



**Strathmore**  
UNIVERSITY

**A POSSIBLE TAX HAVEN IN KENYA: AN ANALYSIS OF THE NAIROBI  
INTERNATIONAL FINANCIAL CENTRE ACT AND ITS IMPLICATION ON BASE  
EROSION AND PROFIT SHIFTING**

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## DECLARATION

I, LAUREEN KABURA KAMAU, 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: JULY 30, 2021

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



Signed: .....

MS MERCY MBOVI MBITHI

## **ABSTRACT**

African states are moving towards finding mediums to facilitate domestic resource mobilisation in a bid to finance their development and stop relying on foreign aid. In light of this, Kenya intends to establish an International Financial Centre (IFC) in Nairobi to create a competitive regional financial services hub, which will stimulate both domestic and foreign investments. To support its efforts, the State enacted the Nairobi International Financial Services Act, which provides the legal framework that regulates the operations of the Centre to enable it to meet its expected goal. Civil society groups however, were concerned that some of the provisions of the Act were not in line with the state's goals as they would create a tax haven and facilitate capital flight out of Kenya and Africa. The study investigates whether the provisions in the Act enable the creation of a tax haven instead of an International Financial Centre (IFC). It further examines what the implications would be on Base Erosion and Profit Shifting (BEPS) in Kenya and Africa as a whole. To answer these questions, the study applies both primary and secondary research, by analysing the provisions of the Act as well as the literature concerning tax havens, IFCs and BEPS. The study finds that the legal framework allows for secrecy, lax regulation of firms, weak supervisory mechanisms and tax incentives that are likely to impose little to no tax liabilities. These provisions are similar to the structures that establish tax havens thus the Act risks aggravating the erosion of the tax base in Kenya and within Africa. As a way forward, the study recommends the amendment of the Act to include provisions that guarantee transparency, tax cooperation between states and strong supervisory mechanisms to enable Kenya and other African states to achieve their goal of generating more revenue for the state to enhance public welfare.

## **LIST OF ABBREVIATIONS**

1. BEPS – Base Erosion and Profit Shifting
2. IFC - International Financial Centre
3. IFFs- Illicit Financial Flows
4. MNEs- Multinational Enterprises
5. NIFC- Nairobi International Financial Centre
6. NIFC Act- Nairobi International Financial Centre Act
7. OECD- Organisation for Economic Co-operation and Development

## **LIST OF CASES**

1. *Ayrshire Pullman Motors Services and DM Ritchie v IRC* (1929), The Court of Session of Scotland First Division.
2. *Levene v IRC* (1928), The United Kingdom House of Lords.
3. *ICR v Duke of Westminster* (1936), The United Kingdom of House of Lords.
4. *Elmiger v CIR* (1966), The New Zealand Court of Appeal.

## **LIST OF LEGAL INSTRUMENTS**

1. *Constitution of Kenya* (2010).
2. *Nairobi International Financial Centre Act* (Act No.25 of 2017).
3. *Tax Procedure Act* (Act No. 29 of 2015).
4. *Income Tax Act* (Act No. Cap 470).
5. *Companies Act* (No 17 of 2015).

# CHAPTER 1: INTRODUCTION

## 1.1 BACKGROUND OF THE STUDY

The Kenyan government set out to establish a financial centre in Nairobi through the Nairobi International Financial Centre Bill in 2016<sup>1</sup> that obtained the force of law and became an Act in 2017.<sup>2</sup> The objective of the Act is to provide a legal framework to facilitate and support the development of an efficient and globally competitive financial services sector through the establishment of the Nairobi International Financial Centre (hereinafter NIFC) and the Nairobi International Financial Centre Authority.<sup>3</sup> In creating the NIFC, the State believes that it will create more opportunities for domestic and international savings, attract more foreign direct investment into Kenya's financial services sector, promote the export of international financial services from Kenya to the rest of Africa, create more employment and increase competitiveness of Kenyan enterprises.<sup>4</sup>

This is in line with the Sustainable Development Goals (hereinafter SDGs), adopted by the United Nations and its member countries in 2015. It consists of seventeen goals that countries should accomplish by the year 2030.<sup>5</sup> Some of these goals include the elimination of poverty, inclusive and sustainable economic growth and equality within and among countries.<sup>6</sup> The achievement of these goals requires state-level responsibility, as States are required to raise the sufficient resources to cover the costs of realisation of these objectives as well as ensure global collaboration and partnership.<sup>7</sup>

Furthermore, the creation of the NIFC aligns with Kenya's Vision 2030, a development plan designed to create a globally competitive and prosperous country with a high quality of life by 2030. The development blueprint sets out six pillars that will facilitate the achievement of this goal. One of these pillars is the economic pillar that seeks to raise the GDP growth rate in Kenya by 10 per cent through six identified priority sectors, the financial services sector being one of them. The State intends to undertake projects and programmes within the sector to

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<sup>1</sup> Ngugi B, 'Rotich calls for public views on financial hub' Business Daily Africa, 26 May 2016 - <<https://www.businessdailyafrica.com/markets/Rotich-calls-for-public-views-on-Nairobi-financial-hub-/539552-3220424-facd8ez/index.html>> on 24 March 2020.

<sup>2</sup> Section 1, *Nairobi International Financial Centre Act* (Act No 25 of 2017).

<sup>3</sup> Objective, *Nairobi International Financial Centre Act* (Act No 25 of 2017).

<sup>4</sup> National Treasury Publications, *Nairobi International Financial Centre*, 2017, 1.

<sup>5</sup> United Nations Development Programme, *Sustainable Development Goals*, 2015, 3.

<sup>6</sup> United Nations Development Programme, *Sustainable Development Goals*, 2015, 4, 11, 13.

<sup>7</sup> Vienna Institute for International Dialogue and Cooperation, *Nairobi International Financial Centre or Nairobi Tax Haven? A review of the Nairobi International Financial Centre Bill*, 2017, 6.

generate a vibrant and competitive financial sector driving high levels of savings and financing the country's investment needs. The NIFC serves as one of the projects.<sup>8</sup>

Nevertheless, the Bill's transition to an act was not smooth. This was due to kickback by civil society groups<sup>9</sup> who cautioned the adoption of the bill owing to the far-reaching consequences that would be experienced in Kenya and Africa as a whole due to some of its salient provisions.<sup>10</sup> A few of the controversial provisions were Section 17 and Section 30 of the Act, which allow for secrecy thus mimicking measures similar to those applied in tax havens or secrecy jurisdictions. The civil society groups believed that this secrecy would facilitate capital flight in Africa through avoidance mechanisms as well as criminal activities such as evasion and money laundering.<sup>11</sup>

Apart from contention caused by the provisions, the circumstances under which the bill was proposed also raised questions as to its capabilities to prevent exploitation by the foreign investors it aimed to attract. This was because the discussion of the Bill run concurrently with the occurrence of the Panama leaks.<sup>12</sup> The Panama Leaks occurred in April 2016 after a whistleblower approached a media house with 11.5 million confidential documents concerning the business activities of Mossack Fonseca, a Panamanian law firm and offshore service provider.<sup>13</sup> The International Consortium of Investigative Journalists (hereinafter ICIJ) took the lead and broke down, assessed and made public the confidential documents. The documents provided insight into the use of more than 214,000 shell companies in tax havens around the world over the past 45 years.<sup>14</sup> The owners of these shell companies were not only multinational corporations and wealthy individuals but also politicians, their associates, and public officials from around the world.<sup>15</sup>

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<sup>8</sup> Republic of Kenya Government Press, *Kenya Vision 2030*, 2008, 1, 2, 15.

<sup>9</sup> Gumba D and Mcolaka P, 'Will new legislation turn Kenya into a tax haven?' ISS Africa Today, 20 April 2018 - <<https://issafrica.org/iss-today/will-new-legislation-turn-kenya-into-a-tax-haven>> on 24 March 2020.

<sup>10</sup> Tax Justice Network-Africa, *Memorandum to the Clerk of the National Assembly: Nairobi International Financial Centre Bill (2016)*, 2017.

<sup>11</sup> Vienna Institute for International Dialogue and Cooperation, *Nairobi International Financial Centre or Nairobi Tax Haven? A review of the Nairobi International Financial Centre Bill*, 2017, 13,17.

<sup>12</sup> Vienna Institute for International Dialogue and Cooperation, *Nairobi International Financial Centre or Nairobi Tax Haven? A review of the Nairobi International Financial Centre Bill*, 2017, 7.

<sup>13</sup> Dalen S, 'Tax havens Secrecy jurisdictions and journalistic investigations: How to make it part of the global discussion?' University of Oxford, Reuters Institute Fellowship Paper, 2016, 16 - <[https://reutersinstitute.politics.ox.ac.uk/sites/default/files/201902/Tax%20havens\\_Secrecy\\_jurisdictions\\_and\\_journalistic\\_investigations\\_How\\_to\\_make\\_it\\_part\\_of\\_the\\_global\\_discussion.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/201902/Tax%20havens_Secrecy_jurisdictions_and_journalistic_investigations_How_to_make_it_part_of_the_global_discussion.pdf)> on 24 March 2020.

<sup>14</sup> O'Donovan J, Wagner F and Zeume S, 'The Value of Offshore Secrets: Evidence from the Panama Papers' 32(11) *The Review of Financial Studies*, 2019, 9.

<sup>15</sup> Dalen S, 'Tax havens Secrecy jurisdictions and journalistic investigations: How to make it part of the global discussion?' University of Oxford, Reuters Institute Fellowship Paper, 2016, 16.

The leaks gained global and national coverage in various countries thus increasing public awareness in regards to the tax planning strategies utilised by Multi National Enterprises (MNEs).<sup>16</sup> Subsequently, it sparked discussion among policy makers and lawmakers about the global offshore tax system consisting of tax havens and International Financial Centres (IFCs) and their role in draining wealth from states through profit shifting especially in Africa, which according to estimated data has lost billions of dollars.<sup>17</sup> It created global apprehension about offshore tax structures and their ability to facilitate the tax avoidance activities carried out by MNEs known as Base Erosion and Profiting Shifting (hereinafter BEPS), consequently, denying states revenue.<sup>18</sup> Resultantly, countries were encouraged by various civil society groups to amend the international tax system and move away from such structures as it increased inequality.<sup>19</sup>

Kenya's decision to begin an IFC seemed to go against the global movement.<sup>20</sup> Kenya's ranking as a secrecy jurisdiction also contributed to the wariness of the civil society groups of the promulgation of an Act establishing an IFC in the country.<sup>21</sup> Kenya currently ranks number 24 of 133 countries in the financial secrecy index with a score of 76 out of 100 in secrecy, which is quite high.<sup>22</sup>

Although the Bill is now an Act, the same concerns raised by civil societies on the suitability of the law are echoed with groups, such as Tax Justice Network Africa, who assert that the establishment of the Act and consequently the IFC is a drastic move in the wrong direction.<sup>23</sup>

## 1.2 STATEMENT OF THE PROBLEM

Budget deficits, increasing debt levels, borrowing constraints and the ongoing international economic downturn means that governments, especially in developing countries, need to

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<sup>16</sup> Ssuna R, One Year after the Paradise papers: Should We Keep the Hope Alive? Tax Justice Network Africa - Policy Brief Series December 2018, 1-< <https://taxjusticeafrica.net/wp-content/uploads/2019/09/Paradise-papers-BLOG.pdf>> on 4 December 2020.

<sup>17</sup> Vienna Institute for International Dialogue and Cooperation, *Nairobi International Financial Centre or Nairobi Tax Haven? A review of the Nairobi International Financial Centre Bill*, 2017, 7.

<sup>18</sup> Ssuna R, One Year after the Paradise papers: Should We Keep the Hope Alive? Tax Justice Network Africa - Policy Brief Series December 2018, 1.

<sup>19</sup> Financial Transparency Coalition, 'Paradise Papers reiterate need for a truly global response to crack down on tax haven abuses', 9 November 2017 -< [Paradise Papers reiterate need for a truly global response to crack down on tax haven abuses - Financial Transparency Coalition](https://www.financialtransparencycoalition.org/paradise-papers-reiterate-need-for-a-truly-global-response-to-crack-down-on-tax-haven-abuses) > on 4 December 2020.

<sup>20</sup> Vienna Institute for International Dialogue and Cooperation, *Nairobi International Financial Centre or Nairobi Tax Haven? A review of the Nairobi International Financial Centre Bill*, 2017, 7.

<sup>21</sup> Gumba D and Mcolaka P, 'Will new legislation turn Kenya into a tax haven?' ISS Africa Today, 20 April 2018 - < <https://issafrica.org/iss-today/will-new-legislation-turn-kenya-into-a-tax-haven> > on 24 March 2020.

<sup>22</sup> Tax Justice Network Africa, *Narrative Report on Kenya*, 2020, 1.

<sup>23</sup> Tax Justice Network Africa, *Narrative Report on Kenya*, 2020, 5.

expand their domestic resource base to finance the gaps and provide alternative funding.<sup>24</sup> One of the championed solutions to these challenges in Kenya is the *Nairobi International Financial Centre Act* (hereinafter NIFCA) which creates an IFC designed to attract foreign investment and host large international lenders, consequently raising the country's natural borrowing limit and increasing the State's financial capabilities to undertake larger projects.<sup>25</sup> Additionally, the state plans for the Centre to establish Nairobi as the Financial Hub for the East and Central African region.<sup>26</sup>

However, the accomplishment of these benefits may fail if the provisions of the Act facilitate the creation of a tax haven instead of an IFC.<sup>27</sup> This is because the creation and development of an IFC is contingent on a robust legal framework and fair tax system capable of curbing the manipulation and abuse that is prone to affecting IFCs.<sup>28</sup> If the Act establishes a tax haven it will pose a danger to the economy, by negatively, affecting tax collection and domestic revenue generation as tax havens encourage tax avoidance schemes carried out by MNEs thus enabling BEPS. Additionally, it will lower the financial integrity and transparency of the state.<sup>29</sup>

The paper aims to analyse the provisions of the *NIFCA* so as to investigate if there exists a link between the Act and the establishment of a tax haven. Furthermore, the study aims to understand if the nature of the Act has possible consequences especially in regards to BEPS in Africa. Lastly, the research will consider any possible recommendations that could aid in strengthening the *NIFCA*.

### **1.3 JUSTIFICATION OF THE STUDY**

Although Kenya is a vibrant and growing economy, it is plagued by extreme inequality such that only a small portion of the population is said to benefit from this growth while poverty affects the majority. The only way out of the quagmire is through fiscal justice, which involves progressive taxation to redistribute and raise revenue for essential public services.<sup>30</sup>

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<sup>24</sup> Vienna Institute for International Dialogue and Cooperation, *Nairobi International Financial Centre or Nairobi Tax Haven? A review of the Nairobi International Financial Centre Bill*, 2017, 6.

<sup>25</sup> U4 Anti-Corruption Resource Centre, *Tax haven or International Financial Centre? The Case of Kenya*, 2014, 2.

<sup>26</sup> Vienna Institute for International Dialogue and Cooperation, *Nairobi International Financial Centre or Nairobi Tax Haven? A review of the Nairobi International Financial Centre Bill*, 2017, 6.

<sup>27</sup> Tax Justice Network-Africa, *Memorandum to the Clerk of the National Assembly: Nairobi International Financial Centre Bill (2016)*, 2017.

<sup>28</sup> Vienna Institute for International Dialogue and Cooperation, *Nairobi International Financial Centre or Nairobi Tax Haven? A review of the Nairobi International Financial Centre Bill*, 2017, 6.

<sup>29</sup> U4 Anti-Corruption Resource Centre, *Tax haven or International Financial Centre? The Case of Kenya*, 2014, 1.

<sup>30</sup> Oxfam International, *Taxing for a More Equal Kenya: A Five Point Action Plan to Fight Inequality*, 2017, 1.

The establishment of a poorly regulated financial centre can worsen the inequality as it risks encouraging more profit shifting out of Kenya, and the continent as a whole, depriving countries of vital revenues to invest in quality public services. Furthermore, it can promote the development of a network of tax havens across Africa and its near neighbours for wealthy elite to exploit for tax abuse and criminal activity, which continues to widen the gap between the rich and poor.<sup>31</sup> In addition, fiscal incentives imposed by one country can lead to tax competition among countries who then lower their tax rates in order to retain and attract investors. Eventually, the tax competition can make it difficult for countries to maintain desired tax rates, leading to ever-declining tax rates and revenues. Researchers commonly refer to this effect as the race to the bottom.<sup>32</sup>

The study is important as it endeavours to provide a critical analysis of the Act to determine if it contains the proper safeguards to protect Africa and its growing economies from the erosion of their tax bases, which causes the depletion of revenue that governments could use to close the inequality gap. Moreover, the study hopes to contribute to the research determining the proper laws that should govern IFCs.

#### **1.4 SIGNIFICANCE OF THE STUDY**

The study seeks to add on to the growing research relating to the regulation of IFCs in Africa as more African countries include such centres in their development plans.<sup>33</sup> Subsequently, the results of the research will assist law and policy makers in Africa to design appropriate laws and policies that provides for a transparent and equitable tax system as opposed to laws that are attractive to MNEs but injurious to the state and its neighbours. This will enable the IFCs to meet their intended goals of generating more funds to develop their states.

#### **1.5 AIMS AND OBJECTIVES**

The research conducted in this study aims to study the Nairobi International Financial Centre Act so as to determine if it creates a tax haven which can lead to the erosion of the corporate tax base not only within the country but also in Africa due to its facilitation of capital flight and harmful competition.

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<sup>31</sup> Oxfam International, *Taxing for a More Equal Kenya: A Five Point Action Plan to Fight Inequality*, 2017, 35.

<sup>32</sup> Tax Justice Network-Africa and ActionAid International, *Tax competition in East Africa: A race to the bottom? Tax incentives and revenue losses in Kenya*, 2012, 15, 16.

<sup>33</sup> Seabrooke L and Waris A, 'Arrested Development in Africa's Global Wealth Chains: Accountability and Hierarchy Among 'Tax Havens' in Hashimzade N and Epifantseva Y(eds), *The Routledge Companion To Tax Avoidance Research*, 1<sup>st</sup> ed, Taylor & Francis Group, New York, 2018, 279-282.

The following are the objectives the research intends to accomplish to meet its aim:

- To analyse tax havens and international financial centres and discuss their components.
- To evaluate the critical provisions present in the Nairobi International Financial Centre Act.
- To investigate a possible link between the provisions of the Act and the establishment of a tax haven.
- To examine the effects of the Act in relation to tax avoidance and BEPS in Kenya and in Africa as a whole.
- To undertake a comparative study between the Nairobi International Financial Centre and the Ghana International Financial Centre to determine if there are any similarities.

## **1.6 RESEARCH QUESTIONS**

- What are the salient provisions of the Nairobi International Financial Centre Act?
- Do these provisions create a tax haven instead of an international financial centre?
- What is the effect of the provisions of the Act especially in relation to BEPs within the Kenyan jurisdiction and internationally?
- Are these provisions similar to other provisions that establish financial centres within the Ghana International Financial Centre?

## **1.7 HYPOTHESIS**

- The provisions of the Nairobi International Financial Centre Act create a tax haven.
- The creation of the tax haven exposes the economy to various negative implications such as BEPS.

## **1.8 LITERATURE REVIEW**

### **1.8.1 Tax Havens and International Financial Centres**

Palan, Murphy and Chavagneux, set out in their book to pin down a definition of a tax haven and distinguish it from IFCs. They emphasise that a clear-cut definition of a tax haven does not exist, as there is yet to be a consensus on what it means. They define tax havens as places or countries that have sufficient autonomy to write their own tax and finance laws and regulations. These places then proceed to use their autonomy to create legislation designed to assist persons, mostly foreign persons or corporations, to avoid the regulatory obligations imposed on them in

the places where they carry out the substance of their economic transactions.<sup>34</sup> Subsequently, corporations and foreign persons fail to pay tax in jurisdictions where they undertake the primary economic activities that generate their income and add identifiable value to the economy of the state.<sup>35</sup> As a result, tax havens are more often subject to accusations of tax avoidance and evasion as well as harmful competition.<sup>36</sup>

The scholars also define IFCs as financial centres specialising in non-resident financial transactions. The authors note that at present it is difficult to distinguish in practice between the activities of tax havens and those of IFCs. This is because they both feature tax avoidance schemes. They characterise an IFC to having inadequate supervision and regulations that allow persons to easily abuse the centre for tax avoidance and money laundering purposes. However, they state that not all tax havens are IFCs and not all IFCs are tax havens.<sup>37</sup>

According to the U4 Anti-Corruption Centre, the study published by the Organisation for Economic Cooperation and Development (OECD) on harmful tax competition in 1998, is the most authoritative starting point when seeking to identify tax havens.<sup>38</sup> The Organisation's report outlined the characteristics of a tax haven, which include little to no taxation on relevant income, a lack of transparency, lack of effective exchange of information and they do not require foreign persons to carry out substantial activity in their jurisdictions. The organisation noted that the 'no or low taxation' criterion alone is not sufficient in determining if the tax regime of a jurisdiction is harmful. One must therefore undertake the analysis and identification in conjunction with the other characteristics.<sup>39</sup>

Rawlings' study contributes to the research relating to the identification of tax havens by asserting that, tax havens focus on providing financial regimes based on secrecy, privacy and confidentiality. He adds that enabling clients to be completely anonymous and 'unknown' is also one of the prominent feature of many IFCs thus establishing a common thread between IFCs and tax havens. He stipulates that IFCs also have protective measures in place for their secrecy provisions, which he illustrates through the example of the Luxembourg leaks. This is

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<sup>34</sup> Palan R, Murphy R and Chavagneux C, *Tax Havens How Globalization Really Works*, 1<sup>st</sup> ed, Cornell University Press, Ithaka , 2010, 8, 17.

<sup>35</sup> U4 Anti-Corruption Centre, *Tax-motivated illicit financial flows a Guide for development practitioners*, 2014, 9.

<sup>36</sup> Palan R, Murphy R and Chavagneux C, *Tax Havens How Globalization Really Works*, 8, 17.

<sup>37</sup> Palan R, Murphy R and Chavagneux C, *Tax Havens How Globalization Really Works*, 23-25.

<sup>38</sup> U4 Anti-Corruption Centre, *Tax-motivated illicit financial flows: A Guide for Development Practitioners*, 2014, 9.

<sup>39</sup> Organisation for Economic Co-operation and Development, *Harmful Tax Competition: An Emerging Global Issue*, 1998, 23.

because the whistle-blower, who provided the information revealing the aggressive cross-border tax avoidance schemes carried out by multinational companies and the wealthy elite within Luxembourg was charged with criminal offences relating to the ‘theft’ of information and the ‘illegal’ release of said information to the media.<sup>40</sup> Rawling’s study later upholds that low or no-tax jurisdictions that combines a lack of transparency and access to information about the account holders or their activities in the IFCs is likely to present a fiscal risk.<sup>41</sup>

### **1.8.2 Developments in relation to International Financial Centres and Tax havens**

Tax havens have remained a specialised topic of interest to lawyers, accountants, and tax specialists navigating within its structure. These professionals raise the demand for the privileges that the havens supply by offering services that allow individuals or companies to take advantage of the grey area that exists within international tax laws to avoid or reduce their tax liabilities. Change began in the 1970s, a period characterised by slow economic growth, where there was an increased interest in tax havens not as conduits for tax evasion and avoidance but as financial centres. However, the study of tax havens remained a secondary discipline with little impact on mainstream academia.<sup>42</sup>

Palan states that in the late 90s awareness of the negative effects of tax havens started to increase after the OECD published its study on harmful tax competition and a number of international financial organizations began to list the issue of tax havens as one of their key priorities.<sup>43</sup> Whereas initially there was little political interest, major changes began to take place in 2008 in relation to the expansion of tax havens.<sup>44</sup> Shaxson notes that the changes were due to the economic decline that caused budget deficits in the developed world as well as the public criticism raised against the activities of tax havens that begun gaining traction. This propelled states to take action.<sup>45</sup> International bodies such as the OECD also got involved and launched actions, such as the Common Reporting Standards (CRS) regime that advances the automatic exchange of financial information and the BEPS Project, to combat the harm caused by tax havens.<sup>46</sup> Since then, there has been an increased interest by a growing number of

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<sup>40</sup> Rawlings G, ‘Shifting profits and hidden accounts: Regulating tax havens’ in Drahos P(ed) *Regulatory Theory: Foundations and Applications*, 1<sup>st</sup> ed, ANU Press, Australia, 2017, 668.

<sup>41</sup> Rawlings G, ‘Shifting profits and hidden accounts: Regulating tax havens’, 663.

<sup>42</sup> Palan R, Murphy R and Chavagneux C, *Tax Havens How Globalization Really Works*, 4.

<sup>43</sup> Palan R, Murphy R and Chavagneux C, *Tax Havens How Globalization Really Works*, 4.

<sup>44</sup> Shaxson N, ‘Tackling Tax Havens: The billions attracted by tax havens do harm to sending and receiving nations alike’ 56(3) *Finance and Development Journal*, 2019, 8.

<sup>45</sup> Shaxson N, ‘Tackling Tax Havens: The billions attracted by tax havens do harm to sending and receiving nations alike’, 8.

<sup>46</sup> Shaxson N, ‘Tackling Tax Havens: The billions attracted by tax havens do harm to sending and receiving nations alike’, 9.

academics, journalists and civil society organisations leading to the generation of new information.<sup>47</sup>

Research on IFCs has also expanded. One of the studies conducted by Shaxson maintains that hosting an IFC is a lose-lose proposition. He states that IFCs aggravate financial flows by corporations seeking to alleviate their tax liability thus not only causing harm to other economies but also to the jurisdiction that has set up the IFC. Some of the negative effects he proposes affecting jurisdictions with an IFC include worsening inequality as well as unquantifiable political damage due to the secrecy-shrouded capital that can infiltrate a political system.<sup>48</sup> Closer home, the African Union in its report regarding illicit financial flows in Africa maintained that the interest of African states in becoming financial centres would have detrimental effects especially on other African states in regards to capital flight<sup>49</sup> as Africa is prone to movement of capital outside the continent, which leads to large losses.<sup>50</sup> Their concern is well founded as tax havens and IFCs within Africa are likely to act as conduits facilitating repatriation and transfer of capital outside the continent rather than being the final destination of the investment.<sup>51</sup> This is because, as Waris and Seabrooke note, clients utilising these structures are unwilling to transfer their money out of established financial centres into less well-regulated and politically stable states.<sup>52</sup> The report by the Partnership for African Social Governance further outlines this as they found that the establishment of the Nairobi International Financial Centre is a setback in curbing financial flows out of the African region.<sup>53</sup>

### **1.8.3 Effects of tax havens**

The Association for Accountancy and Business Affairs (ABBA) maintains that tax havens are part of the world disorder that facilitate secrecy and poor regulation. The association further expresses that tax havens abet inequality as major corporations and the wealthy avoid and

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<sup>47</sup> Palan R, Murphy R and Chavagneux C, *Tax Havens How Globalization Really Works*, 4.

<sup>48</sup> Shaxson N, 'Tackling Tax Havens: The billions attracted by tax havens do harm to sending and receiving nations alike', 10.

<sup>49</sup> African Union Commission and United Nations Economic Commission for Africa, *Report of the High Level Panel on Illicit Financial Flows from Africa*, 2015, 42

<sup>50</sup> African Union Commission and United Nations Economic Commission for Africa, *Report of the High Level Panel on Illicit Financial Flows from Africa*, 2015, 1.

<sup>51</sup> Seabrooke L and Waris A, 'Arrested Development in Africa's Global Wealth Chains: Accountability and Hierarchy Among 'Tax Havens'', 281-282.

<sup>52</sup> Seabrooke L and Waris A, 'Arrested Development in Africa's Global Wealth Chains: Accountability and Hierarchy Among 'Tax Havens'', 281-282.

<sup>53</sup> Partnership for African Social Governance (PASGR), *Illicit Financial Flows in Kenya: Mapping of the Literature and Synthesis of the Evidence*, 2018, 13.

evade taxes, while ordinary people pay higher taxes for worsening public services.<sup>54</sup> Their study also indicates that the creation of tax havens and the demands created by it are also preventing elected governments from pursuing socially responsible economic policies.<sup>55</sup>

Zucman, Fagan and Picketty in their book, discuss among other things, the importance of hindering the growth of tax havens and their activities. This is not only to enable governments to collect more taxes but to restore balance in the realm of public finances and promote social justice.<sup>56</sup> The U4 Anti-Corruption Centre proposes proper tax jurisdiction rules as an important solution to the activities of tax havens as the rules enable developing countries to determine the tax base they can access which then affects the amount of tax revenue they can raise. The Organisation also asserts that the facilitation of the exploitation of certain tax rules has far-reaching effects. They support this assertion by maintaining that jurisdictions are more prone to tax-motivated financial flows, where the government has failed to design the tax regulations properly, as they do not have appropriate safeguards.<sup>57</sup>

#### **1.8.4 Base Erosion and Profit-Shifting (BEPS)**

Oguttu in her research refers to BEPS as the activities carried out by MNEs utilising the loopholes created by the asymmetries in international and national tax laws to avoid paying taxes. She asserts that persons could avoid taxes by either reducing the taxable income they are required to pay or shifting the profits they have earned to jurisdictions that levy lower taxes.<sup>58</sup>

As the United Nations Conference on Trade and Development (UNCTAD) demonstrates the nature of BEPS is part of growing research with some scholars placing BEPS under the umbrella of illicit financial flows (hereinafter IFFs) while other scholars propose that BEPS and IFFs are distinct.<sup>59</sup> Forstater establishes that this confusion is due to the lack of a clear consensus on the definition of IFFs particularly in relation to the word illicit.<sup>60</sup> Civil Society Organisations such as Oxfam and the Tax Justice Network in their research have advanced that

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<sup>54</sup> Association for Accountancy & Business Affairs, *No Accounting for Tax Havens*, 2002, 56.

<sup>55</sup> Association for Accountancy & Business Affairs, *No Accounting for Tax Havens*, 2002, 56.

<sup>56</sup> Zucman G, Fagan T and Picketty T, *The Hidden Wealth of Nations: The Scourge of Tax Havens* 1<sup>st</sup> ed University of Chicago Press, Chicago, 2015, 54.

<sup>57</sup> U4 Anti-Corruption Centre, *Tax-motivated illicit financial flows a guide for development practitioners*, 2014, 13.

<sup>58</sup> Oguttu A, 'Tax Base Erosion and Profit Shifting in Africa – Part 1: Africa's Response to the OECD BEPS Action Plan' International Centre for Tax and Development, Working Paper 54, June 2016, 6 - <[ICTD\\_WP54.pdf \(ids.ac.uk\)](#)> on 4 December 2020.

<sup>59</sup> United Nations Conference on Trade and Development (UNCTAD), *Tackling Illicit Financial Flows for Sustainable Development in Africa*, 2020, 3-4.

<sup>60</sup> Forstater M, 'Illicit Financial Flows, Trade Misinvoicing, and Multinational Tax Avoidance: The Same or Different?' Center for Global Development Policy Paper 123, 2018, 2 - <[Illicit Financial Flows, Trade Misinvoicing, and Multinational Tax Avoidance: The Same or Different? \(cgdev.org\)](#)> on 4 December 2020.

BEPS are IFFs. Their approach coincides with application of a wider definition of illicit, which includes all behaviours legal or not that reduce tax payments.<sup>61</sup> However, scholars such as Oguttu and Forstater advocate for the use of the narrow definition of illicit whereby the term illicit correlates to illegal behaviour that requires criminal action. Thus, activities such as tax evasion and money laundering which are illegal and subjected to the penal code of the affected state classify as illicit. Subsequently, they argue that recognition of BEPS as IFFs is false, as it does not involve illegal practices.<sup>62</sup>

### 1.8.5 Background of BEPS

Olika posits that the practice of BEPS is rooted in the ability of taxpayers to avoid paying taxes. He also adds that over the years, there has been debate on the legality of tax avoidance activities.<sup>63</sup> John and Zoe Prebble have illustrated that courts, in past judgements, have distinguished tax evasion from tax avoidance, by stating that the former is illegal, while the latter is legal. The reason is that tax evasion involves the illegal manipulation of laws to avoid paying taxes such as the falsification of books of accounts. Tax avoidance on the other hand, operates within the working of the law and involves the arrangement of one's affairs to reduce one's tax burden.<sup>64</sup> The court has demonstrated its legality in a variety of cases. In *Ayrshire Pullman Motor Service and Ritchie v IRC* the court asserted that no man was under any obligation to arrange his affairs to enable the tax authorities to put the largest possible shovel into his stores.<sup>65</sup> Furthermore, in *Levene v IRC*, the court was of the opinion that taxpayers are free to make their own arrangements so that their cases may fall outside the scope of the taxing acts.<sup>66</sup> This was echoed again in the case of *ICR v Duke of Westminster* where it was held that every man is entitled if he can to order his affairs so that the tax attaching to the business under the appropriate act is less than it otherwise would be.<sup>67</sup>

However, recently, according to Olika, there has been a shift in public and institutional perception of tax avoidance activities with more and more persons advocating for tax

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<sup>61</sup> Forstater M, 'Illicit Financial Flows, Trade Misinvoicing, and Multinational Tax Avoidance: The Same or Different?', 2.

<sup>62</sup> Oguttu A, 'Tax Base Erosion and Profit Shifting in Africa – Part 1: Africa's Response to the OECD BEPS Action Plan' International Centre for Tax and Development, 13, 15-16.

<sup>63</sup> Olika D, 'Tax Morality: Examining the BEPS Debate, Work of the OECD and its Impact on Africa' 11(1) *Pretoria Student Law Review*, 2017, 89-90.

<sup>64</sup> Prebble Z and Prebble J, 'Tax Avoidance and Morality' in Hashimzade N and Epifantseva Y(eds), *The Routledge Companion To Tax Avoidance Research*, 1<sup>st</sup>ed, Taylor & Francis Group, New York, 2018, 369-370.

<sup>65</sup> *Ayrshire Pullman Motors Services and DM Ritchie v IRC* (1929), The Court of Session of Scotland First Division.

<sup>66</sup> *Levene v IRC* (1928), The United Kingdom House of Lords.

<sup>67</sup> *ICR v Duke of Westminster* (1936), The United Kingdom of House of Lords.

morality.<sup>68</sup> This is due to the loss of tax revenue resulting from tax avoidance activities that constrains the states abilities to meet its development goals.<sup>69</sup> Christians refers to tax morality as the responsibility of MNEs to comply with the applicable tax laws by paying the legally obliged taxes. Tax activists frequently insert morality into the narrative of tax avoidance as a tool to correct the tax injustice created when MNEs who earn large amounts of revenue around the world, fail to pay their fair share of taxes. This is because enterprises are more tax compliant when they face public criticism after their practices are exposed and society calls their tax morality into question.<sup>70</sup> The courts are beginning to move away from permitting all instances of tax avoidance activities as demonstrated in the New Zealand case of *Elmiger v CIR*. The court observed that the legal devices engineered to enable individual taxpayers to minimise or avoid their tax liabilities are often unproductive in themselves as they have social consequences and are contrary to the general public interest. Moreover, they found that these transactions only benefit the individual taxpayer who obtains the tax advantages.<sup>71</sup>

Stewart found that as a result of the public outcry against tax avoidance activities, another category referred to as tax mitigation, has emerged to classify the practices that enable MNEs to set-up their businesses in a manner that reduces their tax liability within the law.<sup>72</sup> States consider tax mitigation as proper tax planning and differentiate it from tax avoidance activities that include artificial steps undertaken by the taxpayer, which have no economic value to the taxpayer, and are solely for the purposes of avoiding taxes thus conflicting with the intention of the legislature.<sup>73</sup>

### **1.8.6 Effects of BEPS**

As Iver and Oguttu discuss, BEPS has led to a significant loss of tax revenue as it poses a risk to the corporate tax base of countries.<sup>74</sup> Subsequently, it impairs domestic resource mobilisation by states and drains resources thus decreasing the state's ability to facilitate development and ensure the welfare of its citizens.<sup>75</sup> Thus, base erosion is among the reasons

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<sup>68</sup> Olike D, 'Tax Morality: Examining the BEPS Debate, Work of the OECD and its Impact on Africa', 91.

<sup>69</sup> Oguttu A, 'Tax Base Erosion and Profit Shifting in Africa – Part 1: Africa's Response to the OECD BEPS Action Plan' International Centre for Tax and Development, 8.

<sup>70</sup> Christians A, 'Avoidance, Evasion, and Taxpayer Morality' 44(1) *Washington University Journal of Law and Policy*, 2014, 46-48.

<sup>71</sup> *Elmiger v CIR* (1966), The New Zealand Court of Appeal.

<sup>72</sup> Stewart M, 'Sham Transactions and Tax Avoidance' in Hashimzade N and Epifantseva Y(eds), *The Routledge Companion To Tax Avoidance Research*, 1<sup>st</sup> ed, Taylor & Francis Group, New York, 2018, 57.

<sup>73</sup> Stewart M, 'Sham Transactions and Tax Avoidance, 57.

<sup>74</sup> U4 Anti-Corruption Centre, *Tax-motivated illicit financial flows: A guide for development practitioners*, 2014, 19.

<sup>75</sup> Oguttu A and Iver M, 'Tax Abuse And Implications For Human Rights In Africa' in Alston P and Reisch N(eds) *Tax, Inequality, and Human Rights*, 1<sup>st</sup> ed, Oxford University Press, Oxford, 2019, 189.

attributed to the rise of poverty and inequality in states.<sup>76</sup> Moreover, the OCED found that BEPS undermine the perception of fairness of the tax system among taxpayers.<sup>77</sup> This is because, as noted by the African Union in its report concerning domestic resource mobilization, taxpayers witness wealthy persons paying less tax by undertaking transactions that reduce their tax liabilities, which then calls into question the effectiveness and equitableness of the tax system.<sup>78</sup> Research conducted by McGill, Haye and Lipo on BEPS has also linked it to the distortion of competition between international and domestic businesses. This is attributable to the fact that small domestic enterprises are unable to afford to the tax planning strategies exploited by MNEs. In view of this, large multi-national corporations have a significant competitive advantage over domestic enterprises making it difficult for companies to compete on a level playing field.<sup>79</sup>

Various researchers such as Durst, Iver and Oguttu as well as organisations such as the African Tax Administration Forum have concluded that the impact of tax base erosion affects developing and developed countries differently especially in regards to resource mobilization.<sup>80</sup> Moreover, the African Tax Administration Forum illustrate in their report that corporate taxes are a very important source of income for developing countries as in Africa, there is greater reliance on the corporation tax obtained by taxing MNEs than in developed countries.<sup>81</sup> Durst points out that this is as a result of the informal operation of many domestic enterprises within the continent. As the proper maintenance of the books and records is rare in such organisations, the ability of states to obtain revenue by taxing persons is greatly limited. However, in developed countries, the states have the capacity to obtain sufficient revenue from taxing individuals and from consumption taxes such as VAT (Value Added Tax).<sup>82</sup> Accordingly, the OECD proposes that the income lost due to BEPS is substantial for countries

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<sup>76</sup> McGill R, Haye C and Lipo S, *G.A.T.C.A.: A Practical Guide to Global Anti-Tax Evasion Frameworks (Global Financial Markets)*, 1st ed, Palgrave Mac Millan Publisher, London, 2017, 160.

<sup>77</sup> Organisation for Economic Co-Operation and Development, *Addressing Base Erosion and Profit Shifting*, 2013, 5.

<sup>78</sup> African Union, *Domestic Resource Mobilization: Fighting against Corruption and Illicit Financial Flows*, 2019, 89.

<sup>79</sup> McGill R, Haye C and Lipo S, *G.A.T.C.A.: A Practical Guide to Global Anti-Tax Evasion Frameworks (Global Financial Markets)*, 160.

<sup>80</sup> Oguttu A and Iver M, 'Tax Abuse and Implications For Human Rights In Africa', 189.

<sup>81</sup> African Tax Administration Forum, *African Priorities on Base Erosion and Profit Shifting (BEPS)*, 2014, 4.

<sup>82</sup> Durst M, 'Assisting Developing Countries in Taxation after the OECD's BEPS Reports: A Suggested Approach for the Donor Community' International Centre for Tax and Development Working Paper 71, 2017, 7- <[ICTD\\_WP71.pdf \(ids.ac.uk\)](#)> on 4 December 2020.

in Africa. Africa therefore has a greater interest in fighting the tax avoidance activities conducted by MNEs as they have much more at stake.<sup>83</sup>

### 1.8.7 Development in BEPS

An increased awareness of BEPS occurred after the 2007/2008 financial crises as noted by Smith and Eccleston.<sup>84</sup> This is because states required more resources to cater to the budget deficits resulting from the economic downturn. Curtailing BEPS was one of the means proposed to mobilize more funds.<sup>85</sup>

According to Herzfeld, the G20 countries in partnership with the OECD launched the OECD BEPS Project to correct the aspects of the international tax system that were facilitating BEPS.<sup>86</sup> The BEPS Project contains 15 action plans, which according to McGill, Haye and Lipo, are intended to create a globally coordinated and holistic approach to taxation. The authors also state that the BEPS Project plans to streamline national and international legislation as well as strengthen, modify or replace harmful national practices by setting out minimum standards of best practice and common approaches.<sup>87</sup> The African Administration Tax Forum discusses the three pillars of work contained in the action plan that address the issue of BEPS. The first issue is coherence whereby the action plan sets out to ensure consistency in the laws governing corporate tax across nations. The other pillar is concerned with substance in that it hopes to realign taxation and substance as the rules in place, especially those concerning transfer pricing and the use of conduit companies, worsened the situation and produced undesired results. The last pillar concerns transparency and it is placed in conjunction with predictability and certainty. The purpose of this pillar is to ensure the exchange of information between states by providing for measures such as the mandatory disclosure of aggressive avoidance schemes and the collection of data to measure the effectiveness of the actions that address the BEPS.<sup>88</sup> The OECD, when detailing the action plans has set out to address the tax challenges of the digital economy, neutralise the effects of hybrid mismatch

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<sup>83</sup> Organisation for Economic Co-Operation and Development, *Tax Co-Operation for Development Progress Report*, 2020, 6.

<sup>84</sup> Smith H and Eccleston R, 'The G20, BEPS and the Future of International Tax Governance' in Dietsch P and Rixen T (eds) *Global Tax Governance: What is Wrong with It and How to Fix It*, ECPR Press, Colchester, 2016 175.

<sup>85</sup> Smith H and Eccleston R, 'The G20, BEPS and the Future of International Tax Governance', 176.

<sup>86</sup> Herzfeld M, 'The Case Against BEPS: Lessons for Tax Coordination' University of Florida Levin College of Law Legal Studies, Research Paper Series Paper No. 18-3, 2017, 5- < [delivery.php \(ssrn.com\)](#) > on 4 December 2020.

<sup>87</sup> McGill R, Haye C and Lipo S, *G.A.T.C.A.: A Practical Guide to Global Anti-Tax Evasion Frameworks (Global Financial Markets)*, 162.

<sup>88</sup> African Tax Administration Forum, *African Priorities on Base Erosion and Profit Shifting (BEPS)*, 2014, 3.

arrangements, strengthen controlled foreign company (CFC) rules, limit base erosion via interest deductions and other financial payments, take into account transparency and substance, counter harmful tax practices more effectively and prevent treaty abuse.<sup>89</sup>

Researchers, such as Oguttu, have criticised the BEPS project specifically in relation to the activities of MNEs in developing countries who, as discussed above, are disproportionately affected. She explains that this is because the OECD agenda has mainly been interested in the concerns of developed countries and has disregarded the developing countries. This is illustrated, she adds, when the OECD failed to consult African states on the challenges they faced with BEPS when developing the 15-point action agenda.<sup>90</sup>

### **1.8.8 Tax Havens and BEPS**

Nicholas Shaxson, through the use of data, estimates that about 200 billion dollars' worth of corporate tax revenue is lost in a year by governments in low income states due to the existence of tax havens.<sup>91</sup> Palan, also asserts that tax havens are at the very heart of 'neoliberal' globalisation, aiding and facilitating tax avoidance on a vast scale.<sup>92</sup> This is because, as Alstadsaeter, Johnnesen and Zucman affirm, tax havens provide opportunities for MNEs to shift profits due to their characteristic secrecy, low tax rates, poor legislation and weak enforcement mechanisms. Furthermore, they assert that tax havens contribute to the issue of BEPS by applying different rates and regulations to the taxpayers thus allowing MNEs to take advantage of these inconsistencies by employing techniques that allow them to reduce their taxable income.<sup>93</sup>

### **1.8.9 Conclusion**

The literature review illustrates the academic discussions taking place in regards to tax havens and their connection to IFCs, as well as the effects tax havens have on the global economy in relation to BEPS. The academic research also seeks to highlight the importance of pushing law and policy makers to create fiscal policies and laws that are capable of safeguarding tax systems to ensure they are more socially responsible and do not cause global harm. Researchers

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<sup>89</sup> Organisation for Economic Co-Operation and Development, *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing, 2013, 14-19.

<sup>90</sup> Oguttu A, 'Tax Base Erosion and Profit Shifting in Africa – Part 1: Africa's Response to the OECD BEPS Action Plan' International Centre for Tax and Development, 20.

<sup>91</sup> Shaxson N, 'Tackling Tax Havens: The billions attracted by tax havens do harm to sending and receiving nations alike', 7.

<sup>92</sup> Palan R, 'Tax havens under attack' 69(3) *The World Today*, 2013, 2.

<sup>93</sup> Alstadsaeter A, Johnnesen N and Zucman G, 'What do tax havens cost in terms of lost tax revenue?' in Fjeldstad O, Jacobsen S, Ringstad P and Ngowi H (eds) *Lifting the Veil of Secrecy Perspectives on International Taxation and Capital Flight from Africa*, Chr. Michelsen Institute, Bergen, 2017, 55.

are also generating studies that link Africa's problem with capital flight to the existence of tax havens.

However, Africa has not generated sufficient research discussing the appropriate laws that should govern these IFCs. The present research hopes to link the nature of the legislative design to the formation of either IFCs or the formation of tax havens, which compound the BEPS problem already affecting African states.

## **1.9 CHAPTER BREAKDOWN**

This first chapter has laid down an introduction that provides the background to the study, the research question under study, the objectives and the scope of the research. Moreover, it has conducted an analysis and discussion of the relevant literature to provide a comprehensive study on the concept of IFCs, tax havens and BEPS, giving a background on their history, rise, characteristics and current state within the global economy.

Chapter 2 expounds on the conceptual framework by providing an in-depth discussion on the concepts and their connection to the research question. These concepts will further guide the analysis of the findings of the research.

Chapter 3 will consist of the Kenyan case study and will focus on the assessment of the research questions. Thus, the content will investigate if the provisions of the National Financial Centre have any connection to tax havens and BEPS. Furthermore, the chapter will undertake to decipher whether an IFC can exist in Africa without succumbing to exploitation through a comparative study of Ghana.

Chapter 4 shall lay down a summary and discussion of the results of the study.

Lastly, Chapter 5 will set out the conclusion of the study and provide possible recommendations

## CHAPTER 2: CONCEPTUAL FRAMEWORK

### 2.1 INTRODUCTION

Taxes play crucial roles within a state.<sup>94</sup> It is through these roles that their enforcement on citizens is justified.<sup>95</sup> One of the major roles that taxes play in society is that they enable the mobilisation of resources such that the government is able to maintain itself and its activities. Moreover, they combat anti-social behaviours, mitigate market imperfections and act as mediums of redistributing income and wealth.<sup>96</sup> The design of a tax system therefore, needs to be structured in a manner that promotes and supports the fulfilment of these objectives. A properly designed fiscal system that is accountable, responsible and transparent as well as effective, efficient, fair and just fosters fiscal legitimacy, subsequently increasing the public's faith in the state and its fiscal powers.<sup>97</sup>

To guide states in creating a legitimate tax system, one of the rubrics utilised, is the canons of taxation.<sup>98</sup> Consequently, this research project will use these principles, specifically of equity and equality as well as transparency to conduct an analysis of the salient provisions of the *NIFCA* and investigate if there is a link between the provisions of the Act and the establishment of a tax haven, which proliferates BEPS.

### 2.2 EQUITY AND EQUALITY

The concept of equity in tax asserts that a subject of every state ought to contribute towards the support of the government as much as possible, in accordance to the abilities, established by the amount of revenue they earn.<sup>99</sup> Equity also encourages tax compliance, as taxpayers who believe that the tax system is fair, are likely to pay their due to the relevant tax authorities thus reducing cases of evasion.<sup>100</sup> Discussions on equity take place from two perspectives, horizontal equity and vertical equity. Vertical equity maintains that where one taxpayer has a greater ability to pay taxes, they should bear a higher tax burden. Horizontal equity on the other hand, argues that where two persons have the same ability to pay the taxes levied, both parties

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<sup>94</sup> Organisation for Economic Co-operation and Development (OECD), *Addressing the Tax Challenges of the Digital Economy*, 2014, 30.

<sup>95</sup> Organisation for Economic Co-operation and Development (OECD), *Addressing the Tax Challenges of the Digital Economy*, 2014, 30.

<sup>96</sup> Organisation for Economic Co-operation and Development (OECD), *Addressing the Tax Challenges of the Digital Economy*, 2014, 30.

<sup>97</sup> Waris A, 'Taxation and State Legitimacy in Kenya' in Leaman J and Waris A (eds) *Tax Justice and the Political Economy of Global Capitalism, 1945 to the Present*, 1<sup>st</sup> ed, Berghahn Books Publishers, New York, 2013, 153.

<sup>98</sup> Oats L, Miller A and Mulligan E, *Principles of International Taxation*, 6<sup>th</sup> edition, Bloomsbury Publishing, London, 2017, 4.

<sup>99</sup> Waris A, *Financing Africa*, 1<sup>st</sup> edition, Langaa RPCIG, Bamenda, 2019, 108.

<sup>100</sup> Oats L, Miller A and Mulligan E, *Principles of International Taxation*, 4.

should bear the same burden.<sup>101</sup> Accordingly, the concept of equity justifies the implementation of progressive tax systems, which increases the tax rate as the tax base increases.<sup>102</sup> This differs from a regressive tax system whereby the implementation of taxes leads to a heavier burden being borne by those with low incomes.<sup>103</sup> For this reason, its application facilitates the fulfilment of tax justice and subsequently economic justice. Resultantly, equity and justice are related concepts.<sup>104</sup> In view of this, the elements of equity are associated particularly with distributive and legal justice, which are part of Aristotle's conceptions of justice. Distributive justice is generally linked to vertical equity as it promotes redistribution while horizontal equity is connected to legal justice, which entails treating those who are equal equally and those who are unequal differently.<sup>105</sup>

The general understanding of equality in law is twofold. One definition is concerned with the content of the law, which prescribes and accords each person rights and obligations. As a result, there is an absence of discrimination in the distribution of these rights and obligations. The other meaning relates to the process of the law and its application by the courts, police officers and ministries whereby there is no certain distinction in the implementation of the said laws.<sup>106</sup> Discussions of equality fall within the purview of equity as it also denotes equal treatment of persons. It renders it incorrect to impose discriminatory or unequal treatment among those who are equals.<sup>107</sup>

Equality as the equal treatment principle has been criticised for failing to take into account other mitigating factors present with persons who have the same ability to pay. For example, two individuals although in the same tax bracket and earning a similar amount of revenues may experience their tax burdens differently because of their different backgrounds.<sup>108</sup> The criticism, levied by scholars within the sphere of human rights law, has led to the adoption of substantive equality as it applies a new understanding of equality known as equality of results.

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<sup>101</sup> Oats L, Miller A and Mulligan E, *Principles of International Taxation*, 4.

<sup>102</sup> Oats L, Miller A and Mulligan E, *Principles of International Taxation*, 4.

<sup>103</sup> Prichard W, 'What Might an Agenda for Equitable Taxation Look Like?' International Centre for Tax and Development, Summary Brief Number 16, 2018, 2 - [https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/13822/ICTD\\_SummaryBrief16\\_2.0.pdf](https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/13822/ICTD_SummaryBrief16_2.0.pdf) on 20 October 2020.

<sup>104</sup> Waris A, *Financing Africa*, 108.

<sup>105</sup> Memon N, 'Prioritizing principles of a good tax system for small business in informal economies' 25(1) *Australian Tax Forum*, 2010, 79.

<sup>106</sup> Thompsen F, 'Concept, Principle, and Norm—Equality Before The Law Reconsidered' 24(2) *Legal Theory*, 2018, 3.

<sup>107</sup> Fredman S, 'Taxation as a Human Rights Issue: Gender and Substantive Equity' in Reisch N and Alston P (eds) *Tax, Inequality, and Human Rights*, 1<sup>st</sup> ed, Oxford University Press, Oxford, 2019, 83.

<sup>108</sup> Fredman S, 'Taxation as a Human Rights Issue: Gender and Substantive Equity', 83.

This understanding of equality does not solely focus on the equal treatment of the law it also accommodates the need to reduce the inequalities of outcome. Thus, it is able to create an openly redistributive and progressive tax system. Substantive equality also takes into account stereotypes and structural obstacles that individuals face.<sup>109</sup> It is this conception of equality that is used in this course of this research project in providing a critical analysis of the *NIFCA*.

States currently face new challenges in balancing the attraction of foreign direct investments and the wellbeing of their constituents. The need to attract foreign direct investment has tipped scales in its favour and thus some states willingly trade-off equitable tax systems to put in place legal and policy frameworks that offer secrecy and tax incentives that propagate harmful competition and impair the states' capabilities to redistribute the wealth. Tax havens are one of the structures created by these legal and policy frameworks.<sup>110</sup>

These havens are premised on aiding select persons, either natural persons or corporate enterprises, to exploit tax loopholes and the lack of transparency present within such jurisdictions to avoid or evade paying tax.<sup>111</sup> However, this service is only available to the minority, who are highly wealthy, leaving the poor population to bear the brunt. This is because when the government fails to collect enough income or corporate tax it tends to shift most of the burden of tax on consumption thus relying on regressive taxes like the value-added tax (hereinafter VAT) to increase revenue collection. This greatly disadvantages those with lower incomes.<sup>112</sup>

Consequently, it is difficult for a jurisdiction that creates a tax haven to uphold equity and equality as it impedes the ability of the tax system to levy progressive taxes, which eventually harms persons who cannot afford to conduct extensive tax planning strategies.<sup>113</sup>

## **2.3 TRANSPARENCY**

The concept of transparency is prevalent in international law matters and its application advocated for in the various disciplines of law. These disciplines use transparency as a tool to temper afflictions caused by humanity such as human right abuses and terrorism.<sup>114</sup>

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<sup>109</sup> Fredman S, 'Taxation as a Human Rights Issue: Gender and Substantive Equity', 83, 84.

<sup>110</sup> Dagan T, 'The tragic choices of tax policy in a globalized economy' in Brauner Y and Stewart M *Tax, Law and Development*, 1<sup>st</sup> ed, Edward Elgar Publishing, Massachusetts, 2013, 59.

<sup>111</sup> Zucman G, Fagan T and Picketty T, *The Hidden Wealth of Nations: The Scourge of Tax Havens*, 8, 54.

<sup>112</sup> Tax Justice Network Africa, *Tax and Inequality Fact Sheet*, 2017, 2.

<sup>113</sup> Gillian B, 'Taxation and Global Justice: Closing the Gap between Theory and Practice' 39(2) *Journal of Social Philosophy*, 2008, 164,165.

<sup>114</sup> Bianchi A, 'On Power and Illusion: The Concept of Transparency in International Law' in Bianchi A and Peters A (eds) *Transparency in International Law*, 1<sup>st</sup> ed, Cambridge University Press, Cambridge, 2013, 3, 4.

Transparency often relates to information and knowledge, legitimacy and accountability, participatory democracy and good governance.<sup>115</sup> In general, it requires the provision of accessible data regarding matters concerning decision-making or outcomes by pertinent stakeholders.<sup>116</sup> It has been widely accepted as a characteristic of a good tax system<sup>117</sup> as it ensures compliance with the existing tax laws of a state thus supporting economic development. Moreover, it acts as a form of checks and balances as it facilitates the monitoring and restriction of government spending. It also encourages active participation by citizens in decision-making, as they are adequately informed and is a common tool in deterring corruption and abuse.<sup>118</sup> One of the criticisms issued against transparency however, is that there are certain grey areas and uncertainty surrounding its understanding, which resultantly presents challenges when applying it to enforce tax compliance.<sup>119</sup>

One can distinguish two forms of transparency, from the objectives that transparency sets out to fulfil. One form of transparency is the transparency for governance and the other is the transparency of governance.<sup>120</sup> Transparency for governance entails the tactical use of state power to ensure companies, especially those that are multi-national, comply with the existing legal framework governing international tax by addressing the information asymmetries that exist within the system between the taxpayer and tax authorities.<sup>121</sup> In view of this, some scholars argue that states should have access to significant information on companies, especially in relation to the identity of the owners of the various entities within their jurisdiction and their financial accounts.<sup>122</sup> Therefore, transparency for governance is a suitable medium that monitors taxpayers then influences the activities of these taxpayers by deterring them from committing harmful tax practices and encouraging them to obey the rule of law.<sup>123</sup> International activities, fostered mainly by the OECD and the European Union (hereinafter the EU), are

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<sup>115</sup> Bianchi A, 'On Power and Illusion: The Concept of Transparency in International Law', 8.

<sup>116</sup> Stewart M, 'Transparency, Tax and Human Rights' in Reisch N and Alston P(eds) *Tax, Inequality, and Human Rights*, 1<sup>st</sup> ed, Oxford University Press, Oxford, 2019, 238.St

<sup>117</sup> Barkoczy S, *Foundations of Taxation Law*, 10<sup>th</sup> ed, Oxford University Press, Oxford, 2018, 72.

<sup>118</sup> Stewart M, 'Transparency, Tax and Human Rights', 237.

<sup>119</sup> Peters C, 'Improving Democratic International Tax Governance: On the Power of Citizens, Transparency and Independent Watchdogs', 223.

<sup>120</sup> Peters A, 'Towards Transparency as a Global Norm' in Bianchi A and Peters A (eds) *Transparency in International Law*, 1<sup>st</sup> ed, Cambridge University Press, Cambridge, 2013, 552.

<sup>121</sup> Peters C, 'Improving Democratic International Tax Governance: On the Power of Citizens, Transparency and Independent Watchdogs' in Peeters B, Gribnau H, and Badisco J (eds) *Building Trust in Taxation*, 1<sup>st</sup> ed, Intersentia Publishers, Cambridge, 2017, 222- 223.

<sup>122</sup> Garbarino C and Garufi S, 'Transparency an Exchange of Information in International Taxation' in Bianchi A and Peters A (eds) *Transparency in International Law*, 1<sup>st</sup> ed, Cambridge University Press, Cambridge, 2013, 175.

<sup>123</sup> Peters C, 'Improving Democratic International Tax Governance: On the Power of Citizens, Transparency and Independent Watchdogs', 222-223.

mainly geared towards transparency for governance as is seen by their tax initiatives to establish country-by-country reporting which allows states to access data on the revenue of multi-national enterprises.<sup>124</sup>

Transparency of governance addresses tax matters from the viewpoint that the relationship between taxpayers and authorities necessitates caution and not wholehearted trust. Transparency consequently intervenes in the relationship between states and multinationals to create public awareness, which can ensure that the said relationship produces positive outcomes for the citizens of the state. Peer review mechanisms instituted by the OECD demonstrate transparency of governance as they place the responsibility on states to monitor one another and ensure that they are all complying with international tax norms.<sup>125</sup> The EU, falling in line with this type of transparency, has put in place a legal framework that ensures the creation and dissemination of information related to activities between states and multinationals.<sup>126</sup> Furthermore, in Africa, African countries who are members of the Global Forum on Transparency and Exchange of Information for Tax Purposes teamed up with various international organisations to launch the Africa Initiative program to advance the exchange of information on request between African states.<sup>127</sup> As illustrated, the aspects of tax transparency advocate for both the transparency of government agents and institutions as well as taxpayers.<sup>128</sup>

Recently, the lack of transparency within the international tax regime has become a popular public discussion with tax activists agitating for its need especially in relation to multinational enterprises.<sup>129</sup> This is due to media reports that indicate that these enterprises are not paying their fair share of tax on account of their tax planning activities which have been at times referred to as aggressive.<sup>130</sup> Tax activists are pushing for transparency as the tool that exposes the global structures in place that facilitate the activities and interests of these enterprises.<sup>131</sup>

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<sup>124</sup> Peters C, 'Improving Democratic International Tax Governance: On the Power of Citizens, Transparency and Independent Watchdogs', 223.

<sup>125</sup> Peters C, 'Improving Democratic International Tax Governance: On the Power of Citizens, Transparency and Independent Watchdogs', 224.

<sup>126</sup> Peters C, 'Improving Democratic International Tax Governance: On the Power of Citizens, Transparency and Independent Watchdogs', 224.

<sup>127</sup> Global Forum on Transparency and Exchange of Information for Tax Purposes, *Tax Transparency in Africa 2020 Africa Initiative Progress Report: 2019, 2020*, 1.

<sup>128</sup> Stewart M, 'Transparency, Tax and Human Rights, 237-239.

<sup>129</sup> Christians A, 'Tax Activists and the Global Movement for Development through Transparency' in Brauner Y and Stewart M *Tax, Law and Development*, 1<sup>st</sup> ed, Edward Elgar Publishing, Massachusetts, 2013, 288.

<sup>130</sup> Gibranau S, 'Good Tax Governance: A Matter of Moral Responsibility and Transparency' 2017(1) *Nordic Tax Journal*, 2017, 70.

<sup>131</sup> Christians A, 'Tax Activists and the Global Movement for Development through Transparency', 293.

Their aim is to demonstrate the connection between the activities that lead to under taxation of these enterprises and the stunted economic growth and unrealized human right obligations within states especially in the global south.<sup>132</sup>

Global discussions have identified tax havens as one of the structures that assist MNEs to manipulate the existing legal framework that contains certain loopholes to greatly lower their tax liability and avoid paying taxes. Furthermore, it allows corrupt individuals, who are in some cases kleptocrats, to escape their tax liabilities altogether thus enabling tax evasion.<sup>133</sup> This is due to their characteristic secrecy that impedes oversight and watchdog mechanisms.<sup>134</sup> An international financial centre that contains secrecy laws undermines the concept of transparency and is at risk of establishing tax havens, whose activities thrive on the exploitation and abuse of secrecy provisions, which can lead to capital flight, illicit financial flows as well as tax avoidance and evasion.<sup>135</sup> As the advocacy and mobilisation against the entrenchment of tax havens and its activities increases, transparency acts as a viable mechanism to not only identify these secrecy jurisdictions but also ensure tax compliance by combating the issues of tax avoidance and evasion that occurs within the havens.<sup>136</sup>

## **2.4 CONCLUSION OF CONCEPTUAL FRAMEWORK**

As has been demonstrated above, these concepts are both the ends that a tax framework should aim to meet as well as the means of achieving the common good of the state and its citizens. Accordingly, the structures of tax havens, work antithetically to proper tax systems, as they lack equality, equity and transparency.

## **2.5 RESEARCH METHODOLOGY**

To answer the questions posed by the study, the research method implemented will be doctrinal. This will involve reviewing secondary sources such as books, journals and research papers, which will form the basis of the conceptual framework, literature review and the case study. The study will also utilise some primary sources such as the Constitution of Kenya and

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<sup>132</sup> Pogge T and Mehta K, 'The Moral Significance of Tax Motivated Illicit Financial Flow' in Pogge T and Mehta K *Global Tax Fairness*, 1<sup>st</sup> ed, Oxford University Press, Oxford, 2016, 3.

<sup>133</sup> Leaman J and Waris A, 'Why Tax Justice Matters in Global Economic Development' in Leaman J and Waris A (eds) *Tax Justice and the Political Economy of Global Capitalism, 1945 to the Present*, 1<sup>st</sup> ed, Berghahn Books Publishers, New York, 2013, 4.

<sup>134</sup> Tollan H, 'An International Convention on Financial Transparency' in Pogge T and Mehta K *Global Tax Fairness*, 1<sup>st</sup> ed, Oxford University Press, Oxford, 2016, 239.

<sup>135</sup> Fjelstad O, Jacobsen S, Ringstad P and Ngowi H, 'Tax and Tax Justice' in Fjelstad O, Jacobsen S, Ringstad P and Ngowi H *Lifting the Veil of Secrecy: Perspectives on International Taxation and Capital Flight from Africa*, 1<sup>st</sup> ed, Chr. Michelsen Institute, Bergen, 2017, 17,19.

<sup>136</sup> Stewart M, 'Transparency, Tax and Human Rights', 237-239.

statutes found in the jurisdictions of Ghana and Kenya. Moreover, the paper will use case law to discuss tax avoidance and evasion in relation to BEPS.

The study will use the concepts of equity, equality, and transparency, which form the basis of the conceptual framework, in the analysis of the Act to determine if the provisions will either lead to a functional International Financial Centre that fosters these concepts or a tax haven. The research project utilises these concepts in particular, because tax activists, in organisations such as Tax Justice Africa, have selected these particular canons as a means of ordering the international tax framework to ensure tax justice and curb the development of tax havens. They assert that this will contribute to the economic development of both developing and developed countries as well as the realization of the human rights obligations particularly those that are socio-economic in nature.<sup>137</sup>

To answer the research questions adequately, the project will also undertake to carry out a comparative study of Ghana and its attempts to establish the Ghana International Financial Centre. Ghana is a suitable case study due to its similarity to Kenya in respect of demographics, legislative process and growth of the economy as reflected by data collected by the World Bank in 2019. According to the data, Ghana recorded a population growth rate of 2.2%, similar to that of Kenya, which was reported at 2.3%.<sup>138</sup> Concerning the growth of the economy, the two states have a comparable GDP growth rate, with Kenya registering a rate of 5.4% and Ghana of 6.5%. Furthermore, in both countries, agriculture is their primary economic activity thus pivotal to their economies.<sup>139</sup> Regarding the law and the law-making process, both countries have inherited a similar style of laws that stem from their colonial history with Britain. Moreover, they have similar legislative processes with both jurisdictions vesting the mandate of law making on the parliament.<sup>140</sup> Subsequently, for the law to acquire the force of law in the two countries, it requires approval by two-thirds of the members of parliament as well as presidential assent.<sup>141</sup>

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<sup>137</sup> Leaman J and Waris A, 'Why Tax Justice Matters in Global Economic Development', 1, 2.

<sup>138</sup> -< [Kenya Demographics - Place Explorer - Data Commons](#)> on 26 December 2020.

<sup>139</sup> -< [Ghana Economics - Place Explorer - Data Commons](#)> on 26 December 2020.

<sup>140</sup> Friedrich Ebert-Stiftung Ghana, *Law-making Process in Ghana: Structures and Procedures*, 2011, 5, 9-13.

<sup>141</sup> Kenya Law Reform Commission, *Guide to the Legislative Process in Kenya*, 2015, 68-71.

## CHAPTER 3: ANALYSIS OF THE NIFC ACT

### 3.1 INTRODUCTION

The chapter provides an analysis of the *NIFCA* focusing on the connection between the provisions of the regulatory framework and the establishment of a tax haven within Africa. The chapter will also further investigate if the provisions of the Act have a subsequent effect on increasing or decreasing BEPS.

### 3.2 SALIENT PROVISIONS OF THE NIFCA

The objective of the *NIFCA* is the provision of a legal framework that facilitates and supports the development of an efficient and globally competitive financial services sector that generates high levels of national savings and investments.<sup>142</sup>

To fulfil its objectives the Act in Section 4 and 5 of the Act established the Nairobi International Financial Centre (hereinafter NIFC)<sup>143</sup> and the Nairobi International Financial Centre Authority (hereinafter the Authority).<sup>144</sup> The NIFC is an operating institution proposed to facilitate and support the development of an efficient and globally competitive financial services sector in Kenya. The Act bestows upon the Authority the responsibility of its management.<sup>145</sup> The Act proposes that the Authority shall be a body corporate<sup>146</sup> required to fulfil a certain set of objectives. These objectives include: establishing and maintaining an efficient operating framework that is capable of retaining firms; developing and recommending strategies and incentives with the appropriate agencies to attract firms and reviewing as well as recommending, in collaboration with the regulatory authorities, a legal and regulatory framework that creates an internationally competitive financial centre.<sup>147</sup> To enable the Authority to meet its objectives, the Act empowers it to certify firms that seek to conduct activities within the centre, develop the pertinent structures that will support the NIFC as well as develop the institutional, legal and regulatory frameworks that meet the needs of the Centre.<sup>148</sup> The Act also grants the Authority confidentiality in its affairs by forbidding any

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<sup>142</sup> Objective, *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>143</sup> Section 4, *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>144</sup> Section 5, *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>145</sup> Section 4(2), *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>146</sup> Section 5(2), *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>147</sup> Section 6, *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>148</sup> Section 7, *Nairobi International Financial Centre Act* (Act No.25 of 2017).

member or agent of the Authority from divulging or publishing information contained on records or documents unless mandated by law or the courts.<sup>149</sup>

The Act provides that the management of the Authority will comprise of a board of directors. The members of the board will consist of a non-executive chairperson appointed by the President, the Cabinet Secretary for Finance (hereinafter the Cabinet Secretary), the Cabinet Secretary for Foreign Affairs and International Trade and the Attorney General or their representative. Moreover, the Cabinet Secretary will appoint four other persons with relevant international financial services experience to sit in the board. The Chief Executive Officer will also be a director but as an *ex-officio* member with no right to vote.<sup>150</sup>

The Act also establishes the Steering Council (hereinafter the Council) comprised of the President as the chairperson, the Deputy President as his deputy, the Cabinet Secretary, the Attorney General, the Chairperson of the Authority and the Governor of the Central Bank of Kenya. Additionally, the Chief Executive Officer of the Capital Markets Authority, Chief Executive Officer of the Insurance Regulatory Authority and Chief Executive Officer of the Retirement Benefits Authority will also form part of the Council.<sup>151</sup> The function of the Council is to review the progress of the Centre, provide direction to the appropriate persons and address any challenges in the development of the Centre and the financial services sector to achieve the objectives of the Act.<sup>152</sup>

The Authority will obtain its funding for its undertaking from capital appropriated by the National Assembly for the purposes of the Authority as well as resources obtained by the Authority in the course of the exercise of its functions under this Act. Additionally, funds may arise from any cash which may become payable to the Authority pursuant to this Act or any written law. The Act also permits the Authority to accept monetary resources provided, donated or lent to them by any other source.<sup>153</sup>

The Act establishes that NIFC firms have the right to be completely foreign owned and cannot be subjected to any nationalisation measures or restrictions on private ownership.<sup>154</sup> They are also free to employ staff of their choosing on the terms they wish to agree, subject to

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<sup>149</sup> Section 17, *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>150</sup> Section 8, *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>151</sup> Section 19(1), *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>152</sup> Section 19(3), *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>153</sup> Section 20, *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>154</sup> Section 32, *Nairobi International Financial Centre Act* (Act No.25 of 2017).

international obligations relating to employment rights.<sup>155</sup> Additionally, the Act permits firms to repatriate profits and realise investments they have earned.<sup>156</sup> All firms functioning within the NIFC require certification.<sup>157</sup> As it is one of the mandates of the Authority, the interested firm must submit an application to the Authority in its prescribed form accompanied by the prescribed fees and any other information that the Authority deems essential.<sup>158</sup> Upon certification, the firm can engage in any of the activities qualified by the Authority.<sup>159</sup> The certification remains in force unless the Authority suspends it or the firm voluntarily surrenders it.<sup>160</sup> Any firm that operates within the NIFC without the necessary certification will be liable to face imprisonment of not less than five years or a fine not exceeding ten million shillings or both.<sup>161</sup>

In relation to Dispute Resolution, the Act establishes the Financial Centre Tribunal (hereinafter the Tribunal), which will consist of members appointed by the Judicial Services Commission.<sup>162</sup> The members will serve for a term of three years; however, the term is renewable for one additional term.<sup>163</sup> The Tribunal has the jurisdiction to hear and determine any appeals that arise from the decision of the Authority.<sup>164</sup>

### **3.3 CORRELATION BETWEEN THE ACT AND THE CREATION OF A TAX HAVEN**

The study deems these provisions problematic due to their closeness to the distinguishing attributes of tax havens, which include secrecy provisions, attractive tax incentives that lead to the imposition of little to no tax and a favourable legal environment.<sup>165</sup> As a consequence, they are at risk of driving the Nairobi International Financial Centre from an International Financial Centre to a tax haven.

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<sup>155</sup> Section 32, *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>156</sup> Section 32, *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>157</sup> Section 28, *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>158</sup> Section 28(2), *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>159</sup> Section 28(4), *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>160</sup> Section 28(6), *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>161</sup> Section 26(2), *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>162</sup> Section 35(1), *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>163</sup> Section 35(3), *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>164</sup> Section 35 (7), *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>165</sup> Palan R, Murphy R and Chavagneux C, *Tax Havens How Globalization Really Works*, 17.

### 3.3.1 Supremacy of the Act over all Opposing Statutes

Section 3 of the NIFC Act provides that the Act will supersede any other regulations when there is a conflict or the regulation contains contrary provisions to those contained in the Act.<sup>166</sup> As a result, Section 3 of the Act prevents interference of other regulations that could be beneficial in curbing the exploitation of these regulations to carry out tax abuses.<sup>167</sup> An example of regulations with protective mechanisms are the various laws relating to the prevention of tax avoidance caused by the aggressive tax planning of MNEs. One such law is the Tax Procedure Act of 2015, which defines tax avoidance as any transaction or scheme, designed to avoid liability to pay tax under the law<sup>168</sup> and seeks to protect domestic resource mobilization by penalising tax avoidance schemes undertaken by taxpayers.<sup>169</sup> Another law that protects the tax system from avoidance activities is the Income Tax Act under Section 23. It provides a General Anti-avoidance Rule, that empowers the Commissioner of the Kenya Revenue Authority to disregard transactions they believe the taxpayer solely designed to avoid tax liability.<sup>170</sup> Section 93 of the Companies Act and the Companies (Beneficial Ownership Information) Regulations 2020 also curb tax avoidance. This is because they foster transparency within corporate structures by requiring companies to disclose the persons who own and control the company.<sup>171</sup> This prevents corporations from taking advantage of anonymity to carry out detrimental activities.<sup>172</sup> Moreover, this section restricts the application of other relevant acts such as the Access to Information Act, Central Bank of Kenya Act, Banking Act and the Public Finance Act, which could act as possible safeguards.<sup>173</sup>

### 3.3.2 Wide Discretion of the Authority and the Cabinet Secretary of Finance

As discussed earlier, firms that desire to operate within the NIFC must apply for a certificate from the Authority.<sup>174</sup> However, the Act does not provide the criteria of assessment utilised to qualify the firms. Moreover, there was no chance for the public to weigh in on what criteria

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<sup>166</sup> Section 3, *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>167</sup> Latif L, 'Does the Nairobi International Financial Centre Act, 2017 Undermine Kenya's Constitutional Supremacy? Testing the Merits of a Constitutional Challenge against Specific Provisions of the NIFC Act' Social Science Research Network, 2018, 2-3.

<sup>168</sup> Section 3, *Tax Procedure Act* (Act No. 29 of 2015).

<sup>169</sup> Section 85, *Tax Procedure Act* (Act No. 29 of 2015).

<sup>170</sup> Section 33, *Income Tax Act* (Act No. Cap 470).

<sup>171</sup> Section 93, *Companies Act* (No 17 of 2015).

<sup>172</sup> Oraro and Company Advocates, 'Disclosure of Beneficial Ownership of Companies in Kenya' 2 November 2020-< [Disclosure of Beneficial Ownership of Companies in Kenya - Oraro & Company Advocates Oraro & Company Advocates](#)> on 12 December 2020.

<sup>173</sup> Tax Justice Network-Africa, *Memorandum to the Clerk of the National Assembly: Nairobi International Financial Centre Bill (2016)*, 2017, 1.

<sup>174</sup> Section 28, *Nairobi International Financial Centre Act* (Act No.25 of 2017).

should be in use as it was also not present in the Bill and therefore not subjected to any public participation process.<sup>175</sup> Thus, the certification of firms is vulnerable to exploitation, as no guidelines have been provided.<sup>176</sup>

Furthermore, the Act fails to provide for the activities that the firms can conduct within the Centre. However, it authorises the Cabinet Secretary to designate the qualified activities they can conduct through a publication in the Kenyan Gazette.<sup>177</sup> This gives the Cabinet Secretary wide discretion to decide what particular business activities the firms can carry out.<sup>178</sup> Similar to the criteria of assessment, the provision was also not included in the Bill. Therefore, there was no opportunity for public participation and parliamentary deliberations on the matter of the activities.<sup>179</sup> Consequently, there is ambiguity as to what specific activities will be undertaken and whether these activities will promote harmful and unfair competition as it will be difficult for local and regional industries to compete with MNEs within the same industry.<sup>180</sup>

The Cabinet Secretary also has the mandate to decide on any benefits, exemptions and incentives available to NIFC firms that will be in place to foster the growth of the NIFC.<sup>181</sup> There are no limitations to the Cabinet Secretary's discretion and no institutional measures provided to allow other parties such as the parliament to provide input into the decisions of the Cabinet Secretary.<sup>182</sup> Without these checks and balances, the tax incentives may leave the Kenyan tax system exposed to the perpetuation of tax avoidance schemes that lead to large losses in domestic revenue.<sup>183</sup>

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<sup>175</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017, 13.

<sup>176</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017, 13.

<sup>177</sup> Section 27(1), *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>178</sup> Tax Justice Network-Africa, *Memorandum to the Clerk of the National Assembly: Nairobi International Financial Centre Bill (2016)*, 2017, 1.

<sup>179</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017, 13.

<sup>180</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017, 13.

<sup>181</sup> Section 40 (2)(b), *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>182</sup> Tax Justice Network-Africa, *Memorandum to the Clerk of the National Assembly: Nairobi International Financial Centre Bill (2016)*, 2017,1.

<sup>183</sup> Tax Justice Network-Africa, *Memorandum to the Clerk of the National Assembly: Nairobi International Financial Centre Bill (2016)*, 2017, 1.

### 3.3.3 Facilitation of secrecy

Secrecy is a key requirement of any International Financial Centre as it attracts foreign investment.<sup>184</sup> Section 40(2) (f) mandates the Cabinet Secretary of Finance to prescribe the information required to certify NIFC firms.<sup>185</sup> Moreover, Section 30(2) provides the Authority with a wide discretion to decide on the type of information they deem appropriate for disclosure in the authority's website or public register.<sup>186</sup> These provisions serve as blanket statements and do not provide a comprehensive picture as to what information will be available to the public.<sup>187</sup> Furthermore, the ambiguity of the laws threatens transparency and disclosure as MNEs can take advantage of the uncertainty to carry out tax avoidance activities in secret.<sup>188</sup>

In addition, the Act does not provide for important provisions such as those relating to beneficial ownership transparency.<sup>189</sup> Beneficial ownership transparency involves the identification, registration and disclosure of the people who ultimately own or control legal vehicles.<sup>190</sup> It is a tool used to promote domestic resource mobilization by preventing erosion of tax bases through avoidance<sup>191</sup> as it is able to provide information on the movement of money in relation to who is moving it and to what location.<sup>192</sup> As the Act does not require MNEs to provide information on beneficial ownership, it can worsen the tax avoidance schemes that MNEs apply, as it will be difficult to trace the movement of money or hold them accountable.<sup>193</sup>

### 3.3.4 Lack of independence and accountability of the Authority

The NIFC Act fails to guarantee the independence of the Authority.<sup>194</sup> The heavy influence of the Executive arm of Government compromises its independence. This influence is as a result

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<sup>184</sup> U4 Anti-Corruption Resource Centre, *Tax Haven or International Financial Centre? The Case of Kenya*, 2014, 3.

<sup>185</sup> Section 40(2)(f), *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>186</sup> Section 30(2), *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>187</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017, 13.

<sup>188</sup> African Union Commission and United Nations Economic Commission for Africa, *Illicit Financial Flow: Report of the High Level Panel on Illicit Financial Flows from Africa*, 2015, 81, 86.

<sup>189</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017, 13.

<sup>190</sup> Tax Justice Network Africa, *Beneficial ownership transparency in Africa The state of play in 2020*, 2020, ii.

<sup>191</sup> Tax Justice Network Africa, *Beneficial ownership transparency in Africa The state of play in 2020*, 2020, ii.

<sup>192</sup> African Union Commission and United Nations Economic Commission for Africa, *Illicit Financial Flow: Report of the High Level Panel on Illicit Financial Flows from Africa*, 2015, 81, 86.

<sup>193</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017, 13.

<sup>194</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017, 14.

of its composition, which consists of a number of presidential appointees<sup>195</sup> as well as members of the Executive.<sup>196</sup> The Council whose main function is to oversee the Authority can also threaten its independence, as it is also comprised of several members of the Executive.<sup>197</sup> The Executive therefore has the power to influence the Authority into making decisions that are in line with their own personal interests, which may not be in the best interest of the NIFC or the Kenyan citizens. The MNEs can get away with utilising the NIFC in detrimental ways by influencing the Executive to advance their agenda.<sup>198</sup> Moreover, the firms within the NIFC can also induce the Authority to act in a manner that benefits their activities, as the Authority is financially dependent on these firms<sup>199</sup> because they obtain a portion of its financial resources from these same firms.<sup>200</sup>

### 3.3.5 Tax Incentives consisting of very low tax rates

The Act provides for the administration of tax incentives.<sup>201</sup> It however, does not indicate the type of tax incentives that will be available. Because the Act and the NIFC are models of the Qatar International Financial Centre and its regulations,<sup>202</sup> researchers have been able use the information on Qatar to deduce the kind of tax incentives the Centre will provide.<sup>203</sup> The Qatar Financial Centre provides tax incentives characterized by low tax rates and extensive tax exemptions for dividends, capital gains and qualifying activities. In addition, the Qatar Financial Centre does not levy withholding tax on payments out of Qatar.<sup>204</sup> Therefore, researchers expect that the NIFC will follow a similar trajectory and offer low tax rates.<sup>205</sup>

Moreover, as International Financial Centres are steadily gaining popularity among African states as one of the means of spearheading development<sup>206</sup>, there is need to provide favourable

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<sup>195</sup> Article 132, *Constitution of Kenya* (2010).

<sup>196</sup> Section 8, *Nairobi International Financial Centre Act* (Act No.25 of 2017).African U

<sup>197</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*,2017,14.

<sup>198</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*,2017,14.

<sup>199</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017,14.

<sup>200</sup> Section 20 (a) and (b), *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>201</sup> Section 40(2)(b), *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>202</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017,11.

<sup>203</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017,11.

<sup>204</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017,11.

<sup>205</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017,11.

<sup>206</sup> Seabrooke L and Waris A, ‘ Arrested Development in Africa’s Global Wealth Chains Accountability and hierarchy among ‘tax havens’, 279.

tax incentives for the IFCs to attract firms and be competitive.<sup>207</sup> Therefore, tax scholars in Kenya expect the incentives to be aggressive, such as a high slash on corporation taxes levied on the firms operating within these structures, to acquire a competitive edge that will enable the fulfilment of the objectives of the Act.<sup>208</sup>

However, the introduction of these tax incentives may not render the results desired by the state as studies conducted have raised doubts about the effectiveness of tax incentives in attracting foreign direct investment in countries in the Global South.<sup>209</sup> This is because investors regard other factors, such as economic stability, before the tax laws and policies of a certain jurisdiction.<sup>210</sup> Moreover, tax incentives have detrimental effects to the tax system of states as it impedes their ability to collect revenue, allows tax avoidance through profit-shifting and cause distortionary effects to the economy due to harmful tax competition.<sup>211</sup> Accordingly, their negative impact may outweigh the potential positive effects they may generate.<sup>212</sup>

### **3.3.6 Freedom to Repatriate Funds**

Lastly, Section 32 permits foreign companies with the freedom to repatriate profits and realised investments.<sup>213</sup> The Act does not provide any limitations to this freedom hence creating an ultra-permissive legal system that is open to abuse from these foreign firms.<sup>214</sup>

## **3.4 THE IMPLICATIONS OF THE ACT ON BEPS IN KENYA AND AFRICA**

Data has demonstrated that the corporate use of tax havens facilitates tax avoidance activities that have led to a massive loss of revenue.<sup>215</sup> This is because MNEs are able to exploit the environment created by tax havens to shift their profits to low tax jurisdictions to avoid paying higher corporate tax.<sup>216</sup> Consequently, these resources escape taxation and undermine the

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<sup>207</sup> U4 Anti-Corruption Resource Centre, *Tax Haven or International Financial Centre? The Case of Kenya*, 2014, 2.

<sup>208</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017, 11.

<sup>209</sup> Financial Transparency Organisation, *Use and Abuse of Tax Breaks: How Tax Incentives Become Harmful*, 2020, 12.

<sup>210</sup> Financial Transparency Organisation, *Use and Abuse of Tax Breaks: How Tax Incentives Become Harmful*, 2020, 12.

<sup>211</sup> Financial Transparency Organisation, *Use and Abuse of Tax Breaks: How Tax Incentives Become Harmful*, 2020, 24-25.

<sup>212</sup> Christian Aid Organisation, *Tax Incentives in the Global South: A business and civil society briefing*, 2018, 3.

<sup>213</sup> Section 32, *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>214</sup> Deneault A, *Legalizing Theft: A Short Guide to Tax Havens*, 1<sup>st</sup> ed, Fernwood Publishing, Nova Scotia, 2018, 17.

<sup>215</sup> Fjeldstad O, Jacobsen S, Ringstad P, Ngowi H, 'Tax havens, capital flows and Africa – An Introduction', 9.

<sup>216</sup> Fjeldstad O, Jacobsen S, Ringstad P, Ngowi H, 'Tax havens, capital flows and Africa – An Introduction', 9.

ability of states to raise revenue thus eroding their tax base.<sup>217</sup> The lack of capacity and proper laws within African countries, to combat the avoidance schemes by MNEs, heightens the effect of BEPS in the continent as compared to developed countries.<sup>218</sup> BEPS contributes to African states lacking the valuable resources needed to meet their commitments in relation to human right and economic development.<sup>219</sup> The *NIFCA* establishing provisions that contain haven like characteristics such as secrecy, ease of transfer of money and a permissible legal system, risks perpetuating capital flows out of other African states.<sup>220</sup> As was earlier discussed in the literature review, tax havens and IFCs in Africa are unlikely to retain the foreign investments generated, as they are unable to compete with the tax havens and IFCs present in developed states with more favourable and secure environments.<sup>221</sup> Instead, these structures are likely to act as conduits facilitating the movement of money outside the continent<sup>222</sup> thus weakening the efforts made by other African states to strengthen their domestic resource mobilization.<sup>223</sup>

The creation of a tax haven in Kenya also encourages harmful tax competition.<sup>224</sup> Due to the lack of cohesiveness within the international tax systems, tax havens are able to design their fiscal law in a manner that makes their tax systems as favourable as possible through provisions that lower the tax rate or enable secrecy, to attract investors.<sup>225</sup> Other states, as a response, lower their own tax rates to prevent capital outflow from their countries.<sup>226</sup> This pressure to put in place aggressive tax measures in an effort to compete for capital is referred to as a “race to the bottom”.<sup>227</sup> The basis of lowering of tax rates by states is the belief that it will attract foreign direct investments, which will then boost their economic growth. However, research has

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<sup>217</sup> Schlenther B, ‘Addressing illicit financial flows in Africa: how broad is the whole of government approach supposed to be?’ 23(4) *Journal of Financial Crime*, 2016, 4.

<sup>218</sup> Oguttu A and Iyer M, ‘Tax Abuse and Implications for Human Rights in Africa’, 189-190.

<sup>219</sup> Oguttu A and Iyer M, ‘Tax Abuse and Implications for Human Rights in Africa’, 189-190.

<sup>220</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017, 18-19.

<sup>221</sup> Seabrooke Land Waris A, ‘Arrested Development in Africa’s Global Wealth Chains Accountability and hierarchy among ‘tax havens’, 281-282.

<sup>222</sup> Seabrooke Land Waris A, ‘Arrested Development in Africa’s Global Wealth Chains Accountability and hierarchy among ‘tax havens’, 281-282.

<sup>223</sup> Moore M, Prichard W, Fjeldstad O, *Taxing Africa Coercion, Reform And Development*, 1<sup>st</sup> ed, Zed Books Ltd, London, 2018, 85.

<sup>224</sup> Fjeldstad O, Jacobsen S, Ringstad P and Ngowi H, ‘The scope and consequences of capital flows from developing countries’ in Fjeldstad O, Jacobsen S, Ringstad P and Ngowi H *Lifting the Veil of Secrecy: Perspectives on International Taxation and Capital Flight from Africa*, 1<sup>st</sup> ed, Chr. Michelsen Institute, Norway, 2017, 42.

<sup>225</sup> Dietsch P, *Catching Capital: Ethics of Tax Competition*, 1<sup>st</sup> ed, Oxford University Press, New York, 2015, 2.

<sup>226</sup> Dietsch P, *Catching Capital: Ethics of Tax Competition*, 2.

<sup>227</sup> Shaxson N and Christensen J, ‘Tax Competition- a Dangerous Obsession’ in Pogge T and Mehta K (eds) *Global Tax Fairness*, 1<sup>st</sup> ed, Oxford University Press, Oxford, 2016, 266.

indicated that this is not always the case.<sup>228</sup> Harmful tax competition has negative effects on the haven itself and on other states. This is because it erodes countries' tax bases, as they are no longer able to tax income at suitable rates.<sup>229</sup> The OECD recognised this problem and through Action 5 of the BEPS Action Plan aims to curb harmful tax competition in tax havens so as to foster an international environment whereby free and fair tax competition takes place.<sup>230</sup> Although the Cabinet Secretary, in accordance with the Act, has not yet delineated the tax incentives that will be available in the Centre, tax researchers expect the incentives to feature low corporate taxes and a variety of tax exemptions, to be competitive and attract firms.<sup>231</sup> This may lead to harmful tax competition in Sub-Saharan Africa as lowering the tax levied in Kenya may encourage other African countries to do the same so as to maintain their investors and prevent capital outflow.<sup>232</sup> Consequently, erosion of tax bases within Africa will occur thus hindering domestic resource mobilization.<sup>233</sup> Moreover, these incentives will also diminish the tax base within Kenya, as they will reduce the amount of corporate tax the Kenyan government will be able to collect.<sup>234</sup> This is injurious as Kenya relies heavily on corporate tax.<sup>235</sup>

Facilitating BEPS may have serious consequences on the state as it may prompt the international community to blacklist Kenya thus exposing it to punitive sanctions such as economic penalties that will be detrimental to its development.<sup>236</sup>

### **3.5 COMPARATIVE CASE STUDY OF GHANA**

The comparative study will endeavour to add onto the analysis of the legal frameworks regulating Financial Centres in Africa and their effects in relation to Base Erosion and Profit Shifting. The study will undertake an analysis of the Ghana International Financial Services

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<sup>228</sup> Brauner Y, 'The future of tax incentives for developing countries' in Brauner Y and Stewart M (eds) *Tax, Law and Development*, 1<sup>st</sup> ed, Edward Elgar Publishing Ltd, Cheltenham, 2013, 25-26

<sup>229</sup> Dietsch P, *Catching Capital: Ethics of Tax Competition*, 6.

<sup>230</sup> OECD, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5-2015 Final Report*, 2015, 11-12

<sup>231</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017, 15.

<sup>232</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017, 16.

<sup>233</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017, 16.

<sup>234</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017, 16.

<sup>235</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017, 15.

<sup>236</sup> Dean S and Waris A, 'Ten Truths About Tax Havens: Inclusion and the 'Liberia' Problem' 70(7) *Emory Law Journal*, 2021, 2, 8-13.

Centre and its corresponding regulation to determine the similarities with the Centre and the NIFC Act.

Ghana is comparable to Kenya given that they have similar demographics and both countries featured the establishment of International Financial Centres in their plan to foster development.<sup>237</sup> Moreover, the International Financial Services Centre in Ghana is an appropriate place to research as it enables us to garner the potential effects of the Act seeing that the NIFC is not yet in operation.

The establishment of the Ghana International Financial Services Centre began in 2005 when the then President, through a Memorandum of Understanding with Barclays Bank Ghana, sought to explore the possibility of creating an IFC in the country.<sup>238</sup> Similar to the situation in Kenya, the creation of the IFC in Ghana received backlash not only from civil society groups but also from the international community, with OECD asserting that an IFC in the African continent would contribute to tax avoidance, crime and corruption.<sup>239</sup> However, the state proceeded with its plans and after the feasibility study, the Ghanaian government, in collaboration with Barclays Bank Ghana, developed a legal framework to regulate the IFC.<sup>240</sup> Subsequently, in 2007, the parliament amended the Banking Act 2004 through the Banking Amendment Act 2007 to operationalise the IFC.<sup>241</sup> In the same year, the Bank of Ghana granted Barclays Bank Ghana the authority to manage the banking services within the Ghana International Financial Services Centre.<sup>242</sup>

The Amendment Act established an IFC with a hybrid structure such that both domestic and foreign corporations could operate within the IFC.<sup>243</sup> Moreover, the Act set up an organisational framework comprising of various bodies that would operate in the IFC. The Financial Service Regulatory Body had the authority to supervise the activities that in the IFC, the Financial Services Promotion Agency, which had the authority to promote financial services and the Financial Intelligent Unit whose function, was to investigate any alleged

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<sup>237</sup> Seabrooke Land Waris A, ‘Arrested Development in Africa’s Global Wealth Chains Accountability and hierarchy among ‘tax havens’’, 281.

<sup>238</sup> Tax Justice Network, *Financial Secrecy Index 2020: Narrative Report on Ghana*, 2020, 1.

<sup>239</sup> Vlcek W, ‘Offshore finance in Ghana: Why not?’ 38 (127) *Review of African Political Economy*, 2011, 143, 145.

<sup>240</sup> Vlcek W, ‘Offshore finance in Ghana: Why not?’, 143.

<sup>241</sup> Bank of Ghana, *Offshore Banking and the Prospects for the Ghanaian Economy*, 2008, 16.

<sup>242</sup> Vlcek W, ‘Offshore finance in Ghana: why not?’, 143.

<sup>243</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017, 19.

wrongful conduct.<sup>244</sup> The Act also contained provisions that reflected aspects of tax havens.<sup>245</sup> It contained provisions that exempted offshore banking entities and businesses listed in the offshore jurisdiction from taxation, reduced regulatory requirements and capital adequacy rates for offshore banks and allowed for secrecy, which contradicted the anti-money laundering legal framework already in existence.<sup>246</sup>

The haven like characteristics established a weak legal framework that offshore entities and persons exploited to facilitate illicit financial flows. Consequently, the international community declared the IFC a tax haven and the Financial Action Task Force placed the country on its blacklist as a non-cooperative state. Moreover, Ghana gained a reputation for its connection with money laundering activities.<sup>247</sup> The international pressure triggered by the activities of the IFC led to the Ghanaian government shutting it down.<sup>248</sup> Thus, the Ghana International Financial Services Centre ceased its operation less than five years after its establishment<sup>249</sup>

The Ghanaian case study is similar to that of Kenya as both countries sought to use IFCs to generate Foreign Direct Investment. Likewise, both countries put in place legal frameworks that contain characteristics of tax havens such as secrecy provisions, tax incentives and permissible laws to attract the foreign investors. Through an analysis of Ghana, the research is able to assess the weakness of such a framework and the possible effects. The Ghana case study demonstrates that provisions that create tax havens will impede the function of the centre and generate serious repercussions. This is an important lesson for Kenya if the country intends to set up a legitimate IFC that is capable of generating the economic growth and development desired.

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<sup>244</sup> Bank of Ghana, *Offshore Banking and the Prospects for the Ghanaian Economy*, 2008, 17.

<sup>245</sup> Prichard W and Bentum I, 'Taxation and development in Ghana: finance, equity and accountability' Tax Justice Network, Tax Justice Country Report Series, April 2009, 43 -<  
[https://www.taxjustice.net/cms/upload/pdf/Ghana\\_0906\\_Report\\_printer\\_friendly.pdf](https://www.taxjustice.net/cms/upload/pdf/Ghana_0906_Report_printer_friendly.pdf)> on 12 December 2020.

<sup>246</sup> Prichard W and Bentum I, 'Taxation and development in Ghana: finance, equity and accountability', 43.

<sup>247</sup> Tax Justice Network, *Financial Secrecy Index 2020: Narrative Report on Ghana*, 2020, 1.

<sup>248</sup> Tax Justice Network, *Financial Secrecy Index 2020: Narrative Report on Ghana*, 2020, 1-2.

<sup>249</sup> Tax Justice Network, *Financial Secrecy Index 2020: Narrative Report on Ghana*, 2020, 1.

## CHAPTER 4: FINDINGS

### 4.1 DISCUSSION OF FINDINGS

#### 4.1.1 Introduction

The aim of this chapter is to present the results of the research project and discuss their place within the related literature and the conceptual framework.

#### 4.1.2 Reiteration of Research Problem

The purpose of the study was investigative in nature. It sought to determine if the provisions of the Nairobi International Financial Centre Act established a tax haven. Furthermore, it looked at the possible effects of the creation of a tax haven in Africa with a focus on BEPS.

#### 4.1.3 Findings and Hypothesis 1

The first hypothesis of the research states that the provisions of the Nairobi International Financial Centre Act create a tax haven. Although tax havens do not have a precise definition, and studies regularly conflate it with terms such as low tax jurisdictions, secrecy jurisdictions and international financial centres,<sup>250</sup> various tax researchers have identified key structures that can distinguish them.<sup>251</sup>

One such structure is the provision of tax incentives that significantly lower or completely do away with the tax liability of its members.<sup>252</sup> Tax havens use low or no tax requirements to attract MNEs and the wealthy elite who are looking to reduce their tax burdens.<sup>253</sup> This feature is present in the Act as it provides for the provision of tax incentives, which the Cabinet Secretary will determine.<sup>254</sup> In addition, the tax incentives will likely offer favourable tax incentives such as very low direct taxation of the NIFC firms.<sup>255</sup> This is due to the need for the Centre to compete with other existing and upcoming IFCs in Africa.<sup>256</sup> Furthermore, the Qatar International Financial Centre, which the Centre is modelled after, offers low tax rates to corporations in their IFC, further indicating that Kenya is likely to take a similar direction in

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<sup>250</sup> Beckett P, *Tax havens and International Human Rights*, 1<sup>st</sup> ed, Taylor & Francis Group New York, 2018,14.

<sup>251</sup> Shaxson N, *Treasure Islands: Uncovering the Damage of Offshore Banking and Tax Havens*, 1<sup>st</sup> ed, Palgrave and MacMillan Publishers, New York, 2011, 2.

<sup>252</sup> Shaxson N, *Treasure Islands: Uncovering the Damage of Offshore Banking and Tax Havens*, 2.

<sup>253</sup> Oats L, Miller A and Mulligan E, *Principles of International Taxation*, 527.

<sup>254</sup> Section 40(2)(b), *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>255</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017,11-12.

<sup>256</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017,11-12.

regards to the tax incentives it offers. The likelihood of the NIFC providing tax incentives that consist of little to no tax is comparable to a tax haven.<sup>257</sup>

Additionally, tax havens feature secrecy provisions.<sup>258</sup> Thus, tax havens lack transparency and mechanisms that promote the effective exchange of information.<sup>259</sup> Secrecy provisions are a salient characteristic of tax havens as they enable members to conceal their identities from tax authorities.<sup>260</sup> Consequently, secrecy enables activities such as avoidance and evasion that deplete countries' tax bases.<sup>261</sup> The Act enhances secrecy of the Centre as it lacks provisions that safeguard transparency such as exchange of information mechanisms and beneficial ownership transparency.<sup>262</sup> Moreover, it is ambiguous as to the specific information that the firms are to disclose and provides the Authority with a wide discretion to determine the information that will be available to the public in the register and in the website. This lack of clarity regarding accessibility of information makes it difficult for the public to participate effectively and hold authorities accountable, which serves to contravene Article 35 of the Constitution of Kenya<sup>263</sup> that guarantees citizens the right to access information held by the State.<sup>264</sup> The entrenchment of secrecy is a shared characteristic between the provisions of the Act and a tax haven.

Tax havens also boast highly permissible laws with limited restrictions.<sup>265</sup> The laws are structured to be accommodating to the firms that operate within their framework, such that they do not face the constraints they would otherwise face in other jurisdictions.<sup>266</sup> This creates a favourable legal environment<sup>267</sup> that allows the movement of capital without knowledge of relevant national authorities thus leading to substantial losses in revenue.<sup>268</sup> A number of the

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<sup>257</sup> Palan R, Murphy R and Chavagneux C, *Tax Haven: How Globalization Really Works*, 24.

<sup>258</sup> Barkoczy S, *Foundations of Tax Law*, 1335.

<sup>259</sup> Organisation for Economic Co-Operation and Development, *Harmful Tax Competition: An Emerging Global Issue*, 1998, 23.

<sup>260</sup> Oguttu A, 'The financial secrecy of tax havens' in Fjeldstad O, Jacobsen S, Ringstad P and Ngowi H *Lifting the Veil of Secrecy: Perspectives on International Taxation and Capital Flight from Africa*, Bergen, Chr. Michelsen Institute, 2017, 150.

<sup>261</sup> Oguttu A, *The financial secrecy of tax havens*, 150.

<sup>262</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017, 13.

<sup>263</sup> Tax Justice Network-Africa, *Memorandum to the Clerk of the National Assembly: Nairobi International Financial Centre Bill (2016)*, 2017, 1.

<sup>264</sup> Section 35, *Constitution of Kenya* (2010).

<sup>265</sup> Deneault A, *Legalizing Theft: A Short Guide to Tax Havens*, 17.

<sup>266</sup> Deneault A, *Legalizing Theft: A Short Guide to Tax Havens*, 17.

<sup>267</sup> Oats L, Miller A and Mulligan E, *Principles of International Taxation*, 528.

<sup>268</sup> Fjeldstad O, Jacobsen S, Ringstad P, Ngowi H, 'Tax havens, capital flows and Africa – An Introduction' in Fjeldstad O, Jacobsen S, Ringstad P, Ngowi H *Lifting the Veil of Secrecy: Perspectives on International Taxation and Capital Flight from Africa*, Bergen, Chr. Michelsen Institute, 2017, 10.

provisions of the Act create a permissive atmosphere. One such provision is Section 3 that places the Act before any other relevant statutes that have the potential of restricting some of the conduct of the NIFC firms by providing mechanisms that guard against exploitation.<sup>269</sup> Moreover, Section 32 which bestows the NIFC firms the unrestricted freedom to repatriate their profits,<sup>270</sup> Section 40(2)(b) which provides for tax incentives and Section 30(2) and Section 40(2) (f), which foster ambiguity and create secrecy loopholes, all establish favourable legal environment for MNEs to exploit.<sup>271</sup> Altogether, these provisions create a legal environment that is advantageous to corporations, just like the legal framework in tax havens, thus enabling them take advantage of the weakness of the law and the loopholes for their benefit.

Another key factor of tax havens, originating from a human rights perspective, is little to no accountability, as the state legislation in tax havens intentionally promotes, facilitate and ensures accountability avoidance of the parties involved.<sup>272</sup> This is evidenced in the Act as it fails to ensure the accountability of supervisory bodies.<sup>273</sup> As was discussed earlier, the Act provides measures to ensure accountability through the Authority who are in charge of managing the Centre and ensuring that it is operating efficiently enough to attract foreign firms<sup>274</sup> and the Steering Council who are required to review the progress of the Centre. However, they lack complete independence from the executive, which may thus impede these bodies from carrying out their oversight functions in a fair manner thus enabling parties such as MNEs and corrupt individuals to escape accountability.<sup>275</sup>

Lastly, tax havens are also characterised by the ease of transfer of money and documentation.<sup>276</sup> The Act demonstrates this in Section 32, which provides the NIFC firms with unrestricted freedom of repatriating profits.<sup>277</sup>

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<sup>269</sup> Section 3, *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>270</sup> Section 32, *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>271</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017, 11-13.

<sup>272</sup> Beckett P, *Tax havens and International Human Rights*, 26.

<sup>273</sup> Section 19(4)(a), *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>274</sup> Section 6, *Nairobi International Financial Centre Act* (Act No.25 of 2017).

<sup>275</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017, 14-15.

<sup>276</sup> Oats L, Miller A and Mulligan E, *Principles of International Taxation*, 526.

<sup>277</sup> Section 32, *Nairobi International Financial Centre Act* (Act No.25 of 2017).

Consequently, the study finds that various factors existing within the NIFC Act create structures similar to those in tax havens. Thus, there is consistency between the research findings and the first hypothesis.

#### **4.1.4 Findings and Hypothesis 2**

The second hypothesis posited by the study posited that the creation of the tax haven exposed the economy to various negative implications such as BEPS. The findings agree with this assertion as analysis conducted on the subject matter have linked the creation of tax havens to BEPS due to their inclination to create frameworks that facilitate tax avoidance activities by MNEs.<sup>278</sup> Consequently, the tax base of countries is eroded which then undermines the amount of resources they can round up leading to inequality and inequity.<sup>279</sup> This is because these tax avoidance services are only available to the MNEs, which greatly reduces the amount of corporate tax the state is able to collect. This eventually ruins the country's tax base and influences it to levy the said taxes on individuals who do not have the same opportunities as MNEs to avoid their tax liability.<sup>280</sup> This then creates an unequal tax system devoid of equity, as one portion of society is unfairly bearing the burden for these large corporations.<sup>281</sup>

Additionally, research in the area illustrates that tax havens perpetuate harmful competition between the tax haven and the states that surround it as they struggle to offer better tax incentives to encourage foreign investors.<sup>282</sup> Such activities contribute to BEPS, as countries are required to lower their tax rates further, which reduces the amount of tax they can collect which again erodes their tax base.<sup>283</sup> Relating the pre-existing literature and conceptual framework to the Act, the study observes that the attractive tax incentives the NIFC is set to offer will erode Kenya's ability to collect corporate tax by allowing the firms operating within the Centre to avoid paying taxes. Other African countries are also at risk, due to the rising pressure to lower their tax rates to compete with Kenya in an effort to guarantee foreign investment. This then impedes their own attempts at domestic resource mobilization.

Accordingly, the study found the results to be in line with the hypothesis 2.

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<sup>278</sup> Fjeldstad O, Jacobsen S, Ringstad P, Ngowi H, 'Tax havens, capital flows and Africa – An Introduction', 9.

<sup>279</sup> Schlenther B, 'Addressing illicit financial flows in Africa: how broad is the whole of government approach supposed to be?', 4.

<sup>280</sup> Gillian B, 'Taxation and Global Justice: Closing the Gap between Theory and Practice', 164-165.

<sup>281</sup> Gillian B, 'Taxation and Global Justice: Closing the Gap between Theory and Practice', 164-165.

<sup>282</sup> Dietsch P, *Catching Capital: Ethics of Tax Competition*, 2.

<sup>283</sup> Dietsch P, *Catching Capital: Ethics of Tax Competition*, 6.

#### **4.1.5 Findings of the Comparative study**

The last aspect of the case study focused on a comparative analysis of Kenya and Ghana. Ghana was a suitable choice as it had already attempted to create an IFC within its jurisdiction, which it eventually shut down. The comparative study was essential, as its aim was to provide foresight to the circumstance in Kenya. Accordingly, the study reviewed the situation in Ghana to discern the possible reasons Ghana's IFC failed to meet the aspirations of the Ghanaian government and had to cease operation. The study then aimed to identify these factors in Kenya, which could lead it to suffer the same fate. The study drew the conclusion that Ghana contained regulations that had tax haven qualities. These qualities prompted international organisation to brand Ghana internationally as a tax haven and blacklist it. This led to the discontinuation of the Ghana IFC. Moreover, the results illustrated that Kenya contained similar provisions to that of Ghana and therefore at risk of suffering the same fate.

#### **4.1.6 Conclusion**

The results enables the study to meet its objectives as it identifies and evaluates the critical provisions of the Act and illustrates their connection to the creation of a tax havens and the effect it would have on BEPS. Furthermore, through the comparative study, the research was able to identify similarities between the circumstance in Kenya and Ghana thus finding that Kenya is likely to face a similar fate if policy and lawmakers do not take corrective action.

### **4.2 DELIMITATIONS AND LIMITATIONS OF THE RESEARCH**

Although the research aimed to discuss the creation of tax havens and the subsequent effects, the results do not fully discuss all the effects a possible tax haven can have on Kenya and its neighbours as it solely focuses on the erosion of tax bases and shifting of profits. Moreover, the research project focuses on Kenya's role in exacerbating the problem of IFCs but does not examine and discuss the greater international tax law landscape that ultimately aids the creation of tax havens and the tax avoidance activities of MNEs.

Lastly, the fact that the Cabinet Secretary is yet to publish the NIFC Regulations affects the credibility of the results. This is because the NIFC Regulations are set to contain the specific tax incentives, which include the actual corporate tax rate, and tax reliefs that will be available in the Centre. Therefore, the research project is unable to provide with certainty the exact tax incentives offered. Instead, the discussion conducted in the previous Chapters used the situation in the Qatar International Financial Centre, which is the paradigm of the NIFC as well as the

need for a Kenya to set up a competitive Centre to glean the type of tax incentives the Centre will offer.

#### **4.3 POTENTIAL AREAS FOR RESEARCH**

A study on the other feasible effects of the creation of a tax haven in Kenya such as the increase in illicit financial flows due to tax evasion and money laundering activities can serve as a further area of research.

## CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

### 5.1 CONCLUSION

Through the discussion above, the research has arrived at the conclusion that the *NIFCA* has tax haven qualities that will negatively influence the management of BEPS in Kenya and Africa.

### 5.2 RECOMMENDATIONS

The study recommends the amendment of the Act to include the following corrective measures to ensure that the Centre remains an IFC and not a tax haven to avoid the exacerbation of BEPS in Africa.

#### 5.2.1 Transparency

The first recommendation concerns the inclusion of transparency within the law. The law has supremacy over all other opposing laws hence it is important to ensure that it has the necessary safeguards, that are ordinarily provided by other statutes, to prevent exploitation. Transparency is a significant protective measure as it manages the secrecy that permits abuse by persons. It also encourages the public to hold the MNEs and the State accountable and enhances the decision making of the Authority and Steering Council.

One of the ways to increase transparency within the Act is through provisions that provide for Beneficial Ownership disclosure. Beneficial Ownership disclosure forms part of tax justice organisations' framework on transparency known as the ABC of transparency. The B represents Beneficial Ownership<sup>284</sup> and is the cornerstone of international tax transparency.<sup>285</sup> Beneficial Ownership information enables tax authorities to identify the natural persons behind the legal entities in operation and the assets in their control.<sup>286</sup>

The Act can utilize the guidance of international standards to incorporate the suggested provisions. One such standards requires beneficial ownership disclosure regulations to assert that the information should be accurate and provided by firms in a timely manner to the relevant tax authorities. In an effort to meet these standards the Beneficial Ownership disclosure requirement should set out a publicly available register that will be used to record relevant and

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<sup>284</sup> Cobham A, 'Procuring Profit Shifting: The State's Role in Tax Avoidance' in Reisch N and Alston P(eds) *Tax, Inequality, and Human Rights*, 1<sup>st</sup> ed, Oxford University Press, Oxford, 2019, 142.

<sup>285</sup> Organisation for Economic Co-Operation and Development, *A Beneficial Ownership Implementation Toolkit*, 2019, 1.

<sup>286</sup> Organisation for Economic Co-Operation and Development, *A Beneficial Ownership Implementation Toolkit*, 2019, 1-4.

specified information such as the company name and list of directors. Additionally the provisions should require the NIFC firms to take reasonable measures to ensure that the information is current, accurate and can be promptly provided on request. International standards also recommend that the company record this information and maintain it within the jurisdiction of its operation at a location known to the authorities. The provision in the Act can include sanctions to the NIFC firms if they fail to comply.<sup>287</sup>

### **5.2.2 Tax Cooperation between States**

It is important to increase tax cooperation among African countries instead of tax competition. The Act can achieve this through provisions that provide for the exchange of information for tax purposes between states and provisions that expressly establish that Kenya can enter into Tax Information Exchange Agreements (TIEAs) with other African states. This will be beneficial to Kenya's neighbours, as it requires states to make information available to all interested parties in a bid to assist one another in tax administration.<sup>288</sup> The cooperation enable states to tackle tax avoidance schemes and ensure that the tax activities of other states do not compromise the integrity of their tax systems.<sup>289</sup> The study proposes that the Act embody this important aspect, given its supremacy over all opposing statutes, in order to enshrine and protect the cooperation between states thus guaranteeing the transparency of governance.

This recommendation borrows from the reforms executed by Botswana, which also began an International Financial Centre and, upon advisement by OECD, reformed its laws to permit TIEAs. The State has since signed a number of these agreements with other jurisdictions. After the reforms, the OECD acknowledged Botswana one of the States that are compliant with the international standards on transparency and information sharing.<sup>290</sup>

### **5.2.3 Strengthening Oversight Mechanisms**

In order to strengthen tax compliance of the NIFC firms, the Act should institute strong administration mechanisms. The study encourages the inclusion of tax authorities such as the Commissioner of the Kenya Revenue Authority in the management bodies such as the Council. The tax authorities will provide an experienced perspective on tax administration and advice

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<sup>287</sup> Financial Action Task Force (FATF), *Guidance on Transparency and Beneficial Ownership*, 2014, 13-16.

<sup>288</sup> Organisation for Economic Co-Operation and Development, *Transparency and Exchange of Information for Tax Purposes: Multilateral Co-operation Changing the World 10<sup>th</sup> Anniversary Report*, 2019, 7.

<sup>289</sup> Organisation for Economic Co-Operation and Development, *Transparency and Exchange of Information for Tax Purposes: Multilateral Co-operation Changing the World 10<sup>th</sup> Anniversary Report*, 2019, 7.

<sup>290</sup> Oguttu A, 'International Tax Competition, Harmful Tax Practices and the 'Race to the Bottom': A Special Focus on Unstrategic Tax Incentives in Africa' 51(3) *The Comparative and International Law Journal of Southern Africa*, 2018, 301-302.

the supervisory bodies on tax matters especially in relation to the types of tax incentives to offer. This will help curb any injurious effects the Centre may have on revenue collection.<sup>291</sup>

Furthermore, the Act should provide for the existence of an independent vetting committee to review the appointments of the members of the Authority so as to dilute the executive's influence.<sup>292</sup>

Lastly, the Act should also increase oversight on the Cabinet Secretary of Finance to whom it has bestowed wide discretionary powers.<sup>293</sup> The Act can achieve this by setting up auditing systems within the law that limit the cabinet secretary's powers such as subjecting decisions by the Cabinet Secretary, especially those pertaining to tax incentives, to legislative approval.<sup>294</sup>

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<sup>291</sup> Vienna Institute for International Dialogue and Cooperation (VIDC), *A Review of the Nairobi International Financial Centre. Nairobi International Financial Centre or Nairobi Tax Haven?*, 2017, 14.

<sup>292</sup> Tax Justice Network-Africa, *Memorandum to the Clerk of the National Assembly: Nairobi International Financial Centre Bill (2016)*, 2017,1.

<sup>293</sup> Panel Discussion by Everlyn Kavenge in the online dialogue series focusing on Discussing Pathways to Tackle Illicit Financial Flows: The Nairobi International Financial Centre (NIFC) on 2 December 2020.

<sup>294</sup> Tax Justice Network-Africa, *Memorandum to the Clerk of the National Assembly: Nairobi International Financial Centre Bill (2016)*, 2017,1.

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### **Internet Resources**

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