration-Kenya-GAR-Mar-2015.pdf on the 20 September 2019.
[102] Moloo R, Grema Y, 'Investment Treaty Arbitration: Kenya', *Global Arbitration Review*, 2015, 4, https://www.gibsondunn.com/wp-content/uploads/documents/news/Moloo-Grema-Investment-Treaty-Arbitration-Kenya-GAR-Mar-2015.pdf on the 20 September 2019.
[103] United Nations Conference on Trade and Development, '*World Investment Report 2019*', 2019, 54.
[104] 'International Investments Agreements Navigator', Investment Policy Hub, UNCTAD website, https://investmentpolicy.unctad.org/international-investment-agreements, on the 20 September 2019.
[105] Article 4, Declarations of special arrangements for the reciprocal promotion and protection of investments, Special gazette supplement, (No 46 of 2017).
[106] Cottier T, Oesch M, 'Direct and Indirect discrimination in WTO Law and EU Law', Swiss National Centre of competence in research, Working Paper No 2011/16, April 2011, 5.
[107]The Kenya Foreign Investment Survey, 2018,< https://www.knbs.or.ke/foreign-investment-survey-2018/> on the 16 Mar 2020. See also: Muiruri P, 'Global firms find opportunities where local investors burn their fingers', The Standard, July 2019, _<

field indirectly gives them a head start in the investment sector which causes unwarranted concentration against local investment. The introduction of minimally regulated FDI; or FDI whose regulation is tailored exclusively to favor foreign investors diminishes the ability of the local investor to ably compete in the same market causing unwarranted concentration. Despite national treatment and MFN being more lucrative to foreign investors, Kenya may benefit more than it currently does by granting the exclusions to the same in a bid to place local investment on an equal footing as FDI in the codification of her BITs.

Cottier and Oesch further state that equal conditions of competition have a dichotomy. The first part is the non-discriminatory treatment of both foreign and local investments which Kenya has achieved by her use of the national treatment clause. They however affirm that the second part which is known as equality of opportunity is a measure that seeks to cater to the unchecked de facto discrimination that may ensue even when there is no legal discrimination. This is because non-discrimination on its own '*does not guarantee results and outcomes but only heightens the potential to operate successfully*.'[108] This study therefore urges that Kenya's investment policy shifts from not only including national treatment clauses but also taking into account that there is no equality of opportunity between local and foreign investment.

In this same vein, Kenya should opt to strategically include exclusions in its BITs. Exclusions are a tool used to bring about the exclusive participation of local small and medium scale enterprises in the investment sector; to the exclusion of foreign investors.[109] While strict national treatment clauses *seem to* advance for equality between local and foreign investors in the host state; foreign investors benefit more which is indirectly discriminatory against local investors in the investment market. Exclusions level the playing field by making it more *equitable* for both local and foreign investment to thrive. Exceptions often manifest themselves as non-conforming measures in BITs. Non-conforming measures refer to laws, regulations and procedures, requirements or practices

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https://www.standardmedia.co.ke/business/article/2001333453/why-foreign-firms-are-investing-heavily-as-local-outfits-struggle on Mar 16 2019.

[108] Cottier T, Oesch M, 'Direct and Indirect discrimination in WTO Law and EU Law',5.

[109] Moloo R, Grema Y, 'Investment Treaty Arbitration: Kenya', *Global Arbitration Review*, 2015, 4, https://www.gibsondunn.com/wp-content/uploads/documents/news/Moloo-Grema-Investment-Treaty-Arbitration-Kenya-GAR-Mar-2015.pdf on the 20 September 2019.

that violate certain articles of the BIT.[110] For instance, a law prohibiting an investor of another member country to own a factory does not conform with national treatment as it places a restriction on the strictly equal treatment of foreign investors that national treatment prescribes.

Some exclusions are evident in the BITs signed by Kenya including the BITs signed between herself and France, Slovakia, Switzerland and Germany. The BIT contracted between Kenya and France states that some emerging local industries may necessitate the application of exceptions to national treatment of foreign investors.[111] These exceptions equitably grant Kenyan investors a privilege in plunging into emerging local industries. In a similar vein, Slovakia has a similar provision which makes exceptions for the exclusive participation of not only small and medium scale local enterprises; but also seeks to protect emerging industries.[112] The Swiss BIT makes an exception for non-conforming measures to further the creation of its local industries.[113] The German BIT differs slightly from the aforementioned as it makes exceptions to national treatment based on public security, public order, public morality and health. Moreover, the German BIT goes beyond the provision of standard exceptions by providing for the following:

‘unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the marketing of products inside or outside the country, as well as any other measures having similar effects.’[114]

The exclusion above effectively states that there is mandatory room created by the BIT for the exclusive inclusion of local investors in the activities of foreign investors in the purchase of raw and auxiliary materials and means of production whereby contrary to national treatment; the local suppliers will be opted for and favored as an exception to the

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[110] Berger A, Busse M, Nunnenkamp P, Roy M, ‘Attracting FDI through BITs and RTAs: Does treaty content matter?’, 75, *Vale Columbia Center on Sustainable International Investment,* 2012, 1,2. The citation provided alludes to the function of non-conforming measures in the context of treaties which are negatively listed.
[111] Article 2, *Decree No. 2010-858 of 23 July 2010 on the publication of the agreement between the Government of the French Republic and the Government of the Republic of Kenya on the Reciprocal Promotion and Protection of Investments,* Nairobi December 4, 2007.
[112] Article 3, *Protocol to the Agreement on the Promotion and Reciprocal Protection of Investments between the Government of the Slovak Republic and the Government of Republic of Kenya,* 2011.
[113] Article 4, *Agreement between the Swiss Confederation and the Republic of Kenya on the Promotion and Reciprocal Protection of Investments,* 2009.
[114] Article 3, *Protocol to the treaty between the Federal Republic of Germany and the Republic of Kenya concerning the Encouragement and Reciprocal Protection of Investments*, 2000.

national treatment standard as a means of affirmative action. While the above exceptions make room for the equitable treatment of foreign and local investment; they are few and far between as the BITs contracted by Kenya are largely written without including such strategic exclusions that favor Kenyan investors.

3.32 Tax exceptions granted to foreign investors

One of the incentives most widely used by Kenya to lure foreign investors is the use of tax incentives. Since the 1980's when the government of Kenya made deliberate efforts to attract FDI in order to stimulate economic growth, Kenya's tax policy was changed to accommodate this objective and these accommodations still exist to date.[115] Not only does Kenya continually provide tax holidays to foreign investors to stimulate FDI (to the exclusion of local investors hence advancing the unwarranted concentration of economic power on FDI over local investment; but also does she lose billions of shillings in revenue annually through the provision of tax holidays to foreign investors.[116]

Undoubtedly, the loss of revenue dents the public coffers as it directly results in a lower collection of tax. What is debatable however is how effective tax holidays are to the attraction of investors. According to a study carried out by Action Aid International in conjunction with the Tax Justice Network, Kenya loses a total of an unrecovered 100 billion Kenyan shillings due to the tax incentives and exemptions granted to foreign investors annually. As seen in the Action Aid report, this amount is not recouped in any economic activity or returns by foreign investors. This '*amounts to more than double the amount that Kenya dedicated to her entire health budget of 41.5 billion shillings'.* While the government has previously committed to taking action on this matter, little to no effort has been made to review the regime.[117]

Whereas tax holidays are granted to foreign investors in order to establish Kenya as a lucrative country to invest in; the effectiveness and accuracy of this has been widely disproved. In more recent years, studies have demonstrated that while tax holidays are

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[115] Gumo M, 'The effect of tax incentives on Foreign Direct Investments in Kenya, Project for the Masters of Science in Finance', University of Nairobi, Nairobi, 13.
[116] Gumo M, 'The effect of tax incentives on Foreign Direct Investments in Kenya, Project for the Masters of Science in Finance', University of Nairobi, Nairobi, 4.
[117] 'Tax Justice Network-Africa & ActionAid International, 'Tax Competition in East Africa: a race to the bottom?' 7.

widespread in Kenya, they are inefficient as they are not one of the key determinants of FDI. In fact, tax holidays have been termed as unfocused as they are granted without an explicit statement as to how they serve a specific purpose in the process of FDI.[118] Moreover, it has been found that the economic costs of tax holidays are much higher than the economic benefits that are as a result of the said holidays rendering them as an economic inefficiency.[119]

Statistically speaking, contrary to common belief, tax holidays have been found to be insignificant to foreign investors approaching a state for the purpose of investing in it. The key determinants considered by foreign investors instead are the ease of doing business, good quality infrastructure, low administrative costs of setting up shop, political stability and a fairly clear and predictable macroeconomic policy which speaks to the principle of the fair and equitable treatment of foreign investors.[120] This therefore means that the said billions of shillings lost annually by Kenya in tax exemptions are an unworthy trade off as they are not key in serving the purpose of attracting FDI in spite of their high cost to the state.

A study was carried out in this regard whereby a cluster of African countries, including Kenya were sampled and through quantitative research, the study concluded that the key determinants of FDI depend on agglomeration economies, existence of natural resources, real GDP growth and domestic and international FDI policy amongst others. In fact it asserts that the only positive relation that exists between FDI and taxes is when there is a double taxation agreement in place that benefits the two signatory states.[121]

There is a wide array of categories of exemptions granted to foreign investors as follows:

'Turning specifically to the tax holidays provided, Kenya has moved from a blan]\ket exemption, commencing in the first profit-making year, for two years plus a 50% reduction in tax for the next three years, for all production-oriented FIEs scheduled to operate for at least 10 years, to a more

[118] Gumo M, 'The effect of tax incentives on Foreign Direct Investments in Kenya, Project for the Masters of Science in Finance', University of Nairobi, Nairobi, 14.
[119] Gumo M, 'The effect of tax incentives on Foreign Direct Investments in Kenya, Project for the Masters of Science in Finance', 14.
[120] Gumo M, 'The effect of tax incentives on Foreign Direct Investments in Kenya, Project for the Masters of Science in Finance', 3.
[121] Sichei M, Kinyondo G, 'Determinants of Foreign Direct Investment in Africa: A panel data analysis' 12(18), *Global Journal of Management and Business Research,* 2012, 12.

targeted set of exemptions, a three-year exemption followed by a 50% reduction in tax rate for the next three years…'[122]

The tax exemptions are scattered amongst the following laws: The Income Tax Act, the Value Added Tax Act and customs legislation.

While Kenya's grant of tax exemptions to foreign investors is not evident in the various BITs that she is party to, the increased foreign investment that she participates in allows for foreign investors to benefit directly from the state endorsed tax exemptions on a large scale. In spite of the tax exemptions being inconsequential to the FDI inflows Kenya attracts, domestic investors who would benefit from the exemptions do not have access to them and this further contributes to the unwarranted concentration of economic power on FDI.

[122] Gumo M, 'The effect of tax incentives on Foreign Direct Investments in Kenya, Project for the Masters of Science in Finance', University of Nairobi, Nairobi, 14. The tax exemptions are scattered amongst the following laws: The Income Tax Act, the Value Added Tax Act and customs legislation. See: 'Tax Justice Network-Africa & ActionAid International, 'Tax Competition in East Africa: a race to the bottom?' 4.

Chapter 4

4.1 The analyses of the findings of the Study

In the previous chapter, this study proves that Kenya's legal framework of investment law favors FDI over local investment. This is not only through the indirect discrimination occasioned on local investment but also through the extravagant tax exemptions granted to foreign investors. This chapter seeks to analyse the implications of these findings. From Chapter three, this study finds that the language in the Kenya's investment laws, tax policies and BITs are skewed towards favoring FDI over local investment. Chapter three also found that the current Kenyan investment law and policy framework does not effectively cater to discrimination. While it is cognizant of legal discrimination which it seeks to check by including national treatment clauses that advance for equal treatment of local and foreign investors, it neglects to address the fact that there lies an unchecked inequality of opportunity between local and foreign investors whereby the latter have more access to capital and hence have an ease of carrying out their investment activities. It was further established that Kenya loses billions of shillings in revenue through the tax exemptions granted to foreign investors in spite of taxation not being one of the determinants of FDI and hence rendering it as an inefficient and perhaps useless incentive.

Kenya has justified her hot pursuit of FDI by stating that it is done pursuant to accelerating economic growth in Kenya. This study seeks to demonstrate that the approach taken by the Kenya is counterproductive as it goes contrary to its objectives of economic growth. While Kenya continues to lose revenue through the tax exemptions granted to foreign investors, and continually gives foreign investors extravagant national treatment without using exclusions that can benefit the local investment sector, her GDP only minimally benefits from FDI in spite of all the costs (financial and other) incurred.[123]

As asserted by the Institute of Economic affairs:

'Foreign Direct Investment inflows have had ***minimal contribution to Kenya's GDP*** (emphasis mine). A quick glance at the World Development Indicators database reveals that this figure stood at less than 1% for all but six years in the period between 1970 and 2012. In 2012, for example,

[123] Institute of Economic Affairs, 'Why Kenya should not sign any more Bilateral Investment Treaties', http://www.ieakenya.or.ke/blog/why-kenya-should-not-sign-any-more-bilateral-investment-treaties on the 17 August 2019.

the net FDI inflow to Kenya was USD 259 million (0.64% of GDP), much lower than Uganda's USD 1.2 trillion (6.02%), Tanzania's USD 1.7 trillion (6.04%).'[124]

Other statistics establish that in 2018 FDI registered a growth to 1.8% of Kenya's nominal GDP from the 1.6% growth it had in 2017. Despite the growth, it is imperative to note that the highest growth rate ever experienced was in 2009 where the rate was at 4% and record lows of 0.00% were experienced in 2001.[125] Furthermore, from the appendix below, one may note that since 2009 Kenya has experienced a steady decline in FDI with minimal improvements between 2015 and 2018. [126] This may be because Kenya has '*lost her appeal*' in the eyes of investors.[127]

In spite of the Kenyan government's ardent efforts in incentivizing FDI, there is only negligible (not insignificant) contribution that it has on the GDP of the state. Indeed, FDI has the capacity to enhance economic growth in developing countries but this correlation is not automatic. FDI can only be beneficial for them if certain factors are already up and running prior to the injection of FDI into the economy.[128] These include infrastructure, minimal barriers to entry, low administrative costs, low levels of corruption and political stability.[129]

Furthermore, for FDI to be of optimal economic benefit to developing nations, it should build on the local efficiencies already in place in the local investment sector.[130] This cannot be achieved if local investment is completely '*crowded out*' by FDI.[131] Furthermore, the overdependence on FDI leads to reduced local capacity and technologies

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[124] Institute of Economic Affairs, 'Why Kenya should not sign any more Bilateral Investment Treaties', http://www.ieakenya.or.ke/blog/why-kenya-should-not-sign-any-more-bilateral-investment-treaties on the 17 August 2019.

[125] Kenya Foreign Direct Investment: % of GDP, CEIC data <https://www.ceicdata.com/en/indicator/kenya/foreign-direct-investment--of-nominal-gdp> on the 21 August 2019.

[126] Kenya Foreign Direct Investment: % of GDP, CEIC data <https://www.ceicdata.com/en/indicator/kenya/foreign-direct-investment--of-nominal-gdp> on the 21 August 2019.

[127] Abala D, 'Foreign Direct Investment and Economic Growth: An empirical analysis of Kenyan data', 4(1), *DBA Africa Management review*, 2014, 64.

[128] Nunnenkamp P, 'FDI and economic growth in developing countries' 3(1), Journal of World Investment, 2002, 595.

[129] Gumo M, 'The effect of tax incentives on Foreign Direct Investments in Kenya, Project for the Masters of Science in Finance', 3. See also, Abala D, 'Foreign Direct Investment and Economic Growth: An empirical analysis of Kenyan data',63.

[130] Knoerich J, 'How does outward Foreign Direct Investment contribute to economic development in less advanced home countries', 455.

[131] Abala D, 'Foreign Direct Investment and Economic Growth: An empirical analysis of Kenyan data', 66.

which reduces the incentive to encourage local investment. FDI has the capacity to *'lower or replace domestic savings and investment'*[132] therefore, competition law should be utilized in the creation of a conducive environment between local and foreign investment pursuant to the objectives of the Competition Act; in order to foster sustainable economic development in Kenya.

Chapter 5

5.1 Conclusion and Recommendations

5.11 Conclusion

This study sought to prove that there lies an unwarranted concentration of economic power in the foreign investment sector to the detriment of the local investment Sector. This said unwarranted concentration goes contrary to the section 3(e) objectives of the Competition Act which seek to ensure that there is a conducive environment for both local investment and foreign investment; and the section 50 stipulation against the unwarranted concentration of economic power in a sector, in this case the investment sector.

This study has proven that the local and foreign investment sectors are adversarial in nature as they seek to provide the same services and goods to the market. This has been demonstrated using the example of real estate investments whereby local investors due to the current real estate crunch are being denied credit by Kenyan banks and are thus finding it difficult to successfully carry out real estate investments. This is unlike foreign investors who penetrate the Kenyan markets easily and have the capital they need at their disposal to carry out their investment activities.

This state of affairs speaks to the indirect discrimation occasioned on local investors through the national treatment clause that is dominant in the BITs contracted by Kenya. The national treatment advocates for the equality of treatment of both foreign and local investors but is not cognizant of the inequality of opportunity that creates a disadvantage against local investors. Furthermore, the state's mentality as depicted in its legal language of contracting BITs is largely investor driven as it often seeks out incentives in their favor but neglects to strategically include permissible exclusions to clauses such as national

[132] Abala D, 'Foreign Direct Investment and Economic Growth: An empirical analysis of Kenyan data', 63.

treatment which would go a long way in giving local investors a head start by injecting their activities into the investment activities of foreign investors. This chapter further demonstrates the bias of the Kenyan state in favor of foreign investors by granting them tax incentives that occasions a grand loss of revenue for the state annually. This is proved to be an untargeted and unnecessary loss as it does not incentivize foreign investors to penetrate the Kenyan markets as tax incentives do not form part of the key determinants of FDI.

The fourth chapter of this study has proved that while the Kenyan government is in the arms race for the attraction of FDI, Kenya is losing her appeal as a hotspot for FDI. Furthermore, the GDP of the country only minimally benefits from the FDI. This is in spite of the loss of tax revenue occasioned by the state’s attempt to attract the same and the accessory lack of creation of conducive conditions for local investment.

This study therefore concludes that there is an unwarranted concentration of economic power in the foreign investment sector, to the detriment of local investment and proposes the following recommendations so as to bring about an equilibrium of fair competition in the investment sector.

5.12 Recommendations

In view of the findings of this study, the following recommendations are made.

First, Kenya is urged to be more strategic in her contracting of BITs. It is recommended that in contracting BITs, Kenyan should be more accommodative of exclusions so as to foster local development which in turn would encourage fair competition between local and foreign investment by introducing not only face value equality but also equality of opportunity. Furthermore, it is recommended that Kenya overhauls the exorbitant tax holidays granted to foreign investors so as to stop the large scale annual loss of funds due to their inefficiency and their untargeted and unstartegic nature in the attraction of FDI. A more efficient system that factors in the core determinants for the attraction of FDI would be better suited for Kenya. Thirdly, it is recommended that the Competition Authority exercises the powers vested in it to take steps towards breathing life into section 3(e) of the Act so as to ensure that there exists fair competition between the local and foreign investment sectors. It is further recommended that the authority breathes life into its section 50 power of compelling sectoral participants to provide it with the information it needs to destabilize any unwarranted concentration of power. It is proposed that the CAK should compel the Kenya Investment Authority to provide it with the information it needs regarding the foreign investments set up in Kenya, their capital and resultant net profits; and compare this with the same data for local investments. This can be done in conjunction with the Kenya National Bureau of Statistics. This real time date can help to direct the needed reforms in the investment sector in a more equitable direction. Last but not least, I would like to call upon scholars in the field of law and economics in Kenya to carry out further research on this important issue.

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