

**THE UNIVERSITY OF THE WESTERN CAPE**

**LAW FACULTY**

**EXAMINING THE LEGAL FRAME WORK FOR ATTRACTING FOREIGN  
DIRECT INVESTMENT IN THE EAST AFRICAN COMMUNITY**

A mini-thesis submitted in partial fulfillment of the requirements for the degree of LL.M in  
International Trade, Investment and Business Law.

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## DECLARATION

I, Nazziwa Bridget Patricia, declare that Examining the Legal Framework for Attracting Foreign Direct Investment in the East African Community is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed: \_\_\_\_\_

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May 2011 Signed: \_\_\_\_\_

Prof P M Lenaghan



## ACKNOWLEDGEMENTS

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## DEDICATION

This work is affectionately dedicated to my parents, Mrs. Anitah Dbembe Kateregga and Mr. Muwanga Muhammed and My best friend Gladys Bwoch, who continue to nurture my dream and to my supervisors, Prof P M Lenaghan and Prof. Riekie Wandrag, who gave me the opportunity to pursue post-graduate education.



## LIST OF ACRONYMS

ACP	African, Caribbean and Pacific Group of State
AGOA	African Growth and Opportunity Act
AU	African Union
BIT	Bilateral Investment Treaty
BIPA	Burundi Investment Promotion Agency
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
EAIA	East African Investment Authority
EDP	Export Development program
EPZA	Export Processing zones Act
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
GSP	Gross Supply Product
RIA	Rwanda Investment Authority
SEZs	Special Economic Zones
IPAs	Investment Promotion Authorities/Agencies
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
KIA	Kenya Investment Authority
MIGA	Multilateral Investment Guarantee Agency



NEPAD	New Partnership for Africa's Development
TIA	Tanzania Investment Authority
UIA	Uganda Investment Authority
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organisation



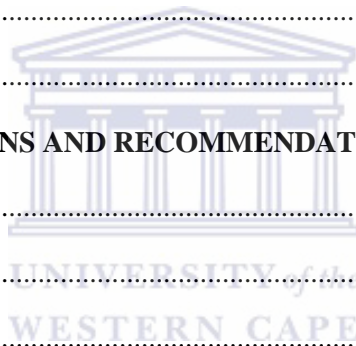
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## CHAPTER ONE

### INTRODUCTION: EAST AFRICAN COMMUNITY

The East African Community (EAC) is a regional intergovernmental organisation comprising the Republics of Kenya, Uganda, Rwanda, and Burundi, and the United Republic of Tanzania. The EAC aims at widening and deepening co-operation among the member states in political, economic and social fields for their mutual benefit.<sup>1</sup> To that effect, the EAC aspires to achieve a monetary union in 2009 and a federation by 2010.

The main reason for the countries moving towards regional integration is economic development. It is believed that sustainable economic development significantly hinges on a favorable trade and peaceful investment environment. Moreover, many trade and investment related activities and progress in all fields of development in the EAC depend on well drafted and harmonised legislation and policy framework. Without dependable legislation and administrative structure, health services, education, politics, military operations, and trade and investment opportunities collapse.<sup>2</sup>

Foreign Direct Investment (FDI) is one of the main pillars of economic development and has been welcomed by the EAC. Considerable liberalisation of the prevalent investment regulations has been undertaken to facilitate the smooth flow of FDI into EAC economies.

FDI is defined then to mean, the transfer or intangible assets from a natural person or a company whose majority of shares are directly or indirectly held natural persons of foreign nationality, into a host county with the specific purpose of use in that country to generate wealth under a total or partial control of the owner of the assets.<sup>3</sup> It should be noted that FDI does not only comprises the initial transactions establishing the relationships between the investor and the enterprise but also all subsequent transactions between the parties and affiliated enterprises, both incorporated and unincorporated.<sup>4</sup>

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<sup>1</sup> See generally Davoodi R.H *The East African Community After Ten Years Deepening Integration*. (2012) available at <http://www.eac.int/> (accessed 13/October/2012).

<sup>2</sup> United Nations Economic Commission for Africa. 'Assessing regional integration in Africa: EAC policy research report' (2004) see available at: [www.uneca.org](http://www.uneca.org). (accessed 31/October/2012).

<sup>3</sup> The East African Investment Community Model Investment Code 2006.

<sup>4</sup> Sodersten B& Reed G *International economics* (1994) at 501.

The EAC aims at strong economic, social, and political integration, starting with joint customs union and moving on to a common market, a monetary union, and ultimately a political federation among the five member states.<sup>5</sup> It seeks to achieve these goals by laying down common rules governing, inter alia, trade in goods and services; cross-border investment; mobility of natural/legal persons; infrastructure development and maintenance; environmental and natural resource management; tourism; and regional industrial development, including industrial parks and special economic zone (SEZs).<sup>6</sup>

In the context of the EAC, it should be noted from the outset that over the last two decades, its economic recovery programs have been characterized by structural reforms that sought to transform the economy from one dominated by Government parastatals to a private sector-led economy.

The highlights of the reforms included the setting up of the EAC development strategy, which set out the priority programmes for the region for a period of 2001-2005, 2006-2010. The strategy focused on macroeconomic cooperation; trade liberalisation and development; cooperation in infrastructure; the development of human resource, science and technology; and cooperation in legal and judicial as well as political affairs.<sup>7</sup> To further promote trade and uniformity, the member states developed an EAC Export Processing Zones (EACEPZ) Operation Manual which would govern and regulate the existing EFZs.<sup>8</sup>

Each of the five countries in the EAC has its own investment promotion agencies, as well as a trade and investment policy and strategy. For some the policies are clearly stated; for others they are presumed. However, these policies are not effective.<sup>9</sup> Without effective policies on trade and investment protection and promotion, the EAC has minimum benefits in terms of trade, investment inflows and sustainable economic development.

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<sup>5</sup> Preamble and article (1) of the Treaty for the Establishment of the East African Community of (1999).

<sup>6</sup> The East African Investment Community Model Investment Code, 2006. (hereafter The East African Investment Code, 2006).

<sup>7</sup> Commission on Sustainable Development, Report of the Ninth Session, U.N. doc. E/2001/29, Decision 9/1 at para.1 available at: <http://www.un.org/esa/sustdev/csd/ecn172001-19e.htm> (accessed on 10/November/2012).

<sup>8</sup> African Union 'Consultancy for the development of a common investment strategy for Africa' (2008) available at: <http://www.africa-union.org/root/au/Consultancy.htm> (accessed 10/07/2012).

<sup>9</sup> African Union 'Consultancy for the development of a common investment strategy for Africa' (2008) available at: <http://www.africa-union.org/root/au/Consultancy.htm> (accessed 10/07/2012).

The laws in all member states protect property rights and facilitate the acquisition and disposal of property, including intellectual property.<sup>10</sup> Each country is also a member of the International Center for the Settlement of Investment Disputes (ICSID) and the World Bank's Multilateral Investment Guarantee Agency (MIGA). Investment is guaranteed against nationalization and expropriation. Expropriation of private property is permitted only when due process is followed and prompt and adequate compensation is offered. Investors in the Community enjoy national treatment under the Customs Union Protocol.<sup>11</sup>

At the EAC level, Community law also establishes various means for the settlement of disputes arising either between the Member states or between investors and Partner State. The national laws of the Member states provide appropriate procedure for the settlement of disputes through litigation, negotiation or arbitration.<sup>12</sup>

It is therefore witnessed from this background, especially in the post-1990's period that the EAC has endeavored to improve the competitiveness of the economy in attracting FDI during the liberalisation of the economies in the member states. Around that period, EAC also put in place a uniform regulatory and Institutional frame work for attracting FDI. A key challenge confronting EAC has been the creation of an institutional and policy framework that would attract rather than hinder the flow of new FDI and lead to accelerated economic growth. These policies bearing fruits, it is envisioned that by 2030, EAC will grow to become a middle income region.

In all this, FDI promotion has been one of the most important pillars of the EAC's economic and social development goal. The policies being implemented are intended to help discover EAC's comparative advantage and, in the process, develop strategies for attracting high volumes of FDI in various economically productive sectors in order to create wealth and reduce unemployment.<sup>13</sup>

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<sup>10</sup> Article 103 (1) (i) of the Treaty establishment the East African Community of 1999. The article mentions areas of cooperation to include promotion and protection of intellectual property rights.

<sup>11</sup> See the WTO Appellate Body's decision in the Shrimp-Turtle Case (WTO Appellate Body (1998) WT/DS58/AB/R) at 7-9.

<sup>12</sup> Investment Disputes Convention Act Cap 522.

<sup>13</sup> African Union 'Consultancy for the development of a common investment strategy for Africa' (2008) available at: <http://www.africa-union.org/root/au/Consultancy.htm> (accessed 10/07/2012).

## 1.1. PROBLEM STATEMENTS

Empirical studies investigating host-country policy factors that influence the inflows and outflows of FDI have been undertaken in the context of least developed countries (LDCs). They have also been carried out in the context of America and its FDI in other LDCs.<sup>14</sup> This context appears to be one sided and focus is put on the overall political and macroeconomic policy framework, with limited consideration of the legal framework in the LDCs. The context in which factors affecting FDI is treated in neither conclusive, nor fully reliable.

In the changing scenario where the global economy has become so intricately integrated, the need to generate new insights in the context of FDI cannot be undermined. Literature has shown that host-country institutional legal framework relations are bound to be contextual, and that they would tend to evolve over-time according to changes in host-country policies and FDI objectives and entry strategies. In fact, these relations would entail consultative and negotiated processes between host-country institutions and foreign investors. Over the years, and especially in the post-1990 period, the EAC Government has endeavoured improve the competitiveness of the economy in attracting FDI through a variety of initiatives. Despite of all the efforts the EAC region still lags behind in comparison with other trading blocks.<sup>15</sup>

The lack of fragmentation in FDI policy/legislation and institutional frameworks responsible for attracting FDI in the region largely affects FDI inflows. The role host-country institutions, like the Kenya Investment Authority (KIA) Uganda Investment Authority (UIA) Tanzania Investment Center (TIC), Rwanda Development Board (RDB), and Burundi Investment Promotion Agency (BIPA) play in influencing the decisions is very important especially if played against a country is FDI strategies in this context therefore it is clear that institutional approach and legal frameworks designed to attract FDI are very important determinates that are not receiving any much attention as they should. Focus shall be put on the East African Investment Model Code Act of 2002 to determine the role played by the host country institutions in attracting or hindering FDI flows in the region. Basis is made on this because FDI strategies and interactions are shaped by host-country institutions which are a direct result of these strategies and interactions.<sup>16</sup>

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<sup>14</sup> Grosse R & Trevion L *International Business and Government Relations in the 21st Century* 5 ed (2005) at 10.

<sup>15</sup> African Union 'Consultancy for the development of a common investment strategy for Africa' (2008) available at: <http://www.africa-union.org/root/au/Consultancy.htm> (accessed 10/07/2012).

<sup>16</sup> African Union 'Consultancy for the development of a common investment strategy for Africa' (2008) available at: <http://www.africa-union.org/root/au/Consultancy.htm> (accessed 10/07/2012).

However, it should also be noted that despite some considerable inflow of FDI and some positives in overall economic performance, the policy and institutional framework for attracting FDI currently in place in EAC has further been highly criticized for example, a 2006 report focusing on EAC by the International monetary fund (IMF) noted that ‘investment incentives particularly tax are an important factor in attracting foreign investment’, however despite the increased tax incentives given by the EAC member states ,the inflow of FDI is still very low. Furthermore, absolute FDI inflows to EAC have been deemed to be small.<sup>17</sup>

This study therefore analyses the model investment code of the EAC, and the domestic investment laws of the member states regulatory and legal frameworks with in EAC and the role of domestic institutions , concurrent comparative analysis will be made on the different investment laws provided for attracting of FDI, treatment of foreign direct investors and their investments as a means of attracting more FDI inflow into the region and dispute resolution mechanisms available.

## **1.2. OBJECTIVES AND RESEARCH QUESTION**

The primary aim of the research is to propose Trade and Investment policies and strategies in attracting FDI inflows that EAC Member States should pursue in order to achieve Economic Transformation. These will include, among others, suggestions for the harmonization of trade and investment regimes in member states, including policies, laws and practices in accordance with the best practices within the overall strategy towards regional integration.

- a. To investigate EAC’s legislation/policy on FDI, challenges and the role of Member states institutions in attracting or hindering the in-ward flow of FDI.
- b. To review EAC’s legal framework on FDI, challenges and existing institutional frameworks in place for attracting FDI into the community;

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<sup>17</sup> United Nations Economic Commission for Africa. Assessing regional integration in Africa: ECA policy research report. (2004) available at: [www.uneca.org](http://www.uneca.org) on (accessed 31/November/2012).

- c. To study and determine the policies, strategies and best practices that Member States, collectively, need to adopt to make the EAC a viable and credible investment destination.
- d. To provide recommendations on the best legal framework configuration that is necessary for EAC to attract more FDI.

### 1.3. SIGNIFICANCE OF RESEARCH

A general glance on the literature indicates that the configuration of the legal framework affects the investment decisions of investors and therefore shapes FDI in LDCs. This is premised on the concept of legal framework as formal conventions (rules), as well as informal conventions (standards) of society. In this context, FDI is informed by the legal framework the overarching environment in which institutions and organizations operate that facilitates economic activity.<sup>18</sup>

A number of studies<sup>19</sup> have been done on the institutional determinants of FDI. However, there appears to be limited empirical works on the role host-country legal framework are bound to play in investors' decisions on which of the LDCs are more viable for FDI. The study will facilitate the production of knowledge which is critical to understanding, or of host-country institutions and their relative significance in SEZ's investment decisions in the LDCs. These insights will therefore inform both the legal framework and future research in order to further understand SEZ's decision when considering FDI in EAC.

The EAC model investment code and foreign investment laws of the partner state are some of the major themes of this study. A concurrent comparative analysis will be made on the different investment laws providing for; entry of FDI in EAC, treatment of foreign direct investors and their investments, as a means of attracting more FDI inflow into the region and dispute resolution mechanisms available. Recommendations shall be made to the member states whose foreign investment laws are considered to be below standard in comparison to the other EAC states.

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<sup>18</sup> Buckley J & Casson C 'Analyzing Foreign Market Entry Strategies: Extending the Internalization Approach.'(1998) *Journal of International Business Studies* 29 at 3.

<sup>19</sup> African Union 'Consultancy for the development of a common investment strategy for Africa' (2008) Available at <http://www.africa-union.org/root/au/Consultancy.htm> (accessed 10/September/2012).

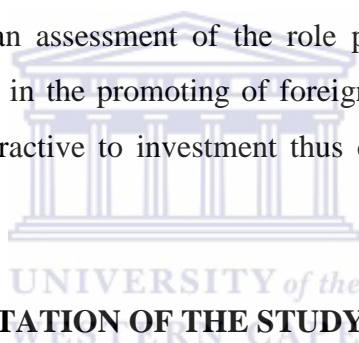


#### **1.4. RESEARCH METHODOLOGY**

This is primarily a literature study, which will examine the legal frame work in place for attracting FDI in the EAC The research shall be a desk and library based. Internet sources shall also be used mostly in exploring relevant information from secondary sources in building sound arguments. The researcher shall collect information from text books, legislations, directives, rules, regulations, policies, reports, information from relevant treaties, protocols, journal articles, newspapers, theses, conventions and from case laws.

The research also shall involve a comparative analysis of EAC investment laws of Kenya, Uganda, Tanzania, Rwanda and Burundi. The research will also make reference to other Investment laws in the region and make suggestions for alternative sources of attracting more foreign direct investment inflow into the EAC region.

The research further involves an assessment of the role played by investment promotion agencies and other stakeholders in the promoting of foreign direct investment and suggests ways of making them more attractive to investment thus creating a conducive investment climate.



#### **1.5. SCOPE AND LIMITATION OF THE STUDY**

The research is limited to the five member state countries of EAC. The research focuses mainly on domestic investment laws under the sectors of taxation and fiscal incentives, Land acquisition, Ownership and property protection of investors and dispute settlement, EAC trade policies, legal framework and best practices in attracting foreign direct investment.

#### **1.6. PRELIMINARY STRUCTURE**

Chapter 1 is a general introduction to the background and nature of the problem under investigation. The chapter clearly outlines the aims, objectives and scope of the study. The need for a single harmonised and binding investment law for the EAC, aiming towards increasing the FDI in flows.

Chapter 2 will provide a detailed review of the EAC. In this chapter, the first section provides back ground of the EAC and its objectives. The second section presents the EAC Investment frame work and the third sections will present the main regional issues.



Thereafter, chapter 3 will draw attention to factors that investors consider. When deciding whether to invest in a country or not and the regulatory system that each of the member states has put in place to regulate FDI inflows.

Chapter 4 will present East African Investment Code Act, with comparisons made to the domestic investment laws of the member states and recommendations will be suggested for investment laws that are below stands and those that are contradictory to the code.

The 5<sup>th</sup> and final chapter highlights the main conclusions and provides recommendations both for policy and future research on the best policy and institutional configuration that is necessary to attract FDI in EAC.



## **CHAPTER TWO**

### **LEGAL AND REGULATORY FRAME WORK OF FOREIGN DIRECT INVESTMENT IN THE EAST AFRICAN COMMUNITY**

#### **2. Introduction**

A favourable investment climate that attracts high foreign investment in the region depends on a combination of policy initiatives, strategies, legislation, trade and investment measures, rather than on one factor. To place these concerns into perspective, this chapter reviews and discusses the member state government priorities, such as foreign direct investment, investment framework, legal frame work, main regional issues, such as the financial sector and foreign exchange and regulations underlying trade and investment and dispute settlement put in place by the community to favour foreign direct investment.

As a matter of necessity, the East African Community (EAC) must adopt policies and strategies that are favourable for investors rather than those that push them away. Policy makers in the EAC should reform the policies in place so as to simultaneously address economic growth (accessibility), social justice (equity), and investment promotion.

## **2.1. Brief history of the East African Community**

Since the beginning of the 20<sup>th</sup> century, the five EAC member states Kenya, Tanzania, Uganda, Rwanda and Burundi have engaged in some form of cooperation under successive regional integration arrangements.<sup>20</sup> These arrangements have included: The Customs Union between Kenya and Uganda in 1917, with Tanzania (then Tanganyika) joining in 1927; The East African High Commission 1948–1961; The East African Common Services Organisation 1961–1967; The first EAC 1967–1977; The East African Cooperation Commission 1993–2000; and The EAC again from July 2000.<sup>21</sup> The republic of Rwanda and the Republic of Burundi acceded to the EAC Treaty on 18<sup>th</sup> June 2007 and become full members of the Community.<sup>22</sup>

The first EAC 1967–1977 contributed to the creation of such major institutions as the East African Development Bank, the East African Legislative Assembly, the East African Harbours Corporation, the East African Posts and Telecommunications Corporation, East African Railways and East African Airways.<sup>23</sup> The former EAC collapsed in 1977 because of various tensions among the three countries, including economic ones.<sup>24</sup> At the regional level the EAC Development strategy has set up priority programmes for the region for the period of 2001-2005. These focused on macroeconomic cooperation; trade liberalisation and development; cooperation in infrastructure; the development of human resource, science and technology; and cooperation in the legal and judicial as well as political.<sup>25</sup>

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<sup>20</sup>An Investment guide to the East African Community .Opportunities and conditions June (2005) at 5 ( hereafter Investment guide to the EAC ).

<sup>21</sup>East African Community Development Strategy 2006 -2010.Available at [www.eac.int/index.com](http://www.eac.int/index.com) (accessed on 10/January/2013).

<sup>22</sup> East African Community Information Guide for Investors (2011) at 4.

<sup>23</sup> Investment guide to the EAC (2005) 6.

<sup>24</sup> East African Community Information Guide for Investors (2011) at 5. ( hereafter Investment information to the EAC ).

<sup>25</sup> East African Community Development Strategy 2006 – 2010.Available at [www.eac.int/index.com](http://www.eac.int/index.com) (Accessed on 10/January/2013).

## 2.2. Objectives of the EAC

In 2005 the EAC established a Customs Union, a Common Market in 2010 and hoped to establish a Monetary Union by 2012 and ultimately a Political Federation of the East African States.<sup>26</sup> The main objective of the EAC is widening and deepening integration among the member states in the political, economic, social and cultural fields; in research and technology; in defence and security; and in legal and judicial affairs for the benefit of the citizens of the EAC member countries.<sup>27</sup>

To achieve these objectives, the Treaty provides for the establishment of a Customs Union, followed by a Common Market, a Monetary Union and a Political Federation.<sup>28</sup> Despite of these objectives the EAC has ensured that the Customs Union kicks off and the Common Market, one would say it's still trying to take centre stage. The biggest huddle the EAC is facing is slow implication of policies that have been put in place by their secretariat. The main reason behind this is that not all member states have put trade and investment as their main objective on their agendas. This has highly affected the regional development as far as trade and investment is concerned.<sup>29</sup>

### 2.2.1. Market size and access

The internal EAC market is currently one of about 93 million consumers. The combined GDP of the region is about \$79.2 billion and the average GDP per capita is about \$685.<sup>30</sup> For the implementation of the Customs Union protocol, the EAC has adopted asymmetrical transitional provisions on internal tariff elimination, which is to be progressive and achieved within a five-year period that is by January 2015.<sup>31</sup> These provisions apply a declining tariff on the exports of Kenya to the other four partners.<sup>32</sup> Most internal trade in the EAC flows from Kenya to its partners.<sup>33</sup> In addition to the EAC market, investors in the member states have access to other African markets (e.g. The Common Market for Eastern and Southern Africa (COMESA) and South African Development Community (SADC) as well as to

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<sup>26</sup> Investment information to the EAC (2011) at 2.

<sup>27</sup> Investment information to the EAC (2011) at 1.

<sup>28</sup> Investment information to the EAC (2011) at 2.

<sup>29</sup> Investment information to the EAC (2011) at 3.

<sup>30</sup> Doing Business in the East African Community Comparing regulations for domestic firms in the EAC and with 183 economies (2012) at 22 (thereafter available at Doing Business in the East African Community) available at [www.doingbusiness.org/subnational](http://www.doingbusiness.org/subnational) (accessed on 12/January/2013).

<sup>31</sup> East African Community Development Strategy 2006 – 2010. available at [www.eac.int/index.com](http://www.eac.int/index.com) (accessed on 10/January/2013).

<sup>32</sup> Investment guide to the EAC (2005) at 8.

<sup>33</sup> The East African community. available at <http://www.eac.int/> (accessed 13/10/2012).

international markets through preferential trade arrangements.<sup>34</sup> This has highly boosted trade in the region, since the movement of goods flows faster. For countries like Uganda, Rwanda and Burundi that are land locked have highly benefited as shall be elaborated in chapter three.

### **2.2.2. The EAC trading partners**

The EAC and its member states have not only concentrated on trade with in its region alone. It has extended its relations and trade actives to other regional blocks as a way to trade more. These include the Common Market for Eastern and Southern Africa (COMESA) which comprises of 20 member States with a population of over 385 million and a total GDP of \$180 billion (at purchasing power parity, \$637 billion).<sup>35</sup> This is one of the largest trading arrangements in Africa. Kenya and Uganda are members of COMESA, whereas Tanzania withdrew from the organization in 2000.<sup>36</sup> COMESA also launched a free trade area (FTA) in October 2000.<sup>37</sup> Eleven of its member countries Burundi, Djibouti, Egypt, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Zambia and Zimbabwe have joined the FTA and reduced their import tariffs to zero on a reciprocal basis.<sup>38</sup> The other countries (including Uganda) continue to trade on preferential terms, with tariff reductions of between 60% and 80%.<sup>39</sup> Member countries are also in the process of removing non-tariff barriers to trade as well, although licensing is required for trading in some products for health, security and environmental reasons. COMESA members have also agreed to implement a Common External Tariff (CET) with a four-band tariff structure: 0% on capital goods, 5% on raw materials, 15% on intermediate goods and 30% on finished goods.<sup>40</sup> This has not yet been realized, as there are still unresolved issues regarding CET levels, compliance, identifying alternative sources of revenue, defining the modalities of administering the CET and the categorization of goods into the proposed CET structure.<sup>41</sup> The COMESA secretariat is working towards resolving these issues. So as to improve trade in the region .

The Southern African Development Community (SADC) is another trading block that the EAC enjoys trade relations with. It was established in 1992 and is now composed of 13

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<sup>34</sup> Investment guide to the EAC (2005) at 9.

<sup>35</sup> African Union 'Consultancy for the Development of a Common Investment strategy for Africa' (2008) 12. available at: <http://www.africa-union.org/root/au/Consultancy.htm> (accessed 10/September/2012)

<sup>36</sup> Investment guide to the EAC (2005) 10.

<sup>37</sup> Investment information to the EAC (2011) at 13.

<sup>38</sup> The East African Community. available at <http://www.eac.int/> (accessed 13/10/2012).

<sup>39</sup> Doing Business in the East African Community (2012) at 23.

<sup>40</sup> Investment information to the EAC (2011) at 14.

<sup>41</sup> African Union 'Consultancy for the Development of a Common Investment strategy for Africa' (2008).available at: <http://www.africa-union.org/root/au/Consultancy.htm> (accessed 10/September/2012).

member States with a population of 815 million and total GDP of \$682 billion.<sup>42</sup> Tanzania is a member of SADC, whereas Kenya and Uganda are not.<sup>43</sup> SADC started implementing its Free Trade Area (FTA) on September 2000. It was expected that, by 2008, 85% of intra-SADC trade, involving less sensitive products, will be liberalized however it's not yet realised. By 2010, it was expected that the region will be a Customs Union and by 2012 a full-fledged free-trade area however due to a few technicalities this has not yet come to pass, however not all hope is lost the member states are still committed to see to it that they make SADC a (FTA) <sup>44</sup>

The following 11 countries have thus far joined the FTA: Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Angola and the Democratic Republic of the Congo are yet to join. In the developed world, the European Union (EU) is the largest trading partner of the EAC countries.<sup>45</sup>

Exports from EAC countries have had preferential access to the EU market under the Cotonou agreement between the EU and the African, Caribbean and Pacific States (ACP).<sup>46</sup> Under the Cotonou agreement, valid until 2015, the EU offers duty-free access to a wide range of agricultural products as well as some industrial products.<sup>47</sup> Other products can access the EU market under the 'commodity protocols' which offer duty-free access on a quota basis to a number of products, including bananas, sugar, beef and veal, and rum. The EU and the ACP are currently negotiating new trading arrangements, to which will be reciprocal and thus WTO compliant.<sup>48</sup> They came into force in 2008.<sup>49</sup> As least developed countries (LDCs), Tanzania and Uganda are also covered by the EU's everything but Arms (EBA) initiative, under which all products from LDCs except arms and ammunitions have preferential access to the EU market.<sup>50</sup>

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<sup>42</sup> African Union a United and Strong Africa available at [www.sadc.int](http://www.sadc.int) (accessed on 1 February 2013).

<sup>43</sup> Doing Business in the East African Community (2012) at 26.

<sup>44</sup> Mshiyeni B Regional economic integration in SADC: progress, prospects and statistical issues for monetary union available at [www.bis.org](http://www.bis.org) (accessed on 1 February 2013).

<sup>45</sup> Investment guide to the EAC (2005) at 13.

<sup>46</sup> African Union 'Consultancy for the Development of a Common Investment strategy for Africa' (2008). Available at: <http://www.africa-union.org/root/au/Consultancy.htm> (accessed 10/September/2012).

<sup>47</sup> African Union a United and Strong Africa available at [www.sadc.int](http://www.sadc.int) (accessed on 1 February 2013).

<sup>48</sup> Doing Business in the East African Community (2012) at 27.

<sup>49</sup> Investment information to the EAC (2011) at 17.

<sup>50</sup> Investment guide to the EAC (2005) 19.

Together with other sub-Saharan African countries, the EAC States also qualify for duty-free access to the US market under the African Growth and Opportunity Act (AGOA) which has been extended until 2015.<sup>51</sup> Together, AGOA and the Generalised System of Preference (GSP) offer US market access to nearly 60% of EAC product lines.<sup>52</sup> Most African countries are currently taking advantage mainly of the textile and apparels provisions, but various agricultural products and manufactured goods are also eligible under these schemes.<sup>53</sup>

Products from EAC countries can also access various markets in the developed world through the GSP, which offers preferential treatment to a wide range of products originating in developing countries.<sup>54</sup> No quantitative restrictions accompany these GSP schemes, although other non-tariff barriers to trade have in the past acted as a constraint on intended beneficiaries' taking full advantage of these schemes. Markets accessible through GSP schemes include those of Australia, Canada, Japan, New Zealand, Switzerland and (as noted above) the United States.<sup>55</sup>

This has been one of the benefits that the EAC member states have been able to achieve from their membership to the WTO. This has also made the member state governments come up with priorities such as poverty reduction, as a way to make their respective countries more favourable for investors, as shall be discussed below.

### **2.3. Priorities of EAC member state governments**

At the national level, the common government focus in the five member states is on poverty reduction and economic growth, the rationale for this is to reduce poverty and make their states more attractive to investors.<sup>56</sup> In Kenya, the poverty reduction strategy paper for wealth and employment creation was developed and identifies four core priority areas: macroeconomic stability, strengthening institutions of governance (by adopting, inter alia, a new constitution and special anti-corruption legislation), rehabilitation and expansion of

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<sup>51</sup> African Union a United and Strong Africa available at [www.sadc.int](http://www.sadc.int) (accessed on 1 February 2013).

<sup>52</sup> . Investment guide to the EAC (2005) 20.

<sup>53</sup> Doing Business in the East African Community Comparing regulations for domestic firms in the EAC and with 183 economies (2012) at 29 available at [www.doingbusiness.org/subnational](http://www.doingbusiness.org/subnational) (accessed on 12/January/2013).

<sup>54</sup> African Union a United and Strong Africa available at [www.sadc.int](http://www.sadc.int) (accessed on 1 February 2013).

<sup>55</sup> . Investment guide to the EAC (2005) at 21.

<sup>56</sup> African Union 'Consultancy for the Development of a Common Investment strategy for Africa' (2008).available at: <http://www.africa-union.org/root/au/Consultancy.htm> (accessed 10/September/2012).



physical infrastructure, and investment in human capital, is believed that if its achieved the country can be able to bring in more FDI. <sup>57</sup>

Tanzania, under its Development Vision 2025, has identified the key objectives as achieving macroeconomic stability, attaining high levels of domestic saving and investment, broad-based human-resource development, and sustainable economic growth. It is also implementing its Poverty Reduction Strategy, which is aligned with the Millennium Development Goals (MDG) of the United Nations.<sup>58</sup>

According to the Uganda Poverty Eradication Action Plan (PEAP) of 2000 has set the highest priorities for medium-term expenditure on security, roads, agricultural research and extension, primary education, primary health, and water and sanitation.<sup>59</sup>

The government of Rwanda also developed a roadmap, Vision 2020, which has six pillars on growth expansions namely: the construction of the nation; an efficient state that unites and mobilises the people; human resource development; the development of basic infrastructure; the development of entrepreneurship and the private sector; and the modernisation of agriculture and animal husbandry. It's indicated that it's performing well.<sup>60</sup>

Burundi Government chose set up the economic and social council, consultative and advisory body with competence in all areas related to economic and social development. Burundi is poverty Reduction Strategy paper (PRSP) launched in 2006 sets out bold poverty reduction objectives consistent with the government is 2005-2010 priority program and the Millennium Development Goals.<sup>61</sup>

At the Community level, the EAC Development Strategy has set out the priority programmes for the region for the period 2005–2015. Their focus does not defer so much from its member states, it focuses on macroeconomic cooperation; trade liberalisation and development; cooperation in infrastructure; the development of human resources, sciences and technology;

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<sup>57</sup> An investment guide to Kenya Opportunities and conditions (2012) at 6-7. (hereafter investment guide to Kenya).available at [www.unctad.org/en/Publications\\_Library/diaepcb2012d2\\_en.pdf](http://www.unctad.org/en/Publications_Library/diaepcb2012d2_en.pdf) (accessed 10/September/2012).

<sup>58</sup> An investment guide to Tanzania Opportunities and Conditions (2005) at 5. (hereafter Investment guide to Tanzania). [unctad.org/en/Docs/diaepcb201006\\_en.pdf](http://unctad.org/en/Docs/diaepcb201006_en.pdf).

<sup>59</sup> An investment guide to Uganda Opportunities and Conditions January (2004).at 11. (hereafter Investment guide to Uganda).available at [www.ugandainvest.go.ug/index.../1-guide-to-investing-in-uganda](http://www.ugandainvest.go.ug/index.../1-guide-to-investing-in-uganda) (accessed 10/September/2012).

<sup>60</sup> An investment guide to Rwanda Opportunities and Conditions January (2006) at 10. (hereafter Investment guide to Rwanda). available at [www.theiguides.org/public-docs](http://www.theiguides.org/public-docs) (accessed 10/September/2012).

<sup>61</sup> An investment guide to Burundi .Opportunities and Conditions October (2012) at 9. (hereafter Investment guide to Burundi).available at [unctad.org/en/Docs/diaepcb200917ch4\\_en.pdf](http://unctad.org/en/Docs/diaepcb200917ch4_en.pdf) (accessed 10/September/2012).

and cooperation in legal and judicial as well as political affairs.<sup>62</sup> It has also undertaken a number of law reforms so as to improve its trade and investment sector as shall be expounded on below.

### **2.3.1. Trade and investment in the EAC**

Trade is an important component of the EAC economies. In 2010, trade in goods amounted to about 66%, 40% and 44% of the GDP in Kenya, Tanzania, Rwanda, Burundi and Uganda respectively.<sup>63</sup> Intra-EAC trade is substantial, with Kenya being the largest exporter to the region and Uganda its largest importer, Rwanda has the best investment policies. And this has enabled the Intra-EAC trade record a steady increase since 1990.<sup>64</sup>

As already observed above that other African countries are major trading partners of EAC partners, justifies why half of all Kenyan exports go to African countries. Imports from the region are also relatively high, at 31.2%, 48.4% and 60.4% in Kenya, Tanzania, Rwanda, Burundi and Uganda respectively. The European Union is the largest developed country trading partner of the five EAC States in terms of both exports and imports. Asia is an increasingly important destination of EAC regional exports.<sup>65</sup>

Rwanda, Burundi, Kenya, Tanzania and Uganda, exports are concentrated in agricultural products (Kenya being the second largest exporter of tea in the world), while Tanzania's exports are dominated by minerals. Imports into the region consist mainly of machinery, transport equipment and petroleum products. This is clear indication that the region has a great investment opportunity, since it is rich in a variety of products.<sup>66</sup> This has also boosted their FDI levels as shall be further witnessed in the chapter three and four.

### **2.3.2. Foreign direct investment in the EAC**

Foreign Direct Investment in the EAC is highly determined by its member states. Each of the five EAC member States has an investment agency, which is responsible for promoting and facilitating both local and foreign direct investment (FDI). These are the Investment Promotion Centre (IPC). In Kenya, it has created the Kenya Investment Authority (Ken Invest), the Tanzania Investment Centre (TIC) for Tanzania, the Uganda Investment

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<sup>62</sup> Investment guide to the EAC (2005) at 21.

<sup>63</sup> See generally World Investment Report 1998 Trends and Determinants, (1990).

<sup>64</sup> Doing Business in the East African Community (2012) at 33.

<sup>65</sup> See generally United Nations Conference on Trade and Development Kenya an Investment Guide (2012).

<sup>66</sup> African Union a United and Strong Africa available at [www.sadc.int](http://www.sadc.int) (accessed on 1 February 2013).



Authority (UIA) for Uganda, Rwanda Investment Promotion Agency for Rwanda, And an Investment Promotion Agency for Burundi.<sup>67</sup>

The rationale behind these investment promotion agencies' they are meant to act as a one stop centre. for investors. This shall be expounded on more in chapter three. However despite the objective of the investment centres in place, Kenya has performed poorly in attracting FDI over the last decade and a half. FDI flows during this period were volatile and fell to their lowest level of \$5.3 million in 2005, and are generally associated with misgovernance and the neglect of basic production assets such as infrastructure for a period of over two decades, which scared away investors. The new Government that came to power in late December 2009 intends to change this undesirable trend and restore investor confidence however title change is witnessed. However this is not the case for other member states.<sup>68</sup>

Rwanda has in particular, stepped up efforts to attract FDI through both national and international investor conferences and the creation of a better investment environment. One part of this effort is by the Government which has created an enabling environment which was by passing of the Investment Promotion Act 2006. Rwanda has been doing better as far as FDI flows into the country since an increased from \$25.6 million in 2002 to \$81.7 million in 2010 was recorded. Key sources of FDI in Rwanda include Germany, the United Kingdom and the United States; and the leading sectors include Tourism, agriculture and food-processing.<sup>69</sup>

Since the beginning of the 1990s, Tanzania and Uganda have done remarkably well in attracting FDI. In Uganda, FDI flows have been increasing steadily since 1990, while in Tanzania they have fluctuated a little but more or less kept pace with those of Uganda.<sup>70</sup> Distribution of FDI in Tanzania is skewed in favour of mining, followed by manufacturing and tourism, with agriculture receiving relatively small amounts.<sup>71</sup> The manufacturing sector has attracted the largest share of planned investment in Uganda, with investment being concentrated in beverages, sugar, textiles, cement, footwear, packaging, plastics and food

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<sup>67</sup> Investment information to the EAC (2011) 22.

<sup>68</sup> Investment guide to Kenya (2012) 4.

<sup>69</sup> Doing Business in the East African Community (2012) at 34.

<sup>70</sup> Investment guide to Uganda (2004) at 4.

<sup>71</sup> Investment guide to Tanzania. (2005) at 6.

processing for the local market. Investment in agriculture is mainly in coffee, tea and cotton plantations.<sup>72</sup>

Having witnessed the fruits of FDI in each member state, it will not be fair enough to say that they have achieved it without any support. With the support of the EAC, the member states have been guided on a number of issues that affect each member state. And this has been done by the legal and institutional framework that the EAC has put in place as shall discussed below.

## **2.4. Legal and Institutional framework of the EAC**

The EAC has seven key organs: the Summit, the Council of Ministers, the Co-ordination Committee, the Sectorial Committees, the East African Court of Justice (EACJ), the East African Legislative Assembly (EALA) and the EAC Secretariat.<sup>73</sup> and these form the legal frame work of the EAC.

### **2.4.1. Policy aspects**

The Summit is made up of the three member states' heads of government. Its key function is to give general direction and impetus to the development of the Community and the achievement of its objectives. The Summit is the highest decision making body of the Community and authorizes the publication of all its rules and orders in the official EAC Gazette, such publication being necessary for them to come into effect.<sup>74</sup>

The Council of Ministers is the second highest decision- making body of the Community. The functions of the Council include making policy decisions, issuing directives, and initiating and submitting bills to the EALA. The Council is also responsible for the Community budget and for the implementation of the decisions and directives of the Summit. The decisions, regulations and directives of the Council are binding on the three member states and all organs and institutions of the Community except the Summit, the EACJ and the EALA.<sup>75</sup>

The Co-ordination Committee is the technical arm of the Community and is made up of Permanent Secretaries top civil servants responsible for regional cooperation in each partner State and any other Permanent Secretaries as determined by each partner. Its functions

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<sup>72</sup> Investment guide to Uganda (2004) at 5.

<sup>73</sup> Doing Business in the East African Community (2012) at 35.

<sup>74</sup> East African Community available at <http://en.wikipedia.org/wiki/East-African-Community> (accessed 7 January 2013) Also preamble of the Treaty for the Establishment of the East African Community of 1999.

<sup>75</sup> Preamble of the Treaty for the Establishment of the East African Community of 1999.

include submitting reports and recommendations to the Council and implementing Council decisions.<sup>76</sup>

#### **2.4.1.1. Legislative aspects**

The East African Legislative Assembly (EALA) provides a democratic forum for debate and also has a watchdog function in respect of the Community's secretariat. Inaugurated in November 2001, the EALA is made up of 27 elected and 5 ex-officio members. Since its inauguration, the Assembly has passed seven bills into law, the Customs Union Management Bill 2004 being the latest, approved budgets for the EAC for 2002–2003 and 2003–2004, and advised the Secretariat with respect to treaty implementation.<sup>77</sup>



#### **2.4.1.2. Judicial aspects**

Judicial aspects of the Community lie within the mandate of the East African Court of Justice (EACJ). This is an international court with responsibility for ensuring the correct interpretation and application of Community law and its compliance with the treaty. The Court is made up of six judges two from each Member State and a registrar.<sup>78</sup>

The Court was inaugurated in November 2003 and is now partially operational. Its operations are, however, ad hoc until it is determined by the Council of Ministers that there is enough business to make it fully operational. Among the key jurisdiction areas are disputes on the interpretation and application of the Treaty and disputes arising out of an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court. Proceedings can be instituted by a partner State, by the Secretary General, or by legal and natural persons resident in a partner State.<sup>79</sup>

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<sup>76</sup> East African Community available at <http://en.wikipedia.org/wiki/East-African-Community> (accessed 7 January 2013) also see the preamble of the Treaty for the Establishment of the East African Community of 1999.

<sup>77</sup> East African Community available at <http://en.wikipedia.org/wiki/East-African-Community> (accessed 7 January 2013) also see the preamble of the Treaty for the Establishment of the East African Community of 1999.

<sup>78</sup> Doing Business in the East African Community (2012) at 37.

<sup>79</sup> Investment information to the EAC (2011) at 25.

Executions of Court judgements that impose a pecuniary obligation on a person are governed by rules of civil procedure in the State in which the execution is to take place. In the absence of a pecuniary obligation, the member states and the Council must implement a judgement without delay.<sup>80</sup>

Protection of person and property Each EAC partner State offers guarantees to investors as provided for in its constitution, its investment laws and agreements to which it is party. The laws in all member states protect property rights and facilitate the acquisition and disposal of property, including intellectual property. However intellectual property rights are not rigorously enforced in the EAC. Each EAC member state is also a member of the International Centre for the Settlement of Investment Disputes and the World Bank's Multilateral Investment Guarantee Agency (MIGA).<sup>81</sup> MIGA is an international financial institution which offers political risk insurance guarantees. Such guarantees help investors protect foreign direct investments against political and non-commercial risks in developing countries and least developed countries.

The EAC member states are party to many international tribunal, however for purposes of this research attention will be given to MIGA, since it's the only international tribunal that handles investment disputes which is our area of concern. Being part of MIGA, has really boosted FDI inflows since investors are sure that their property is protected from any sort of political risk and this is one of the most important factors that foreign direct investors look at as they make their decision whether to invest or not to invest in a region, hence its very import that the author points out this issue since it directly affects investment.<sup>82</sup>

FDI in the EAC is also highly affected by the institutional framework that is in place. And this is mainly because each member state has its own structure which differs from each member as shall be discussed below.

#### **2.4.2. The EAC investment framework**

The EAC member States are in agreement about the need for cooperation in order to spearhead investment in the region. To achieve this the EAC Model Investment Code was drafted in 2002, while development of an EAC Investment Policy and Strategy is on-going.

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<sup>80</sup> Doing Business in the East African Community (2012) at 40.

<sup>81</sup> Doing Business in the East African Community (2012) at 43.

<sup>82</sup> Protocol on the Establishment of East African Community Common Market, 2010

The Investment Code is not a binding legal instrument but rather a model whose features the EAC Partner States may incorporate into their national laws.<sup>83</sup>

The Investment and Private Sector Promotion as contained in the third EAC Development Strategy (2011 – 2015) aims to; achieve free movement of people, capital, labour, services and right of establishment and residence; promote balanced and competitive industrial/manufacturing sector in the region; promotion of participation of the citizenry (civil society, women and private sector) and having them fully aware of the EAC affairs; and strengthen relations with other regional and international organizations.<sup>84</sup>

Other key features of the investment framework in the EAC include;

- The duty drawback scheme: It deals with import duties upon materials used exclusively in the production of goods exported to a third country and it is provided for in the Customs Union Act.
- The duty and VAT remission scheme: This is provided for in The Customs Union Protocol and aims to support export promotion in the EAC member states countries.
- The manufacturing under bond (MUB) scheme is another key feature within the Customs Union framework. The member States may facilitate MUB schemes within their respective territories and such schemes would allow imported goods to be used for processing or manufacturing.
- The Customs Union protocol has also spelt out Export Processing Zone Regulations within the regions, which are intended to ensure that the member states establish EPZs in a uniform fashion and that the implementation process is transparent, accountable, fair and predictable. To further promote uniformity, the member states propose to develop an East African Community Model Export Processing Zones Operational Manual.<sup>85</sup>

Burundi's export processing zones was established in 1993 as part of the overall effort to encourage FDI, export diversification and promotion of non-traditional exports. Kenya inaugurated her Export Processing Zones program in 1990 as part of the Export Development

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<sup>83</sup> Protocol on the Establishment of East African Community Common Market, 2010.

<sup>84</sup> Mutenyo A Foreign Direct Investments, Exports and Economic Growth in COMESA Countries: A Heterogeneous Panel Causality Approach. (unpublished dissertation Makerere University, 2009)<sup>34</sup> available at [http://news.mak.ac.ug/documents/Makfiles/theses/Ndoricimpa\\_Arcade.pdf](http://news.mak.ac.ug/documents/Makfiles/theses/Ndoricimpa_Arcade.pdf) (accessed on 15/January/2013).

<sup>85</sup> Article 21 of the East African Community Model Investment Code, 2006.

Program (EDP). The scheme is managed by a state agency, the Export Processing Zones Authority.<sup>86</sup>

Rwanda legislation provides for free economic zones of three kinds: export-processing zones, single enterprise export-processing zones and free trade zones. Tanzania enacted the Export Processing Zones Act in April 2002, which gives the export processing zones authority (EPZA) the mandate to facilitate and oversee the implementation of the programme throughout the country.<sup>87</sup>

Uganda has gazetted over 1000 hectares of prime industrial land to be developed into fully serviced industrial estates and export processing zones. The Uganda Investment Authority holds the government interest in the proposed project.<sup>88</sup>

The Customs Union Protocol further provides for the establishment of free ports within the Community. The functions of these ports include the promotion and facilitation of trade, the provision of facilities such as storage, warehouses and simplified customs procedures, and provisions for the establishment of international supply-chain centres, which would enhance the Community's international competitiveness.<sup>89</sup>

The Member States agreed to harmonize duty exemption schemes and adopt a single list of exemptions, which is to be specified in the customs law of the EAC Procedures. A restrictive regulatory, investment and administrative regime in the member states have however, been cited as a constraint on attracting investment in the EAC.<sup>90</sup>

According to the East Africa Community report, doing business in East Africa provides a snapshot of the business climate in the EAC. Starting a business is generally less expensive and less time-consuming in the EAC than in sub-Saharan Africa as a whole as is registering property, enforcing contracts and protecting invested property. Hiring and firing workers is easiest in Uganda, which, on the whole, offers the most business-friendly environment, as shall be discussed in the following chapters.

#### **2.4.2.1. Investment protection and related matters in the EAC**

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<sup>86</sup> Protocol on the Establishment of East African Community Common Market, 2010  
Legislations and Regulations.

<sup>87</sup> Doing Business in the East African Community (2012) at 53.

<sup>88</sup> Investment information to the EAC (2011) at 25.

<sup>89</sup> Protocol on the Establishment of East African Community Common Market, 2010

<sup>90</sup> Investment information to the EAC (2011) at 25.



Investment in each EAC Member State is guaranteed against nationalization and expropriation under the laws including the EAC investment code of the partner State. Expropriation of private property is permitted only when due process is followed and prompt and adequate compensation is offered.<sup>91</sup> Further protection is guaranteed under the various bilateral treaties signed by the member states. Companies and their products in each country are given national treatment.<sup>92</sup> Companies investing as well as goods produced and traded within the Community, will enjoy national treatment under the Customs Union Protocol.<sup>93</sup>

The EAC member states have also liberalized their foreign-exchange regimes and transfers in freely convertible currencies are allowed with respect to net profits, the repayment of foreign loans, royalties and fees, the remittance of proceeds (net of taxes and obligations) in the event of sale or liquidation, and the emoluments and other benefits payable to foreign employees.<sup>94</sup> All this is aimed to create an investment climate that is favourable to the investors.

The EAC has been able to record a reasonable increase in its FDI inflows and this has mainly been due to the continuous law reforms that have evolved time after time as shall be discovered in the EAC trade regimes.

#### **2.4.2.1.1. Trade regime**

Trade and investment are the core instruments for attaining the objectives of the EAC, which include developing policies and programmes aimed at widening and deepening cooperation among the member states. The Treaty for the Establishment of the EAC provided for a Customs Union which would aim at the enhancement of trade and investment.<sup>95</sup>

The Customs Union Protocol signed in March 2004 came into force upon ratification by the four member countries and became effective on 1 January 2005. The administration of the protocol is governed by the Customs Law of the Community, which was drafted by a working group at the EAC headquarters in Arusha by the end of 2004. This was followed by the East African Legislative Assembly which was enacted on 16 December 2004. The East African Community Customs Management Act 2004, also applies uniformly in the EAC.

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<sup>91</sup> Protocol on the Establishment of East African Community Common Market, 2010  
Legislations and Regulations.

<sup>92</sup> See generally The Treaty for the Establishment of the East African Community, 1999.

<sup>93</sup> Protocol on the Establishment of East African Community Common Market, 2010  
Legislations and Regulations.

<sup>94</sup> Doing Business in the East African Community (2012) at 53.

<sup>95</sup> Preamble of the Treaty Establishing the East African Community, 1999.

This Act governs the administration of the Customs Union, including legal, administrative and operational matters.<sup>96</sup>

The Act also provides for a transitional decentralized administrative structure for the EAC Customs Union. Within this decentralized set-up, the day to-day operations of customs, including revenue collection, will continue to be managed and administered by the respective national revenue authorities. The newly established Directorate of Customs under the EAC Secretariat identifies policy issues, coordinate and monitor customs and trade-related activities in the EAC.<sup>97</sup>

The objectives of the Customs Union include furthering the liberalisation of intra-regional trade in goods; promoting production efficiency in the Community; enhancing domestic, cross-border and foreign investment; and promoting economic development and industrial diversification. There are two broad areas of cooperation in the Customs Union: (i) customs management and general Trade matters; and (ii) establishing and adopting uniform and common trade procedures in the Community. The Customs Union Protocol has spelt out the rules and regulations that are to govern trade within and outside the Community. The member states have agreed on a three-band Common External Tariff (CET) of 0%, 10% and 25% for raw materials, intermediate goods and finished goods respectively.<sup>98</sup>

With respect to the Community's internal tariffs, the member states have adopted transitional provisions on tariff elimination, which is to be achieved within a five-year period from the time of implementation of the Protocol.<sup>99</sup> The provisional structure is asymmetrical, reflecting the fact that Kenya's economy is more developed than the economies of its EAC partners. On the implementation of the Protocol, goods exported by Rwanda, Burundi, Tanzania and Uganda anywhere within the EAC are to be duty-free with immediate effect. Goods flowing from Kenya Rwanda, Burundi to Tanzania and Uganda are to attract variable and declining tariffs that would be phased out within a period of five years.<sup>100</sup>

Goods and products qualifying for the Community's tariff treatment will have to meet the rules-of-origin criteria as specified in the Customs Union rules of origin, which are fairly

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<sup>96</sup>East African Community available at <http://en.wikipedia.org/wiki/East-African-Community> (accessed January 2013) also preamble of the Treaty for the Establishment of the East African Community of 1999.

<sup>97</sup> Investment guide to the EAC (2005) at 34.

<sup>98</sup> Protocol on the Establishment of East African Community Common Market, 2010  
Legislations and Regulations.

<sup>99</sup> Doing Business in the East African Community (2005) at 55.

<sup>100</sup> Investment guide to the East African (2005) at 34.



accommodating. Identical or similar products of partner State receive national treatment. The Customs union also provides for cooperation in a number of areas, such Tourism, Banking, mining and restrictions prohibitions on trade as witnessed below.<sup>101</sup>

#### **2.4.2.1.2. Restrictions and prohibitions**

The member states have introduced and continued to apply restrictions or prohibitions on trade, especially where trade affects the application of security laws and regulations; control over military equipment such as arms and ammunitions; the protection of human life; the environment and natural resources; public safety, health and morality; and the protection of animals and plants.<sup>102</sup> The restrictions are however, not to be used to restrict the free movement of goods within the Community and a partner State applying such restrictions should first notify the Secretary General of its intention to do so. The goods to be restricted and prohibited from trade are to be specified in the Customs Law of the Community.<sup>103</sup> The EAC has been able to achieve this through its trade facilitation programs as shall be expounded on.

#### **2.4.2.1.3. Trade facilitation in the EAC**

The trade facilitation programs in the EAC aim at reducing the volume and variety of documentation, adopting common standards of documentation and common procedures for trading within the region, coordinating transport activities, collecting and disseminating information on trade and trade documentation, and establishing joint training programmes.<sup>104</sup> The member states have further agreed to cooperate in simplifying, standardizing and harmonizing trade information and documentation so as to facilitate trade in goods.<sup>105</sup>

This includes the establishment of a customs data bank at the Secretariat. Under Article 7 of the Customs Union Protocol, the harmonised customs documentation is to be specified in the Customs Law of the Community.<sup>106</sup> The member states have adopted the Harmonised Commodity Description and Coding System to ensure comparability and reliability of trade

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<sup>101</sup> African Union a United and Strong Africa available at [www.sadc.int](http://www.sadc.int) (accessed on 1 February 2013).

<sup>102</sup> Preamble of the East African Community Mode Investment Code, 2006.

<sup>103</sup> Protocol on the Establishment of East African Community Common Market, 2010  
Legislations and Regulations.

<sup>104</sup> Doing Business in the East African Community (2012) at 55.

<sup>105</sup> African Union a United and Strong Africa available at [www.sadc.int](http://www.sadc.int) (accessed on 1 February 2013).

<sup>106</sup> An Investment guide to the East African Community .Opportunities and conditions June 2005 United Nations New York and Geneva 2005.

information.<sup>107</sup> They have also agreed to cooperate in the prevention and investigation of customs offences within their territories through the exchange of information and on-going surveillance, as well as by consulting one another on the establishment of common border posts and ensuring that traded goods pass through recognized customs offices and approved route.<sup>108</sup> This was also further achieved through creating uniform standards and measures as shall be identified below thus making doing business in the region faster and attracting more investment.

#### **2.4.2.1.4. Standards and measures**

Under Article 81 of the Treaty Establishing the Community, the EAC member states recognized the importance of standardization, quality assurance, metrology and testing for the promotion of trade and investment and consumer protection, among other things.<sup>109</sup> They also undertook to evolve and apply a common policy for standardization, quality assurance, and metrology and testing, and to conclude a protocol on these matters for the goods and services produced and traded within the Community.<sup>110</sup> The Sectoral Committee on Standards has so far harmonised 493 standards, which have been adopted as EAC standards. A total of 361 of these standards have been gazetted.<sup>111</sup> This action made the region as one of best investment destination in Africa.<sup>112</sup>

#### **2.4.3. EAC main regional issues and initiatives that affect foreign direct investment inflows**

They are a number of regional issues that affect the EAC. However for purposes of this research attention shall be directed on issues that affect FDI in the region that the EAC is still trying to come up with a harmonised way so as to apply to all the member states. And these include financial and foreign exchange, capital markets, taxation, infrastructure development and dispute settlement. These five issues are still giving the secretariat sleepless nights since directly affect FDI and they have not been fully concluded or harmonised as expected. These issues shall be expounded on in this section.

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<sup>107</sup> Protocol on the Establishment of East African Community Common Market, 2010 Legislations and Regulations.

<sup>108</sup> The Treaty for the Establishment of the East African Community, 1999.

<sup>109</sup> The Treaty for the Establishment of the East African Community, 1999.

<sup>110</sup> Investment guide to the East African (2005) at 37.

<sup>111</sup> The Treaty for the Establishment of the East African Community, 1999.

<sup>112</sup> Doing Business in the East African Community (2012) at 57.

### **2.4.3.1. The financial sector and foreign exchange**

The financial sector and foreign exchange at the national level is under reform. The member states have started on various financial-sector restructuring programmes. At the Community level, they have undertaken to cooperate in monetary and fiscal matters in line with the Community's approved macroeconomic harmonization programme and convergence framework.<sup>113</sup> The partners will in particular maintain the convertibility of their currencies and harmonize their macroeconomic policies, including specifically those affecting exchange rates, interest rates and taxation. They will also remove obstacles to the free movement of goods, persons, services and capital within the Community.<sup>114</sup>

The member states have undertaken to harmonize their regulatory and legislative frameworks for the financial sector including their banking acts, so as to harmonize and eventually integrate their financial systems.<sup>115</sup> The integration of the financial systems could be achieved earlier than expected, especially if the recommendations of the Federation Fast-tracking Committee are followed. The Committee has proposed that by September 2009 there be a single regional currency. The member states are currently undertaking the harmonization of their monetary and fiscal policies.<sup>116</sup>

Pre- and post-budget consultations, the regular sharing of information on budgets and tax proposals, and the reading of budget statements on the same day have already been institutionalized. Efforts are being made to institutionalize the convertibility of EAC currencies this will make trading very easy and faster.<sup>117</sup> The financial sector being one of the most important sectors for investors the EAC has ensured a number of reforms are implicated so as to attract more FID inflows into the region.

### **2.4.3.2. Taxation**

Taxation each partner state has its own corporate, income, excise and value-added taxes.<sup>118</sup>

The level of taxation is also one of the major issues that have been handled time after time in the EAC. There has been much tax harmonization in the Community and tax rates are now

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<sup>113</sup> Doing Business in the East African Community (2012) at 59.

<sup>114</sup> Investment guide to the East African (2005) at 40.

<sup>115</sup> Protocol on the Establishment of East African Community Common Market, 2010 Legislations and Regulations.

<sup>116</sup> Investment information to the EAC (2011) at 28.

<sup>117</sup> Doing Business in the East African Community (2012) at 61.

<sup>118</sup> Investment guide to the EAC (2005) at 29.

very similar and quite reasonable. There is however, a good deal of concern over tax administration. For example, with the extent of the delays in VAT refunds in Kenya.

In Tanzania and Rwanda, there is concern over the regulation that requires taxpayers to remit a substantial part of the tax assessed even if they are appealing against the tax assessment. In all five countries, there are complain from investors of petty harassment from the revenue authorities as they endeavour to meet tax collection targets by focusing on a few prominent taxpayers. In one country, an investor said that the Government looked upon foreign investors as chickens to be plucked. The absence of double taxation treaties in the region is another point of concern. A double taxation treaty was actually signed by the EAC member states in 1997, but it has yet to be ratified by Uganda, which raises a concern to many investors.

Double taxation is one of the key business concerns in the region. Under Article 80 of the Treaty, the member states agree to take measures to avoid double taxation and harmonize and rationalize incentives, including those related to taxation, with a view to promoting the Community as a single investment area.<sup>119</sup> In 1997, the EAC member States signed a Tripartite Agreement on the Avoidance of Double Taxation. This agreement has been ratified by all the five member states.<sup>120</sup> And the rationale behind this was to ease doing business in the region as tariffs and barriers are reduced. To many investors this has been seen as a mile stone achievement and has greatly made business transactions much easier hence attributing to the increase of FDI inflows in the region.

However despite the favourable tax incentives that have been put in place by the EAC, the infrastructure is still letting the region down. The poor infrastructure development in the region is still a major concern to many investors too and is considered as one of the push factor of FDI in the region, as shall be discussed below.

### **2.4.3.3. Infrastructure**

The EAC member states have agreed to cooperate in the area of infrastructure and the associated services, in particular to develop common policies or harmonize existing ones with

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<sup>119</sup> Doing Business in the East African Community (2012) at 65.

<sup>120</sup> Investment information to the EAC (2011) at 32.

respect to roads, railways, civil aviation, ports, postal services, telecommunications, meteorological services and energy supply.<sup>121</sup>

To promote this regional trade and investment it has been agreed by the member states that and five major regional road corridors have been identified for development and rehabilitation under the East African Road Network Project (EARNP). The network measures 15,273 km and comprises 8,361 km of main routes and 6,912 km of feeder routes. Currently, only about 43% of the network is paved. These corridors will connect the five member states, their areas of production and markets and other transport nodes including ports, railway stations and airports.<sup>122</sup>

The region has also benefited from the NEPAD infrastructure development programme, funded by the African Development Bank and covering transport, energy, ICT, and water and sanitation. Priority is to be given to projects dependent on regional cooperation and joint action between countries. Implementation started and expected to be completed soon.<sup>123</sup> In the rail sub-sector, there are plans for the rehabilitation of the Mombasa–Malaba–Kampala railway, under the European Union’s Regional Indicative Programme for the East African region.<sup>124</sup>

An additional rail line between Musoma–Arusha and the port of Tanga to serve Southern Uganda and Northern Tanzania and other member states, is also planned under the East African Cooperation Rail Network (EACRN). Rehabilitating and expanding the railway network offer investment opportunities hence an increase in the FDI inflows in the region.<sup>125</sup>

It should be noted further that the Member states are in the process of harmonizing civil aviation regulations in the region, to facilitate inter alia the establishment of a regional safety oversight agency; the establishment of a Search and Rescue (SAR) Coordination Center; the sharing/pooling of personnel, particularly in the area of licensing airworthiness inspectors.<sup>126</sup> Furthermore the Tripartite Search and Rescue Agreement were ratified in November 2004 and the Secretariat is developing its implementation framework.<sup>127</sup> With

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<sup>121</sup> Protocol on the Establishment of East African Community Common Market, 2010 Legislations and Regulations.

<sup>122</sup> Investment guide to the EAC (2005) at 30.

<sup>123</sup> Investment information to the EAC (2011) at 38.

<sup>124</sup> See generally An Investment Guide to Tanzania (2005).

<sup>125</sup> Investment information to the EAC (2011) at 35.

<sup>126</sup> Investment guide to the EAC (2005) at 40.

<sup>127</sup> African Union a United and Strong Africa available at [www.sadc.int](http://www.sadc.int) (accessed on 1 February 2013).

respect to inland water transport and port facilities, the five partners signed a waterway transport agreement in 1998. Other infrastructure plans and projects include a Digital Transmission Project in telecommunication, a postal automation project and a five-year meteorological development plan is in place.<sup>128</sup>

Regional cooperation in the development of the Energy Sector is also another area being undertaken. Activities to be undertaken in this area include further intergrade connections, the joint development of energy projects and the undertaking of joint regional research. An Energy Power Master Plan for the region has also been developed.<sup>129</sup>

The entry into force of the Customs Union Protocol in January 2005 was a step towards creating the free movement of labour, capital and entrepreneurship among the three member states.<sup>130</sup> The EAC Fast tracking Committee developed a high-level task force that kicked off in 2010, with the mandate that established free labour movement. The negotiations also considered the possibility of both EAC and non-EAC citizens residing in any of the member states acquiring citizenship in their country of residence.<sup>131</sup>

For the efficient implementation of this free movement of labour, the member states will also need to harmonize their labour laws and policies, institute national identity cards and harmonize social security systems. This is an important issue, given that there are some critical labour gaps in various countries.<sup>132</sup>

Achieving free labour movement within the Community could face difficulties if a partner State fears that it will jeopardize its national employment efforts. Several efforts have, however, been initiated with respect to labour and employment in the region. For example, the East African Business Council (EABC) has set up a working group on labour and employment to discuss issues related to the free movement of labour and services. Also a joint project by the EAC, the EU and the International Labour Organization (ILO) has been initiated to address issues related to labour migration.<sup>133</sup>

The rationale behind all these new development is to ensure that the EAC is one of the favourable investment destinations in the world .As observed above, a lot is being done and

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<sup>128</sup> Doing Business in the East African Community (2012) at 67.

<sup>129</sup> Investment information to the EAC (2011) at 35.

<sup>130</sup> Protocol on the Establishment of East African Community Common Market, 2010 Legislations and Regulations.

<sup>131</sup> African Union a United and Strong Africa available at [www.sadc.int](http://www.sadc.int) (accessed on 1 February 2013).

<sup>132</sup> Investment information to the EAC (2011) at 37.

<sup>133</sup> Investment information to the EAC (2011) at 40.



still a lot needs to be done to see to it that the EAC can attract as many foreigners by the year 2030.

To many investors, settling disputes runs top on their agenda. This has not been ignored by the EAC and its member states a number of mechanisms have been put in place to ensure that in case of any dispute, it's solved quickly and amicably as shall be discussed below.

#### **2.4.3.4. Dispute settlement**

The EAC member states have agreed to cooperate in promoting measures that strengthen linkages among business organizations and professional bodies. The reason behind this move is ensure economic development in the region. And this has been done through the national laws of each member states which provide for appropriate procedures for the settlement of disputes through litigation, negotiation or arbitration.<sup>134</sup> And this is evident as in so far as Kenya, arbitration is governed by the Arbitration Act, under which parties may agree to refer their present or future disputes to arbitration through an arbitration agreement.<sup>135</sup> In Tanzania, the Commercial Court, the Lands Division of the High Court and the Industrial Court deal with commercial, land and labour disputes respectively.<sup>136</sup> In Uganda the Investment Code permits international arbitration in a manner mutually agreed by the parties. The Centre for Arbitration and Dispute Resolution (CADER) provides procedures for the settlement of local disputes.<sup>137</sup>

Arbitration and alternative methods of dispute resolution are not sufficiently developed in Rwanda, despite the fact that the code of civil, commercial, labour and administrative procedures provides for arbitration.<sup>138</sup> However this has not stopped them from handling disputes that arise. An Arbitration Centre was created in 1998 as a non-governmental organization with the mission of settling all commercial disputes. Evaluation of the performance of the centre so far has revealed that it has not done as well as initially envisaged. The Government has now adopted a policy of encouraging the formation of more arbitration centres.

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<sup>134</sup> African Union Consultancy for the development of a common investment strategy for Africa (2008).

<sup>135</sup> Investment information to the EAC (2011) at 45.

<sup>136</sup> Investment information to the EAC (2011) at 47.

<sup>137</sup> Investment Disputes Convention Act Cap 522.

<sup>138</sup> Mutenyo A Foreign Direct Investments, Exports and Economic Growth in COMESA Countries: A Heterogeneous Panel Causality Approach. (unpublished dissertation Makerere University, 2009) at 34 available at [http://news.mak.ac.ug/documents/Makfiles/theses/Ndoricimpa\\_Arcade.pdf](http://news.mak.ac.ug/documents/Makfiles/theses/Ndoricimpa_Arcade.pdf) (accessed on 15/January/2013).

However, still a law on Arbitration and Conciliation is being drafted to provide a legal framework for improving arbitration and alternative dispute resolution in general.<sup>139</sup> Furthermore Burundi's judicial system upholds the sanctity of contracts. In case of a dispute involving foreign interests, a Centre for Arbitration and Mediation has been established by the Government to handle such issues. Additionally the plaintiff has the option of referring his or her complaint to either national courts or an international arbitration.<sup>140</sup>

Kenya, Tanzania and Uganda are also members of several international organizations and parties to international treaties governing the settlement of disputes between Governments and investors, through arbitration or negotiation. These include the Convention on the Recognition and Enforce Enforcement of Foreign Arbitral Awards, the International Centre for the Settlement of Investment Disputes (ICSID), and the Multilateral Investment Guarantee Agency (MIGA) as already discussed in chapter one.<sup>141</sup> At the EAC level, Community laws establishing various means for the settlement of disputes arising either between the member states or between investors and member states are provided for. Under the Customs Union protocol, a dispute settlement mechanism has also been formulated. In the event of a dispute between member states, the mechanism provides for consultation as the first step, with a view to finding an amicable solution.<sup>142</sup>

The consultation period can be up to 60 days. If the parties still fail to settle the dispute, the matter would be referred to the Dispute Settlement Committee which establishes a Dispute Settlement Panel. The panel is to be made up of experts from both the public and the private sector, who are independent persons of high integrity.<sup>143</sup> The panel would submit its report within a period of three months or, in the case of perishable goods, within a period of one and a half months. The report is to be adopted by the committee within a period of 60 days of its circulation. If there are concerns about fraud, lack of jurisdiction or other illegality with respect to the panel's report, any of the parties may refer the matter to the East African Court of Justice for arbitration.<sup>144</sup>

Under Article 32 of the EAC Treaty, the Court of Justice also has jurisdiction over disputes arising from an arbitration clause contained in a commercial contract or agreement in which

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<sup>139</sup> African Union Consultancy for the development of a common investment strategy for Africa (2008).

<sup>140</sup> Investment guide to Burundi. (2012) at 15.

<sup>141</sup> African Union Consultancy for the development of a common investment strategy for Africa (2008).

<sup>142</sup> See generally The East African Customs Union Protocol.

<sup>143</sup> Investment information to the EAC (2011) at 47.

<sup>144</sup> African Union Consultancy for the development of a common investment strategy for Africa (2008).



the parties have conferred jurisdiction on the Court. The Court also has jurisdiction over the interpretation and application of the EAC treaty, and legal and natural persons resident in a partner State may challenge the legality of any act or regulation of an EAC institution or a partner state which is allegedly in breach of the EAC Treaty.<sup>145</sup>

This move by the EAC has increased investor confidence, since investors are certain that justice will be done both at domestic level and regional level. This will result into a pull factor for FDI in the region.

## **2.5. Conclusion**

All the East African states recognize the potential benefits on balance of FDI for the host economy and it's often substantial impact on economic growth. It can therefore be expected that the current national FDI laws of some states which currently apply more FDI restrictive rules will continue to periodically evolve towards more FDI hospitality. Uganda, Rwanda and Burundi are in the process of revising their commercial laws and it is hoped that the laws will be more liberal and friendly towards foreign direct investments. It can however be generally observed that the foreign investment laws of East African states are hospitable. Notwithstanding the principle of state sovereignty, it would be of great importance if the states had uniform investment laws. This process can begin with the adoption of the model investment Code of EAC.

However, before that the author will discuss in chapter three the domestic regulatory frame work put in place by each member state in the areas of land acquisition, ownership and property protection of investors, taxation and dispute settlement. The role of stakeholders for example the Kenya Investment Authority (KIA) in the promotion of investment will also be discussed in the next chapter.

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<sup>145</sup> Doing Business in the East African Community (2012) at 70.



## **THE REGULATORY FRAMEWORK FOR ATTRACTING FOREIGN DIRECT INVESTMENT IN EAST AFRICA**

### **3. Introduction**

This chapter presents literature on the international frame work in place for attracting foreign direct investment (FDI), then the structure of East African Community (EAC) in place for attracting FDI and then also look at the domestic structure in place in each member state for attracting FDI ,with emphasis put on the investment promotion agencies in each member state with main reference given to four area that affect investors decision making ,that being land acquisition ,property ownership and protection, taxation and dispute settlement. Literature review and reports from key stakeholders, including government, professional organizations and investors with be also used.

### 3.1. International Investment frame work of Foreign Direct Investment

The International Investment frameworks we shall consider are the International Governmental Organisations (IGO) active in the field of FDI. They have substantial impact on the national systems in each region in a variety of ways and it's also dependant on the specific nature, objectives and competences of each entity.<sup>146</sup>

The legal and regulatory evolutions that led to a more liberal FDI climates which occurred during the last decades in many countries was in part influenced by IGO's such as the International Monetary Fund (IMF), the OECD, the World Bank (WB) and the World Trade Organisation (WTO). A variety of activities in the field of foreign investment can be pursued in these structures, such as: being the forum in which negotiations on FDI take place; adopting recommendations, guidelines or other instruments; maintaining statistical information; promoting development; establishing working groups or conferences to focus on specific FDI issues and many other activities.<sup>147</sup>

The relevance and influence of World Bank Group in the field of FDI can be demonstrated by its 1992 Guidelines on the Treatment of Foreign Direct Investment, although the provisions are not legally binding. The objective of these guidelines is to promote further development of FDI favourable climates.<sup>148</sup>

The guidelines have promoted standards such as the fair and equitable treatment of foreign investors; national treatment of foreign investors in regard of the protection and security of their person, property rights and interests; non-discrimination among foreign investors on ground of nationality (except in the context of customs unions or free trade area agreements), the prevention of corruption, the promotion of transparency of governmental activities in relation with foreign investors, and national treatment and appropriate compensation in case of expropriation for public purposes.<sup>149</sup> Which principles have been borrowed and included in the domestic legislation in the EAC.

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<sup>146</sup>Sornarajah, M. *The International Law on Foreign Investment* (1999) at 85.

<sup>147</sup> United Nation Conference on Trade and Development (UNCTAD), *World Investment Report* (2012) at 12 available at <http://www.unctad.org/Templates/Page.asp?intemID=3198&lang=1> (accessed on 20/January/2013).

<sup>148</sup> Section II of the World Bank, *Guidelines on the Treatment of Foreign Direct Investment Development Committee* September (1992) at 15 available at <http://italaw.com/documents/WorldBank.pdf> (accessed on 22/January /2013).

<sup>149</sup> *Doing Business in the East African Community* (2012) at 22.

The establishment in 1947 of the predecessor of WTO and the structure of the General Agreement on Tariffs and Trade (GATT), was a milestone in the history of trade liberalisation.<sup>150</sup> This structure continuously evolved until it was replaced in 1995 by the WTO.<sup>151</sup> GATT is an agreement which aims at the progressive liberalisation of trade in services but contains nevertheless provisions which address foreign investment as one of the forms of trade in services taken into consideration and defined.<sup>152</sup> Article 16 and 17 of the GATT Agreement bear their respective titles; Market Access and National Treatment. Article 16.2.f is of particular interest because it relates to national provisions restricting foreign ownership. According to article 17, countries can commit to give national treatment to Foreign Service suppliers, including those who can be qualified as foreign direct investors.<sup>153</sup> If a country decides to do so it will define the terms, the limitations and conditions under which the foreign entities will be treated as domestic service providers.<sup>154</sup>

The undisputable impact of the aforementioned international instruments explains why the WTO decided in 1996, at the occasion of the Singapore Ministerial Conference, to establish a Working Group on the relation between trade and investment.<sup>155</sup>

In the context of the framework of the United Nations (UN), and from the IMF and the WB which are specialized agencies of the UN, reference can also be made to the contributions and impact, in the field of FDI, of the United Nations Centre for Trade and Development (UNCTAD) and the UN Statistics division.<sup>156</sup> The division keeps statistical information on FDI in general, by category of FDI, and by country. The UNCTAD, which was created in 1964 as a UN Agency with the mission to promote the economic integration of the developing countries in the world economy, also compiles detailed statistical information on

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<sup>150</sup> See generally World Investment Report (1998) *Trends and Determinants* United Nations.

<sup>151</sup> See generally Dunning J *International Production and the Multi National Enterprise* (1981) available at <http://www.journalogy.net/Publication/3884438/the-eclectic-paradigm-of-international-production-a-restatement-and-some-possible-extensionas> (accessed on 14/January /2013).

<sup>152</sup> Section III of the World Bank, *Guidelines on the Treatment of Foreign Direct Investment, Development Committee* September (1992) at 18 .available at <http://italaw.com/documents/WorldBank.pdf> (accessed on 22/January /2013).

<sup>153</sup> Jean-Y & Steyt PH *Comparative Foreign Direct Investment Law. Determinants of the Legal Framework and the Level of openness and attractiveness of host economies* (2006) at 28.

<sup>154</sup> United Nation Conference on Trade and Development (UNCTAD), *World Investment Report* at 13 available at <http://www.unctad.org/Templates/Page.asp?intemID=3198&lang=1> (accessed on 20/January/2013).

<sup>155</sup> The GATT- General Agreement on Tariffs and Trade agreement itself continues to exist in the larger framework of the WTO-structure. The WTO currently has over 150 members. Available at [www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf) (accessed on 20/January 2013).

<sup>156</sup> Doing Business in the East African Community (2012) at 25.

FDI and created an on-line World Investment Directory, with information per country.<sup>157</sup>This has acted as a guide to investors in each jurisdiction that they intend to invest in.

It's from the above NGO's guide lines they set that the EAC and its member states have been able to borrow some principles and regulatory structure so as to develop their Investment framework that is applicable to their region and conducive to Investors as we shall see below.

### **3.2. Investment framework laws in East Africa**

The EAC member states have their own institutions and regulatory mechanisms for dealing with foreign investment. The general policy trend has been towards privatization and liberalisation. Each country has its own requirements with respect to such matters as company registration and incorporation procedures, permits and licences, property acquisition, access to capital and land, ownership and management control, and exit procedures. With reference to chapter two where it was earlier mentioned that the EAC Model Investment Code was drafted in 2002, It was not intended to be a binding legal instrument but rather a model whose features the EAC member States may incorporate into their national laws. The code includes sections dealing with establishment of an enterprise, the creation of a regional investment promotion agency, and the establishment, operations and incentives of Special Economic Zones.

The EAC has a number of outstanding investment laws, in each member state as noted above, however for purposes of this chapter attention will be put on the International structure rules in place such as the General Agreement on Tariffs and Trade (GATT), and assess how it has influenced the East African investment structure. The East African Investment code and domestic legislations of each member state such as the land Act , Trade Mark Act, Income Tax Act, and dispute settlement will also be discussed at a later stage as they are some of the main factors that investors consider when deciding whether to invest in a region or not.

### **3.3 Legal and Regulatory Frameworks of Foreign Direct Investment in East Africa**

Most of the laws and regulations in the investment sector in the EAC were enacted before the concerned states had any investment policies. As such, they cannot be expected to be based on the current policies. The fact that they were enacted at different times and under different circumstances which makes them devoid of any consistency with related laws within and

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<sup>157</sup>Sornarajah, M. *The International Law on Foreign Investment* (1999) at 85.

between states.<sup>158</sup> That is why it's important to look at each member state, so as to enable us appreciate the developments of each investment legislation hence be able to draw the difference in each member state legislation ,hence be able to come up with means of harmonising their investment Laws.

It should also be noted that it is only in legislation that is more recent that a difference can be seen. EAC states are slow, in amending the law to meet the current investment trends.<sup>159</sup>

Legislation, as recognised in the international Policy structure mentioned above, is one of the main instruments by which governments can steer and control the development of the investment sector. An independent, autonomous, transparent, predictable and stable regulatory regime for the investment sector is seen as ensuring that the market functions without distortions. To safeguard its independence, the regulatory regime needs the support of legislation.<sup>160</sup>

As already noted above, East Africa is a region overflowing with potential for foreign investments. For this section all the five East African member states will be looked at mainly in the legislations of Land acquisition, intellectual property, Investment protection, and Tax and dispute settlement. Attention has been given mainly to those five factors that influence FDI in the region mainly because each member state has different principles regulating each sector .For example each member state has a different land tenure system. And because of this harmonising the regulatory framework under the land sector is next to impossible. Thus it's important to identify these differences in the above sectors, so as identify a way of creating harmonisation so as to create a conducive investment climate in the region.

However it should be noted that, despite the above mentioned differences all the EAC member states have the same objective of harnessing the Laws that affect FDI, so as to achieve economic growth and development in the region.

The five member states of the EAC (Uganda, Kenya, Tanzania, Rwanda and Burundi) have also agreed to cooperate in the areas of Investment and Industrial Development.<sup>161</sup> The cooperation has been further enhanced by the coming into force of the East Africa

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<sup>158</sup> Sornarajah M *The clash of globalisation and the international law on foreign investment* (2002) at 12 available at: [www.carleton.ca/ctpl/pdf/papers/sornarajah.pdf](http://www.carleton.ca/ctpl/pdf/papers/sornarajah.pdf) . (accessed 12/January/2013).

<sup>159</sup> Doing Business in the East African Community (2012) at 27.

<sup>160</sup> United Nation Conference on Trade and Development (UNCTAD), *World Investment Report* at 17 available at <http://www.unctad.org/Templates/Page.asp?intemID=3198&lang=1> (accessed on 20/January/2013).

<sup>161</sup> United Nation Conference on Trade and Development (UNCTAD), *World Investment Report* at 28 available at <http://www.unctad.org/Templates/Page.asp?intemID=3198&lang=1> (accessed on 20/January/2013).



Community Protocol on the establishment of East Africa common market.<sup>162</sup> The co-operation seeks to, among others, rationalize investments as well as harmonize investment incentives with a view to promoting the Community as a single investment area.<sup>163</sup>

It should be noted that the EAC does not have foreign investment legislation which is binding on the member states comprised of Kenya, Uganda, Tanzania, Rwanda and Burundi as already mentioned above.<sup>164</sup> The applicable law is just a model that the member states may opt to adopt into their domestic legislation.<sup>165</sup> The foreign investment laws that are generally applied in East Africa are those of the member states.<sup>166</sup> Some member states have also ratified international instruments in relation to foreign investment as we shall see as we go on.<sup>167</sup> The doctrine of state sovereignty which is a basic principle of international law in the context of foreign investment means that a state can decide at its discretion how to regulate foreign investment and how to treat foreign investors.<sup>168</sup> Consequently, the member states of East Africa can freely decide whether to establish a liberal and hospitable FDI climate or not.<sup>169</sup> They can prohibit the entry of foreign investment; establish barriers, conditions, restrictions or limits on FDI inflows.<sup>170</sup> Sornarajah stresses that the power of exclusion implies the power to admit conditionally.<sup>171</sup>

However States can freely decide whether their system should discriminate foreign investors compared to their local counter parts, or whether foreign investors from certain countries should be treated differently than those of others.<sup>172</sup>

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<sup>162</sup> United Nation Conference on Trade and Development (UNCTAD), *World Investment Report* at 30 available at <http://www.unctad.org/Templates/Page.asp?intemID=3198&lang=1n> (accessed on 20/January/2013).

<sup>163</sup> Doing Business in the East African Community (2012) at 57.

<sup>164</sup> Doing Business in the East African Community (2012) at 59.

<sup>165</sup> United Nation Conference on Trade and Development (UNCTAD), *World Investment Report* at 29 available at <http://www.unctad.org/Templates/Page.asp?intemID=3198&lang=1> (accessed on 20/January/2013).

<sup>166</sup> Sornarajah M *The clash of globalisation and the international law on foreign investment* (2002) at 12 available at: [www.carleton.ca/ctpl/pdf/papers/sornarajah.pdf](http://www.carleton.ca/ctpl/pdf/papers/sornarajah.pdf) (accessed 12/January/2013).

<sup>167</sup> Doing Business in the East African Community (2012) at 57.

<sup>168</sup> Kinoshita Y & Campos N *Agglomeration and the Location Determinants of FDI in Transition Economies*, (2001).at 25.

<sup>169</sup> Goldsmith A *Slapping the Grasping Hand: Correlates of Political Corruption in Emerging Markets*. (2002) 58 *AJES* 26.

<sup>170</sup> Asiedu E *On the Determinants of Foreign Direct Investment to Developing Countries: Is Africa Different?* (2002) at 30 (1): at 107-19. available at [http://www.iese.ac.mz/lib/publication/III\\_Conf2012/IESE\\_IIIConf\\_Paper1.pdf](http://www.iese.ac.mz/lib/publication/III_Conf2012/IESE_IIIConf_Paper1.pdf) (accessed on 2/January /2013).

<sup>171</sup> Sornarajah M *The clash of globalisation and the international law on foreign investment* (2002) at 12 available at: [www.carleton.ca/ctpl/pdf/papers/sornarajah.pdf](http://www.carleton.ca/ctpl/pdf/papers/sornarajah.pdf) (accessed 12/January/2013).

<sup>172</sup> Asied E *On the Determinants of Foreign Direct Investment to Developing Countries: Is Africa Different?* (2002) at 30 (1): at 107-19. available at [http://www.iese.ac.mz/lib/publication/III\\_Conf2012/IESE\\_IIIConf\\_Paper1.pdf](http://www.iese.ac.mz/lib/publication/III_Conf2012/IESE_IIIConf_Paper1.pdf) (accessed on 2/January /2013).



Thus all the member states have their own foreign direct investment laws despite the existence of legal frameworks in this area within EAC.<sup>173</sup> Their investment laws are in most instances similar and in some cases; the States have adopted the same International Instrument on settlement of investment disputes.<sup>174</sup>

However for purposes of this chapter, is to draw attention to factors that investors consider when deciding whether to invest in a country or not and the regulatory system that each of the member states has put in place to regulate FID. Six major factors will be considered out of the so many that affect investors decisions to invest in a region so as to enable the author to have an in depth and analytical discussion on each of them. These include the setup and exit requirement, land acquisition, ownership of property and protection, Taxation and dispute settlement.<sup>175</sup> The author will start with Kenya since it has the biggest and fastest growing economy in the region.

### **3.3.1 Legal and Regulatory framework of foreign direct investment in Kenya**

For this part we shall be looking at the Regulatory body in Kenya that is responsible for regulating Investment. Attention will also be drawn to legislations that have been put in place by the government to promote foreign direct investment, land acquisition ,protection of investments, property ownership, tax and dispute settlement.

The law governing investment in Kenya is the Kenya Investment Authority (keninvest).<sup>176</sup> It was established by the Investment Promotion Act 2004; its purpose “to promote and facilitate investment by assisting investors in obtaining the licenses necessary to invest and providing other assistance and incentives”.<sup>177</sup>

Investors starting a business in Kenya have to follow a number of administrative procedures and various forms of legal incorporation of business enterprises in Kenya include: incorporated limited liability companies (private and public) , partnerships , sole

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<sup>173</sup> Article 16.2.f of the GATTs, provides that; “In sectors where market-access commitments are undertaken, the measures which a member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory unless otherwise specified in its schedule, are defined as..) Limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

<sup>174</sup> Jean-Y & Steyt PH *Comparative Foreign Direct Investment Law. Determinants of the Legal Framework and the Level of openness and attractiveness of host economies* (2006) at 28.

<sup>175</sup> Doing Business in the East African Community (2012) at 57.

<sup>176</sup> Investment Promotion Act Cap 485B 2004 Kenya law Reports (thereafter Investment Promotion Act, the Act 485 of 2004) Laws available at [www.kenyalaw.org/klr/.../Acts/InvestmentPromotionActCap485B.pdf](http://www.kenyalaw.org/klr/.../Acts/InvestmentPromotionActCap485B.pdf) (accessed on 28/March /2013).

<sup>177</sup> Part 1 Preliminary of Investment Promotion Act 2004.

proprietorships , cooperatives , companies limited by guarantees for most non-profit organizations, representative offices, which are required to comply with Part X of the Companies Act (i.e. to secure a certificate of compliance from the Registrar of Companies).<sup>178</sup>

It should be noted that, limited liability companies are the entities most favoured by foreign investors. This is mainly because they offer advantages similar to those offered by corporate bodies in other countries.<sup>179</sup> A shareholder's liability for any deficiency on winding up is usually limited to the amount unpaid for the issued and called-up capital on the shares issued to the investor. Shares may be transferred without affecting the continuity of the business.<sup>180</sup> Hence a preferred option too many Investors in Kenya.

Having seen the legal requirement that an investor requires before starting a business, the next step is acquiring land on which the investment shall be developed.



### 3.3.1.1 Land acquisition

Land to any investor in the world is a very important aspect. This is mainly because it acts as a source of security to them and also allows them to have stake or ownership in that given country they have invested in. In Kenya, land is classified by the Constitution into three types: public land, private land and community land. Of the three, community land occupies the largest surface. The freedom to own and deal with property is guaranteed by the Constitution.<sup>181</sup> There are several land-tenure systems under which land may be held and operated.<sup>182</sup>

One is freehold tenure, the holding of registered land in perpetuity subject to statutory and common law qualifications. Another is leasehold tenure, the holding of land on a lease between the lesser and lessee for a given period from a specified date of commencement, on

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<sup>178</sup>Part X of the Companies Act Cap (486) Laws available at [www.kenyalawreport.co.ke/Downloads/Acts/Companies%20Act.pdf](http://www.kenyalawreport.co.ke/Downloads/Acts/Companies%20Act.pdf) (accessed on 28/March/2013).

<sup>179</sup> Investment guide to Kenya (2012) at 23-24.

<sup>180</sup> Part VI of the Companies Act Cap (486) Laws available at [www.kenyalawreport.co.ke/Downloads/Acts/Companies%20Act.pdf](http://www.kenyalawreport.co.ke/Downloads/Acts/Companies%20Act.pdf) (accessed on 28 /March/2013).

<sup>181</sup> The Constitution of the Republic of Kenya Revised Edition 2010 available at [www.kenyalaw.org](http://www.kenyalaw.org) (accessed on 28/March/2013).

<sup>182</sup>Land Act No.6 of 2012 Kenya Law Reports (thereafter the Land Act ,the Act, Act No.6 of 2012) [www.kenyalaw.org/klr/.../Acts/Land\\_Act\\_No\\_6\\_of\\_2012\\_1.p](http://www.kenyalaw.org/klr/.../Acts/Land_Act_No_6_of_2012_1.p) (accessed on 28/March/2013).

such terms and conditions as the parties may agree on. A third way in which land may be acquired and used is having it allocated by the Government.<sup>183</sup>

The Constitution restricts foreign ownership of private land to leasehold for a maximum of 99 years.<sup>184</sup> The procedure for the allocation of alienated or unalienated government land is that the developer identifies land suitable for development and completes an application form, which he or she forwards to the appropriate District Land Board for consideration.<sup>185</sup> The Land Board meets once or twice a month (depending on the district) to consider all applications, after which a decision is made and a certificate of allocation issued. Then the developer can process a lease or transfer the title depending on the type of land acquired. This process generally takes three to four months.<sup>186</sup>

Dealings in agricultural land (mostly rural land) are subject to Land Control Board consent under the Land Control Act. Agricultural land (defined as freehold land outside urban areas or land held on a leasehold title that restricts its use to an agricultural purpose) cannot be acquired unless a Land Board approves an application by the owner of such land and the person who wishes to acquire it.<sup>187</sup>

Land Control Boards operate in each district throughout Kenya and meet more or less regularly to consider such applications. It is worth noting that land situated outside an urban area that is held on a leasehold title for a non-agricultural purpose is not subject to this control.<sup>188</sup> Applications for consent must be considered within six months of the agreement to enter into the transaction, or they must be renewed or extended by a Court.<sup>189</sup>

It is possible in Kenya for an Investor to control land in more than one manner. For example, a freehold beachfront plot situated on the coast outside an urban area may also be subject to the provisions of the Land Control Act in that the land would be regarded as agricultural even if it is actually used for a hotel. For this reason, it is usual and desirable for such plots of land

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<sup>183</sup> Part II of the Land Act.

<sup>184</sup> Part III of the Land Act.

<sup>185</sup> Part IV of the Land Act.

<sup>186</sup> Investment guide to Kenya (2012) at 24.

<sup>187</sup> The Land Control Act Cap 302 Kenya Law Reports (Hereafter the Land Control Act, the Act Cap 302), available at [www.kenyalawreport.co.ke/.../Acts/Land%20Control%20Act.pdf](http://www.kenyalawreport.co.ke/.../Acts/Land%20Control%20Act.pdf) (Accessed on 28/March/2013).

<sup>188</sup> Part II of the Land Control Act Cap 302.

<sup>189</sup> Part III of the Land Control Act Cap 302.

to be held on leasehold titles restricted to an appropriate non-agricultural purpose so that the Land Control Act does not apply to such plots of land.<sup>190</sup>

To many investor, it is not all about accumulating property, their main concern is, who offers the most incentives and that brings us to our next point.

### **3.3.1.2 Tax and fiscal incentives for attracting foreign direct investment**

Tax is one incentive that many investors pay a lot of attention to. It should be noted that investors are more attracted to regions that have fewer taxes to pay or that offer tax holidays.<sup>191</sup>

In Kenya, there are a number of taxes as shall be discussed below, that are supposed to be meet by investors and these are income tax which is a direct tax levied on income from business, employment, rent, dividends, interest and pensions, among others.<sup>192</sup> It is paid by any person resident in Kenya, a resident being defined as someone who has a permanent home in Kenya and has spent any part of the working year in the country, or as someone who, without a permanent home in Kenya, has spent 183 days or more working in the country in the year of assessment or an average of 122 days per year over the previous two years. Residents in Kenya are assessed on the worldwide employment income. A foreign employee of a non-Kenyan firm who is resident in Kenya is subject to tax on all emoluments.<sup>193</sup>

Pay as You Earn (PAYE) is the method of collection for individuals in gainful employment. The employer deducts a certain amount of tax from his/her employee's salary or wages on each payday and then remits it (Income Tax Act, Chapter 470).<sup>194</sup>

Corporate tax is another; this is a direct tax on profits made by corporate bodies such as limited companies, trusts, clubs, societies, associations and cooperatives. It has its legal basis in the Income Tax Act, Chapter 470. In general taxable income consists of gross profits minus allowable deductions over a tax year that matches the calendar year.<sup>195</sup>

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<sup>190</sup> Investment guide to Kenya (2012) at 27.

<sup>191</sup> Section 5 of the Income Tax Act, Chapter 470 Laws of Kenya. (hereafter the Income Tax Act ,the Act, Act Chapter 470)

<sup>192</sup> Section 5 of the Income Tax Act.

<sup>193</sup> Section 6 of the Income Tax Act.

<sup>194</sup> The preamble of the Income Tax Act.

<sup>195</sup> Section 25 of the Income Tax Act.

However, companies may under Section 27 of the Income Tax Act and with prior approval of the Commissioner, vary their accounting year.<sup>196</sup> The rate differs between resident and non-resident companies. (A resident company is one incorporated in Kenya.) Companies listed on the Nairobi Stock Exchange (NSE) are also taxed at slightly lower rates than other companies in order to encourage listing.<sup>197</sup>

In addition, expenses incurred on legal costs and other incidental expenses relating to authorization and issue of shares, debentures or similar securities offered for purchase by the public are allowable as deductions. Expenses incurred for purposes of listing on any securities exchange operating in Kenya (without raising additional capital) are also deductible.<sup>198</sup>

In addition to the above, investment in buildings and machinery for manufacturing and hotels enjoys a 100 percent deduction. This deduction rises to 150 percent for investments outside the cities of Kisumu, Mombasa and Nairobi.<sup>199</sup> Investors in export-processing zones, who do not engage in commercial activities such as trading, enjoy a 10-year tax holiday, followed by a 25 percent corporate tax rate for the following 10 years.<sup>200</sup>

Excise taxes are levied on alcoholic beverages, tobacco products, petroleum products, motor vehicles, carbonated drinks, fruit drinks and mineral water, and cosmetics. The taxes are imposed under the Customs and Excise Act (Chapter 472). Tobacco and alcohol are taxed on a specific basis.<sup>201</sup>

Trade taxes, as a member of the EAC customs union, all goods manufactured in one EAC country and sold in another are treated as if they were manufactured locally, by virtue of there being no internal tariffs between partner countries.<sup>202</sup>

The same countries also levy a common external tariff for goods entering the EAC, with the aim of promoting manufacturing and the processing of raw materials. Under this scheme, raw materials are imported duty free; intermediate goods are charged 10 percent and finished

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<sup>196</sup> Section 27 of the Income Tax Act.

<sup>197</sup> Investment guide to Kenya (2012) at 30.

<sup>198</sup> Investment guide to Kenya (2012) at 31.

<sup>199</sup> Investment guide to Kenya (2012) at 30.

<sup>200</sup> Investment guide to Kenya (2012) at 31.

<sup>201</sup> Customs and Excise Act Chapter 472 Law of Kenya.

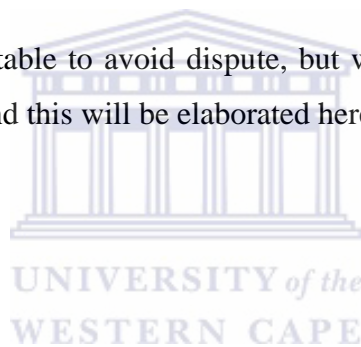
<sup>202</sup> East Africa Community Treaty. Chapter 12 Articles 79 and 80.

goods 25 percent.<sup>203</sup> Investors in export processing zones (EPZs) are exempted from paying import duties.<sup>203</sup>

Value-added tax (VAT) VAT is a consumption tax levied on taxable goods and services, whether locally produced or imported. It was introduced in 1990 to replace the sales tax and is administered under the VAT Act, Chapter 476. Registration is compulsory where annual turnover is expected to be KES 5 million or more. The normal rate of VAT is 16 percent. However, some fuels oils and electricity are taxed at 12 percent. Food products are generally exempt as are a large number of services.

Goods and services that are exported or supplied to privileged persons/organizations (such as projects in EPZs or international organizations) are zero-rated. There is also a large list of zero-rated goods linked to basic foodstuffs, medical products and machinery. More details are available in the schedules of the VAT Act 2009 Edition.

In any transaction dealing, it is inevitable to avoid dispute, but what matters most to investors is how these disputes are settled and this will be elaborated here below.



### **3.3.1.3 Dispute settlement**

The legal system in Kenya is adversarial, and most disputes are resolved through litigation in court, although arbitration and alternative dispute resolution are becoming increasingly popular.<sup>204</sup>

The Arbitration Act governs arbitration.<sup>205</sup> It's stated that, Parties opting to refer their present or future differences to arbitration must include an arbitration clause in their agreement.<sup>206</sup>

The authority of an arbitrator appointed by virtue of such an agreement is irrevocable, except by leave of the High Court or unless a contrary intention appears in the agreement. Facilities

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<sup>203</sup> Investment guide to Kenya (2012) at 30.

<sup>204</sup> Investment guide to Kenya (2012) at 29.

<sup>205</sup> Doing Business in Kenya (2012) at 42.

<sup>206</sup> The Arbitration Act Cap Laws of Kenya.

for alternative dispute resolution are provided by Kenya's Dispute Resolution Centre. In addition, The Chartered Institute of Arbitrators has a Kenya chapter.<sup>207</sup>

Kenya is also a member of the International Centre for the Settlement of Investment Disputes (ICSID), a World Bank agreement for the settlement of disputes between States and Nationals of other States. Under this agreement, Kenya is required to recognize ICSID arbitral awards.<sup>208</sup>

When it comes to enforcement of, The Foreign Judgments (Reciprocal Enforcement) Act (Chapter 43, Laws of Kenya) provides for the enforcement in Kenya of judgments given in other countries that accord reciprocal treatment to judgments given in Kenya.<sup>209</sup> The countries with which Kenya has entered into reciprocal enforcement agreements are Australia, Malawi, Rwanda, Seychelles, United Republic of Tanzania, Uganda, the United Kingdom and Zambia. Without such an agreement, a foreign judgment is not enforceable in the Kenyan courts except by filing suit on the judgment.<sup>210</sup>

Kenyan courts would, as a general rule, recognize a governing-law clause in an agreement that provides for foreign law.<sup>211</sup> However, the selection of such a law must be real, genuine, bona fide, legal and reasonable. It should also be noted that a Kenyan court would not give effect to a foreign law if the parties intended to apply it in order to evade the mandatory provisions of a Kenyan law with which the agreement has its most substantial connection and which, for this reason, the court would normally have applied.<sup>212</sup>

Thus from the above discussion its evident that the provisions of the Kenyan legislations are very clear that the government is priority is to ensure that they create a conducive investment climate in the region, so as to attract more foreign direct investment .The same is done by their neighbour in Uganda, however a different approach is taken as we shall see below.

### **1.1.1 3.3.2 Legal and Regulatory Framework of Foreign Direct Investment in Uganda**

Since the 1980s, the Government of Uganda has taken a number of initiatives to increase its involvement in economic activities, encourage export diversification and growth, and restore the credibility of the country's fiscal and monetary policies. These include trade and foreign-

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<sup>207</sup> Section 3 of the Arbitration Act Cap Laws of Kenya.

<sup>208</sup> Kenya's Dispute Resolution Centre.

<sup>209</sup> Doing Business in Kenya 2012 Doing Business in Kenya (2012) at 55.

<sup>210</sup> The Foreign Judgments Reciprocal Enforcement Act Chapter 43 Laws of Kenya.

<sup>211</sup> The Foreign Judgments (Reciprocal Enforcement) Act (Chapter 43 Laws of Kenya)

<sup>212</sup> Investment guide to Kenya (2012) at 29.



exchange liberalisation, and the dismantling of the market monopolies of various parastatals. Investors seem to be generally satisfied with the Government's trade policy, in particular the import regime. As a result of these policy reforms it has increased Uganda's economic recovery.<sup>213</sup>

One of the policy reforms made was under the investment sector and the law governing investment in Uganda is the Uganda Investment Code of 1991.<sup>214</sup> The agency established under this Code is the Uganda Investment Authority (UIA), which is to promote and facilitate investment in Uganda, advise the Government on policies conducive to investment, and provide information on investment issues.<sup>215</sup> One of the core functions of the UIA is attracting foreign direct investment (FDI) into the country, as well as promoting domestic investment.<sup>216</sup>

An investor is required to apply to the UIA for an investment license to start a business in Uganda.<sup>217</sup> An investment license is issued within five working days if the application form is properly completed.<sup>218</sup> The licence is normally valid for a period of not less than five years after the implementation of the project.<sup>219</sup> Although there is no legal requirement in terms of a minimum investment, in practice a threshold of \$100,000 has been applied to foreign investors and \$50,000 to local investors.<sup>220</sup>

The Code allows foreigners to invest in all activities, except those relating to national security or requiring ownership of land. Foreign investors may, however, lease land for up to 99 years.<sup>221</sup> They can also participate in joint ventures, including those involving the leasing of land for agricultural purposes.<sup>222</sup> In addition, Uganda imposes no limit on equity ownership. Foreign ownership of up to 100% is allowed. Investors are also free to bring in and take out their capital.<sup>223</sup>

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<sup>213</sup> Investment guide to Uganda (2004) at 51.

<sup>214</sup> Part II of the Uganda Investment Authority Code Act Cap 92 Laws of Uganda (thereafter, the Uganda Investment Code Act, the Act, Cap 92) available at [www.eac.int/customs/index.php?option=com\\_docman](http://www.eac.int/customs/index.php?option=com_docman) (accessed on 2/April/2013).

<sup>215</sup> Part II of the Uganda Investment Code Act Cap 92.

<sup>216</sup> Preamble of the Uganda Investment Code Act Cap 92.

<sup>217</sup> Section III of the Uganda Investment Code Act Cap 92.

<sup>218</sup> Section III of the Uganda Investment Code Act Cap 92.

<sup>219</sup> Investment guide to Uganda (2004) at 51.

<sup>220</sup> Brief guide to Investing in Uganda (2006) at 4 (thereafter, the Brief guide to investment in Uganda) available at [www.confapisardegna.it/assets/files/pdf/.../Uganda%20Investment.do](http://www.confapisardegna.it/assets/files/pdf/.../Uganda%20Investment.do). (accessed on 2/April/2013).

<sup>221</sup> Investment guide to Uganda (2004) at 55.

<sup>222</sup> Part III of the Uganda Investment Code Act Cap 92

<sup>223</sup> Investment guide to Uganda (2004) at 55.

In setting up the UIA in 1991, it was expected that all investment-related issues would be handled by the UIA, as a ‘one-stop shop’.<sup>224</sup> This meant having all services such as immigration, customs, land, utilities, and, many others under one roof: the UIA’s.<sup>225</sup> In practice, this has turned out not to be possible, which led to a rethinking of the approach and the adoption of a more appropriate concept.<sup>226</sup> Under the UIA, it created a network with all the relevant government agencies to provide services to investors. As a result, each agency today has a desk officer assigned to handle investment-related matters promptly.<sup>227</sup>

The UIA has worked closely with the public service to introduce Client Charters in key government agencies.<sup>228</sup> A Client Charter is a brief schedule of procedures, costs and time involved in securing a service from such an agency.<sup>229</sup> The Charters are placed on public notice boards where investors and the general public can easily access them for the needed information. The intention is to reduce red tape, corruption and other malpractices in dealing with investors.<sup>230</sup> The introduction of the charters has brought marked improvement in service delivery to the investors.<sup>231</sup>

Investors starting business in Uganda have to follow a number of administrative steps to follow, and this include1s, a company and its name registered.2.Investor can obtain an investment licence.3. Investor may have to obtain sector –specific secondary licenses. 4. Immigration Authority, work permits required for all foreign staff.5.Tax registration, registration as taxpayers, receipt of tax identification number (TIN).<sup>232</sup> Lastly full implementation of the project commences. The time needed to set up a business depends on the precise nature of the planned investment. In some cases, an investor may start operations within a month of arrival in Uganda.<sup>233</sup>

However, if the investment requires the installation of additional utilities or if it is to be located in a restricted area, the process can take as long as six months or more (USAID,

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<sup>224</sup> Part III of the Uganda Investment Code Act Cap 92

<sup>225</sup> Part IV of the Uganda Investment Code Act Cap 92

<sup>226</sup> Investment guide to Uganda (2004) at 51.

<sup>227</sup> Investment guide to Uganda (2004) at 55.

<sup>228</sup> Part III of the Uganda Investment Code Act Cap 92

<sup>229</sup> Brief guide to Investing in Uganda (2006) at 7-8.

<sup>230</sup> Doing Business in Uganda (2012) at 60.

<sup>231</sup> Investment guide to Uganda (2004) at 9.

<sup>232</sup> Uganda Registration Service Bureau available at [www.ursb.go.ug](http://www.ursb.go.ug) (accessed on 2/April/2013).

<sup>233</sup> Investment guide to Uganda (2004) at 25.

1998).<sup>234</sup> Still the institutions involved are helpful and try, as much as possible, to facilitate the process.<sup>235</sup>

Every business in Uganda must be registered with the Registrar of Business Names/Companies in the Registrar General's office.<sup>236</sup> Investors who wish to operate a business in a municipality are also required to obtain a trading licence from the local authority and to register with the Uganda Revenue Authority for income and corporate taxes and, where applicable, for VAT.<sup>237</sup> Most foreign investors setting up business in Uganda tend to prefer to register as limited liability companies.<sup>238</sup> These companies offer the same advantages to investors as corporate bodies in other countries.<sup>239</sup> When they wind up, shareholders' liability for any deficiency is usually limited to the amount unpaid for the issued and/or called-up shares.<sup>240</sup> Shares in any company may be transferred without affecting the continuity of the business. The Companies Act, 1964 (modelled on the UK Companies Act, 1948, before amendments), defines the various forms of legal incorporation.<sup>241</sup>

A Ugandan company is not required to establish a legal reserve, a none distributable reserve built up from annual allocations of profit, as is the case in some other countries.<sup>242</sup> Within six months of commencement of the accounting period, the company has to submit a provisional return invoice which contains an estimate of the income expected to accrue to the business during the accounting period. Detailed information on how to establish a company in Uganda is available from the UIA.<sup>243</sup>

An investor is free to exit from a venture in accordance with the company law of Uganda. In practice, there are no obstacles to a company wishing to divest.<sup>244</sup>

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<sup>234</sup> Doing Business in Uganda (2012) at 61.

<sup>235</sup> Investment guide to Uganda (2004) at 8.

<sup>236</sup> Uganda Registration Service Bureau available at [www.ursb.go.ug](http://www.ursb.go.ug) (accessed on 2/April/2013).

<sup>237</sup> The Income Tax Act Cap 340 Laws of Uganda available at [www.ura.go.ug/openFile.do?path=//...Tax\\_Laws...pdf](http://www.ura.go.ug/openFile.do?path=//...Tax_Laws...pdf) (accessed on 2/April/2013).

<sup>238</sup> Doing Business in Uganda (2012) at 62.

<sup>239</sup> Part II of The Companies Act Cap 110 Laws of Uganda available at [www.ulii.org/ug/legislation/consolidated-act/110](http://www.ulii.org/ug/legislation/consolidated-act/110) (accessed on 2/April/2013).

<sup>240</sup> Part IV of The Companies Act Cap 110 Laws of Uganda available at [www.ulii.org/ug/legislation/consolidated-act/110](http://www.ulii.org/ug/legislation/consolidated-act/110) (accessed on 2/April/2013).

<sup>241</sup> The Companies Act Cap 110 Laws of Uganda available at [www.ulii.org/ug/legislation/consolidated-act/110](http://www.ulii.org/ug/legislation/consolidated-act/110) (accessed on 2/April/2013).

<sup>242</sup> Doing Business in Uganda (2012) at 57.

<sup>243</sup> Investment Guide to Uganda (2004) at 25.

<sup>244</sup> Investment Guide to Uganda (2004) at 26.

As already I identified with Kenya above, the land acquisition in Uganda does not differ greatly, but the tenure systems do differ. And this affects the land policy in each state as shall be discussed below.

### 3.3.2.1 Land acquisition

The Constitution of 1995 vests the right to all land in the citizens of Uganda.<sup>245</sup> Foreign nationals may own land only in a joint venture with a majority local shareholder.<sup>246</sup> There are four land-tenure systems under which land may be held. Freehold tenure: This is the holding of registered land in perpetuity subject to statutory and common-law qualifications. Leasehold tenure: This is the holding of land for a given period from a specified date of commencement, on such terms and conditions as may be agreed by the lessor and lessee.<sup>247</sup>

The lessee enjoys exclusive possession of the land for a specified duration in consideration of a cash payment called a premium and an annual rent which is normally 10% of the premium.<sup>248</sup> Customary tenure: This is the holding of land by an individual or community on former public land in accordance with the customs and traditions of a given community.<sup>249</sup> Mailo tenure: This is the holding of registered land in perpetuity, having its roots in the allotment of land pursuant to the provisions of the 1900 Uganda Agreement and subject to statutory qualifications.<sup>250</sup> The land available to investors falls into three categories: Public land: Available through municipal councils and the District Land Commissions.<sup>251</sup> Both locals and foreigners may lease on public land. All municipalities apart from Kampala and Mbale have land available for leasing. Leased land: Available from the Buganda Land Board and other landlords. Freehold land: Available from private individuals for sale.<sup>252</sup>

Applications for land have now been standardized under the new Land Act.<sup>253</sup> All towns and municipalities are required to follow the new guidelines. Each district has a Land Board.<sup>254</sup>

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<sup>245</sup> The Constitution of the Republic of Uganda (Amendment) Act 2005 Laws of Uganda available at [www.parliament.go.ug/.../constitution/Constitutional\\_Amendment\\_A](http://www.parliament.go.ug/.../constitution/Constitutional_Amendment_A) (accessed on 2/April/2013).

<sup>246</sup> Part II of the land Act Cap 227 (Thereafter the Land Act, the Act Cap 227)) available at [www.academia.edu/.../LAND\\_LAW\\_REFORM\\_IN\\_UGAND](http://www.academia.edu/.../LAND_LAW_REFORM_IN_UGAND) . ( accessed on 2/April/2013).

<sup>247</sup> Investment Guide to Uganda (2004) at 27.

<sup>248</sup> Section II of the land Act Cap 227.

<sup>249</sup> Section II of The land Act Cap 227.

<sup>250</sup> Investment Guide to Uganda (2004) at 57.

<sup>251</sup> Doing Business in Uganda (2012) at 20.

<sup>252</sup> Investment Guide to Uganda (2004) at 58.

<sup>253</sup> Part III of the Land Act Cap 227.

<sup>254</sup> Part IV of the Land Act .Cap 277.

The developer, with or without the assistance of the land supervisor, identifies the land suitable for development and completes an application form, which he submits to the District Land Board, through the Town Clerk's office, for consideration.<sup>255</sup> After a decision to allocate is made, a certificate of allocation is issued. The developer can then process a lease or transfer title depending on the type of control of land acquired. This process generally takes two to three months.<sup>256</sup>

Over 1000 square miles of land have been allocated by the government to investors under special economic zone.<sup>257</sup> The rationale behind this is to attract more FDI into Uganda. Uganda has also stepped up in as incentives to investors is concerned as shall be witnessed below.

### **3.3.2.2 Tax and fiscal incentives for attracting foreign direct investment**

The Minister of Finance, under section 14 of the Finance Statute 1997, repealed section 25 of the Investment Code 1991 which provided for a 3-to- 6-year tax holiday, and proposed a new incentive regime to replace the tax holiday facility.<sup>258</sup> The new incentive regime is specified in the Income Tax Act, 1997, in sections 28 to 34, 36, 37 and 168.<sup>259</sup> It should be noted that, under section 39 of the Income Tax Act 1997, regarding Carry Forward Losses, an assessed loss arising out of company operations, including the loss from the investment allowance, will be carried forward and allowed as a deduction in determining taxable income in the following year.<sup>260</sup> The loss carry forward will continue until the company posts profits.<sup>261</sup>

National treatment In general, the Investment Code 1991 and the Income Tax Act 1997 provide for benefits that accrue to all investors.<sup>262</sup> However, there are exceptions; the Code and some other sectoral legislation allow for restrictions, including the recently enacted land legislation the Land Act that permits foreign investors to hold leasehold but not freehold land title, and the fulfilment of certain performance requirements in order to obtain an investment

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<sup>255</sup> Part IV of the Land Act Cap 227.

<sup>256</sup> Part IV of the Land Act Cap 227.

<sup>257</sup> Investment Guide to Uganda.(2004) at 58.

<sup>258</sup> Brief guide to Investing in Uganda (2006) at 8-9.

<sup>259</sup> The Income Tax Act Cap 340 Laws of Uganda (Thereafter the Income Tax Act the Act Cap 340) available at [www.ura.go.ug/openFile.do?path=//...Tax\\_Laws...pdf](http://www.ura.go.ug/openFile.do?path=//...Tax_Laws...pdf) (accessed on 2/April/2013).

<sup>260</sup> Section II of the Income Tax Act Cap 340.

<sup>261</sup> Section III of the Income Tax Act Cap 340.

<sup>262</sup> Section III of the Income Tax Act Cap 340.

license.<sup>263</sup> The Investment Code may allow for other distinctions in the treatment of foreign and domestic investors. In practice, however, these have been of little relevance so far.<sup>264</sup>

Uganda has made real progress in reforming key policies that affect the business climate for both foreign and local investors.<sup>265</sup> To this end, it is also undertaking a comprehensive modernization of commercial law. In keeping with the overall update of the legal framework, the Uganda Law Reform Commission is spearheading a review of all major commercial laws.<sup>266</sup> The review process, carried out in consultation with the private sector, has found no major gaps in the current laws, just a need to fine-tune them.<sup>267</sup>

Uganda also has an open-door policy with respect to imports. Most goods are importable into Uganda from any country in the world.<sup>268</sup> Restrictions are placed only on imports of narcotic drugs, arms and ammunitions, and other dangerous substances, in keeping with international practice.<sup>269</sup>

Uganda's tariff scheme is simple. Goods sourced from outside the EAC and COMESA is charged a duty of 7 or 15% depending on the category of the goods imported. On the other hand, goods sourced from within the EAC and COMESA attracts import duty of 4 or 6%, again depending on the category they fall in. Most value-added goods are also subject to a VAT of 17%.<sup>270</sup> A few value-added imports are also charged an average of 10% in excise duty. However, the situation is likely to change once the negotiations on the protocol for the establishment of the East African Customs Union and its Annexes are completed in 2020.<sup>271</sup> As we wait and see what happens in 2020 when the annexes of the EAC protocol are completed, it should be noted that when it comes to dispute settlement in Uganda the process is smoother and faster than the one of Kenya discussed earlier as shall be explained here under,

### 3.3.2.3 Dispute settlement

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<sup>263</sup> Section IX of the Income Tax Act Cap 340.

<sup>264</sup> Part IV Uganda Investment Code Act Cap 92.

<sup>265</sup> Brief guide to Investing in Uganda.

<sup>266</sup> Investment Guide to Uganda (2004) at 57.

<sup>267</sup> The Uganda Investment Code Act Cap 92.

<sup>268</sup> Brief guide to Investing in Uganda (2012) at 30.

<sup>269</sup> Part VII of the Value Added Tax (Amendment) Act 2005 (thereafter Value Added Tax (Amendment) Act 2005 of 2005) available at [www.icnl.org/research/library/files/Uganda/VATAmendment.pdf](http://www.icnl.org/research/library/files/Uganda/VATAmendment.pdf) (accessed on 02/April/2013).

<sup>270</sup> Part II of the Value Added Tax (Amendment) Act 2005.

<sup>271</sup> Doing Business in Uganda (2012) at 20.



The Investment Code permits international arbitration in a manner mutually agreed on by the parties. In addition, Uganda has entered into some investment agreements providing an automatic right to the nationals of treaty States to have recourse to international arbitration in the event of a dispute with the Government.<sup>272</sup> The Centre for Arbitration and Dispute Resolution (CADER), created for the settlement of local disputes, is now operational. As already mentioned, Uganda is a signatory to the International Convention on the Settlement of Investment Disputes (ICSID).<sup>273</sup>

Uganda has been looked at as a big sister to Rwanda, this mainly because Uganda played a big role in seeing to it that Rwanda becomes a member of the EAC. Rwanda has also looked up so much toward Uganda in as far as economic growth is concerned. However despite this sister relationship, Rwanda has emerged as one of the fastest growing economies in the EAC, and this is attributed numerous structural reforms it has put in place as shall be discussed below. And the rationale behind this is to attract more FDI in flows into the country.

### **3.3.3 Legal and Regulatory Framework of Foreign Direct Investment in Rwanda**

The legal system of Rwanda derives, historically, from the French/Belgian civil law tradition. Since July 1994, there has been a gradual introduction of the Anglo-Saxon common law system. The advent of the common law system is attributed to Rwandans returning from exile in neighbouring countries (e.g., Uganda) that follow the common law system and the impending accession to the EAC. Rwanda's current system is thus a hybrid that combines both civil and common law features.<sup>274</sup>

Much legal reforms are currently taking place. The law on income tax, customs and VAT became operative in June 2006.<sup>275</sup> Several other major bills are currently before Parliament, including the Public Procurement Bill, the Intellectual Property Rights Law, the law establishing the Rwanda Registration Services Agency, and the Law on the Accountancy Profession. The last two of these have been adopted by the Cabinet. The law on mining and that on insurance have been drafted and are awaiting approval by Cabinet before being sent to parliament for enactment. The Banque Nationale du Rwanda (BNR) is reviewing the current laws on Banking with assistance from the International Monetary Fund. A national steering committee established by cabinet is currently working with consultants from the World Bank

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<sup>272</sup> Part V of the Uganda Investment Code Act Cap 92.

<sup>273</sup> The trade Disputes and settlement Act Cap 244 Laws of Uganda.

<sup>274</sup> Investment guide to Rwanda (2006) at 43.

<sup>275</sup> The Income tax Act 1995 Regulation 2001.



to prepare the financial-sector development plan. The Government has set up a Business Law Reform Commission, drawing on both the private and the public sectors, which is focussing on some key areas of legislation. By April 2007, fourteen bills were prepared by the Commission.<sup>276</sup> The current policy is intended to spur economic growth, as outlined in the document Vision 2020. All sectors are open to foreign investment.<sup>277</sup>

In Rwanda, it should be noted that the Minister of Commerce, Industry, Investment Promotion, Cooperatives and Tourism are all under one ministry and are responsible for most matters relating to investment, while the Minister for Finance and Economic Planning handles fiscal, monetary and related matters.<sup>278</sup> It is a different case from Uganda and Kenya that were looked at above. In other instances, the regulatory authorities issue rules to cover particular aspects within their jurisdiction.<sup>279</sup>

The Law Governing Commercial Establishments, the Investment Law, the Law on Privatization and Public Investment, Land Law, and the Law on Protection and Conservation of the Environment are the main laws governing investment in Rwanda.<sup>280</sup> However some laws await enactment and these include those on public procurement, on privately financed infrastructure projects, on insurance and on mining.

They are also various forms of legal incorporation of business enterprises in Rwanda these include: Limited liability companies (private and public Partnerships; Sole proprietorships; and Cooperatives. It should be noted that limited liability companies are the entities most favoured by foreign investors,<sup>281</sup> this is mainly because they offer advantages similar to those offered by corporate bodies in other countries. A shareholder's liability for any deficiency on winding up is restricted to issued and called-up capital on the shares issued to the investor. Shares may also be transferred without affecting the continuity of the business.<sup>282</sup>

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<sup>276</sup> Investment guide to Rwanda (2006) at 44.

<sup>277</sup> Investment guide to Rwanda (2006) at 45.

<sup>278</sup> Investment guide to Rwanda (2006) at 46.

<sup>279</sup> Investment guide to Rwanda (2006) at 47.

<sup>280</sup> Rwanda Development Board available at [www.rdb.rw/.../investment/investment-opportunities.html](http://www.rdb.rw/.../investment/investment-opportunities.html) (accessed on 3/Aril/2013).

<sup>281</sup> Article 8 of Law No.07/2009 of 27/04/2009 relating to companies (thereafter Law No.07/2009 of 27/04/2009) available at [www.wipo.int/wipolex/en/details.jsp?id=10856](http://www.wipo.int/wipolex/en/details.jsp?id=10856) (accessed on 03/April/2013).

<sup>282</sup> Article 9 of Law No.07/2009 of 27/04/2009

A new investment law, on investment and export promotion and facilitation, which came into force in March 2006, was intended to assist investors in obtaining the necessary licences and by providing other assistance and incentives alongside the existing ones.<sup>283</sup>

The principal features of the law include the following: The law defines foreign investor and local investor and specifies that the former shall qualify for an investment certificate with an investment of \$250,000 and the latter \$100,000.<sup>284</sup> The law provides for free economic zones of three kinds: export-processing zones, single enterprise export-processing zones and free trade zones.<sup>285</sup> The rationale for these features is to increase foreign direct investment inflows in the region.

A one-stop centre is also established at the Rwanda Investment and Export Promotion Agency, composed of officials from the Rwanda Revenue Authority, the Ministry of Justice, the Ministry of Labour, and the Department of Immigration and Emigration, among others. In the performance of their duties, these officials are to be answerable to RIEPA.<sup>286</sup> The rationale for this is to ease doing of business in Rwanda.

The provisions on fiscal incentives have been moved to the new law on customs and the new law on income tax but maintained as annexes to the investment law, for ease of reference.<sup>287</sup> The law provides special non-fiscal incentives for investors who invest \$500,000 in one step.<sup>288</sup> These include permanent residence, citizenship and access to land.<sup>289</sup> RIEPA is required to make and communicate its decision regarding an investment certificate within 10 working days after receiving a complete application. Should RIEPA fail to act within 10 days, the investor may complain to the Minister of Commerce who is in turn required to investigate the matter and communicate his/her decision within 5 working days.<sup>290</sup> The law also states that the holder of an investment certificate is entitled to certain benefits.<sup>291</sup> These benefits are also extended to land acquisition as shown below.

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<sup>283</sup> Investment guide to Rwanda. (2006) at 48.

<sup>284</sup> The Rwanda Investment Code Law N 14/98 of 18/12/1998 Establishing the Rwanda Investment Promotion Agency. (thereafter the Rwanda Investment Code Law N 14/98 of 18/12/1998).

<sup>285</sup> The preamble of the Rwanda Investment Code Law N 14/98 of 18/12/1998 .

<sup>286</sup> The Rwanda Investment Code Law N 14/98 of 18/12/1998.

<sup>287</sup> Investment guide to Rwanda (2006) at 49.

<sup>288</sup> Investment guide to Rwanda (2006) at 50.

<sup>289</sup> Investment guide to Rwanda (2006) at 51.

<sup>290</sup> An Investment guide to Rwanda (2006) at 52.

<sup>291</sup> Immigration issues, work permits, customs, and notary office/company registry. The establishment of the Centre has dramatically reduced the time required to complete a variety of procedures. For example, the company incorporation process used to take at least 21 days; it now takes three. Project evaluation and

### 3.3.3.1 Land acquisition

The law on land is the Organic law No 08/2005 of 14 July 2005 which determines the use and management of land in Rwanda. It repeals several legal instruments which governed land before its enactment.<sup>292</sup>

It also covers all land, including that previously governed by custom. The law is very recent and many of the implementing regulations are not yet in force. In addition, the land registry provided for by the law is up and running. The following are some of the most important developments which have been introduced by the new law, with main emphasis of easing business in Rwanda.

Although the new law retains the legal principle that ownership of land is vested in the Government, it gives every occupant of land, whether the land is acquired through custom or allocated by the Government, a right to a long-term lease of up to 99 years.<sup>293</sup> The law also extends property rights beyond such things as buildings and crops. Title may be held even without any development on the land. With a title, it will be possible for the holder to use land as collateral for a loan, bequeath it to his/her descendants, donate it or sell it.<sup>294</sup> This is important because it makes land on its own very valuable. What is actually bequeathed or sold is the title to the long term lease.

The new land law envisages registration of all land, although land registries are yet to be set up in all districts of Rwanda a few in the capital Kigali are operating. The new law also guarantees the rights of land-owners.<sup>295</sup> They cannot be arbitrarily evicted. In cases of expropriation it's a requirement that, adequate compensation is to be paid to the effected persons.<sup>296</sup>

The net result of all this is to make property rights in land predictable. With assistance from RIEPA, foreign investors can now obtain land and title with relative ease. Most local and foreign investors involved in extensive agricultural projects easily acquire land titles.

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processing took 14 days before the Centre was set up; it too now takes three days. Business visas and work permits can now be issued in one hour, rather than in one to four weeks.

<sup>292</sup> Organic law No 08/2005 of 14 July 2005. (hereafter Organic law No 08/2005 of 14 2005).

<sup>293</sup> Article 5 of the Organic law No 08/2005 of 14 2005.

<sup>294</sup> Article 34-38 of the Organic law No 08/2005 of 14 2005.

<sup>295</sup> Article 30-32 of the Organic law No 08/2005 of 14 2005.

<sup>296</sup> Article 54-59 of the Organic law No 08/2005 of 14 2005.

The land policy in Rwanda differs from Kenya and Uganda as already discussed above. However one thing that all the three states have in common is they have endeavoured to ease land acquisition for investors. The rationale behind this is to see to it that the investors do not get confused with the unfamiliar land policies in the different member states. This brings us to our next issue.

### **3.3.3.2 Tax and fiscal incentives for attracting foreign direct investment**

Taxation is one of the most important factors that foreign investors consider when deciding whether to invest in a country or not. A country like Rwanda has a number of tax policies in place that are supposed to be meant by both foreign and local investors in the country. And some of these include corporate tax, which has been reduced from 35% to 30% to harmonize them with those of the EAC. There is also a fiscal year in place to guide tax payers and, it follows the calendar year. A taxpayer wishing to use another date must apply to the Minister of Finance and Economic Planning for permission. Enterprises whose turnover is less than or equal to Rwandan Franc (Rwf) 20 million pay a lump sum tax of 4% of annual turnover.<sup>297</sup>

There is also a tax law, No. 16/2005 of 18 August 2005 on direct taxes and income, which is good news for low-income earners but not for high income earners. The removal of the exemption of 20% of total remuneration means that all those earning more than Rwf 212,500 p.m. will pay more tax.<sup>298</sup> The EAC Customs Union Protocol, which came into force in January 2005, also provides for a three-band external tariff: 0% for raw materials, 10% for intermediate goods and 25% for finished goods.<sup>299</sup> This directly affects Rwanda since it is a member of the EAC.

When Rwanda was in the process of joining the EAC, it underwent through numerous law reforms. Among these was their tax regime. These tax reforms have enabled Rwanda emerge as one of the most favourable FDI destinations in the region.

This brings us to our next issue of dispute settlement resolution, which does not differ much from its partners in the EAC.

### **3.3.3.3. Dispute resolution**

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<sup>297</sup> Investment guide to Rwanda (2006) at 52.

<sup>298</sup> Tax law No. 16/2005 of 18 August 2005.

<sup>299</sup> Part F of The East African Customs Union Protocol available at [www.eac.int/index.php?option=com\\_docman&task=doc](http://www.eac.int/index.php?option=com_docman&task=doc) (accessed on 12/April/2013).

Most disputes in Rwanda are resolved through litigation in court. At the moment, there is a specialized commercial court that handles trade disputes and other related cases.<sup>300</sup> Arbitration and alternative methods of dispute resolution are fairly developed but not actively used, despite the fact that the code of civil, commercial, labour and administrative procedures provides for arbitration.<sup>301</sup>

An Arbitration Centre was created in 1998 as a non-governmental organization with the mission of settling all commercial disputes. Evaluation of the performance of the centre so far has revealed that it has not done as well as initially envisaged. The Government has now adopted a policy of encouraging the formation of more arbitration centres. A Law on Arbitration and Conciliation is in place to provide a legal framework for improving arbitration and alternative dispute resolution in general. The resolution of business disputes has also become easier with the establishment of the Kigali International Arbitration Centre (KIAC).<sup>302</sup> Rwandan courts would, as a general rule, recognize a governing-law clause in an agreement that provides for foreign law. However, the selection of such a law must be real, genuine, bona fide, legal and reasonable. A Rwandan court would not give effect to a foreign law if the parties intend to apply it in order to evade the mandatory provisions of a Rwandan law with which the agreement has its most substantial connection and which, for this reason, the court would normally have applied.

There have been few investment disputes in Rwanda and the Government has never been involved as a complainant or respondent in dispute settlement under the auspices of the World Trade Organization (WTO). The country has been a member of the Multilateral Investment Guarantee Agency (MIGA), which provides guarantees against non-commercial risks, since 1989. It is also a member of the International Centre for the Settlement of Investment Disputes (ICSID), associated with the World Bank, and a founding member of the African Trade Insurance Agency (ATI).<sup>303</sup>

The Rwandan legal system is quite flexible on exit options, which are normally determined by the agreement the investor has with other investors in the project.<sup>304</sup> The Law on Commercial Enterprises provides for procedures for both voluntary and compulsory winding-

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<sup>300</sup> Investment guide to Rwanda (2006) at 53.

<sup>301</sup> Investment guide to Rwanda (2006) at 54.

<sup>302</sup> Kigali International Arbitration Centre available at [www.newtimes.co.rw/news/views/article\\_print.php?14301&a](http://www.newtimes.co.rw/news/views/article_print.php?14301&a) (accessed on 12/April/2013).

<sup>303</sup> Multilateral Investment Guarantee Agency the World Bank Group available at [www.miga.org/whoweare/index.cfm?stid=1789](http://www.miga.org/whoweare/index.cfm?stid=1789) (accessed on 12/April/2013).

<sup>304</sup> Investment guide to Rwanda (2006) at 55.

up processes.<sup>305</sup> The process in both cases is unfortunately very time-consuming and this is one of the areas legal reform is expected to focus on. Note, however, that no investor has failed to divest when the investor wished to do so.<sup>306</sup> This clearly indicates that the main intention behind these reforms is to make the investment climate more favourable for FDI in the region. That is why members like Burundi have embarked on a number of ambitious programmes and reforms as far as investment is concerned to see to it that they equally scoop as much FDI as shall be discussed below.

### **3.3.4. The regulatory framework of foreign direct investment in Burundi**

Since the mid-2000s, Burundi has under taken a number of programmes of stabilization, national reconciliation and economic reforms. In addition, the government has launched a programme of withdrawal of the state from various economic activities and an opening up of the economy to private investment, including FDI. Although FDI inflows are still very limited, opportunities exist, prompted by the country's integration into the EAC. FDI attraction is now part of Burundi's development strategy and the country intends to use it to stimulate economic growth.<sup>307</sup>

A new Investment Code came into force on 1 January 2009. This Code is the result of a revamp of the 2003 business regulatory framework aimed at improving existing business law and promoting investment and the private sector.<sup>308</sup>

The Code is applicable to both foreign and domestic investors.<sup>309</sup> One of the major advances consists the fact that all investments are now subject to common law procedures, guarantee conditions and advantages of the general scheme instead of the complex old system which provided four licensing regimes.<sup>310</sup> The new code also provides more guarantees to foreign investors in particular with respect to expropriation, the guarantee of transfer of capital and access to international arbitration as shall be discussed below. The Code also takes into account the specific regime for investments in free zones.<sup>311</sup>

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<sup>305</sup> Doing Business in Rwanda World Bank Group 2013 at 34 available at [www.doingbusiness.org/data/exploreeconomies/Rwanda/](http://www.doingbusiness.org/data/exploreeconomies/Rwanda/) (accessed on 12/April/2013).

<sup>306</sup> Investment guide to Rwanda (2006) at 56.

<sup>307</sup> Investment guide to Burundi (2012) at 2.

<sup>308</sup> Law No. 1/24 of 10 September 2008 Establishing the Investment Code of Burundi (thereafter Law No. 1/24 of 10 of 2008) available at [www.investburundi.com/.../Investment%20Code%202008%20](http://www.investburundi.com/.../Investment%20Code%202008%20) (accessed on 13/April/2013).

<sup>309</sup> Article 6 of Law No. 1/24 of 10 2008.

<sup>310</sup> Title 1 of Law No. 1/24 of 10 2008.

<sup>311</sup> Article 16 of Law No. 1/24 of 10 of 2008.



The new Burundian Investment Code also grants to investors guarantees and advantages of the General Scheme (freedom of establishment of capital guaranteed property to any person without any discrimination, free transfer of foreign capital and revenues); it also prohibits any nationalisation and expropriation of the investments made in the Burundian territory, thus any measures of equivalent scope, tax credit for investments by enterprises newly created without prior approval; the new code also simplifying existing legislation and harmonizing legislation in the EAC (Kenya, Uganda, Tanzania and Rwanda); Creation of Investments Agency (API), whose main missions are promotion of investment and export.<sup>312</sup>

The Investment Code is based on a very open and liberal policy for the entry and establishment of FDI, and contains no restrictions. Freedom of investment and establishment applies to all persons or entities and for all activities except for those involved in the production of weapons and ammunitions, which are governed by specific laws.<sup>313</sup>

All economic sectors are open to foreign investment and no restrictions are exerted on foreign investments either in the Constitution, the Investment Code, the Commercial Code or other laws relating to investment.<sup>314</sup> In addition, the state monopolies that still exist, namely in the areas of landline telephony and electricity, are part of a privatization programme open to foreign investment.<sup>315</sup> Reforms are on-going in the telecommunications sector (specifically mobile telephony and privatization of landline telephony), electricity sector and recently the coffee sector as well. Before 2005, the Government retained an important role in the coffee sector but with the Decree 100/012 of 2005, all economic operators, national or international, enjoy freedom of establishment and operation in all parts of the chain of production, marketing, processing and export financing.<sup>316</sup>

The mining sector is also open to foreign investors.<sup>317</sup> The only restrictions present in article 19 of the investment code is that natural persons or legal entities active in mining are required to take up residence in Burundi.<sup>318</sup> Services are of strategic importance for Burundi and are not restricted to foreign investment.<sup>319</sup> However, Burundi has made very few commitments under the General Agreement on Trade in Services of the World Trade Organization

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<sup>312</sup> Article 18 of Law No. 1/24 of 10 2008.

<sup>313</sup> Article 3 of Law No. 1/24 of 10 2008.

<sup>314</sup> Article 2 of Law No. 1/24 of 10 2008.

<sup>315</sup> Investors guide to Burundi (2012) at 5.

<sup>316</sup> Article 2 of Law No. 1/24 of 10 2008.

<sup>317</sup> Investors guide to Burundi (2012) at.5.

<sup>318</sup> Article 19 of Law No. 1/24 of 10 2008.

<sup>319</sup> Article 2 of Law No. 1/24 of 10 2008.



(WTO).<sup>320</sup> The commitments made by the sector in Burundi relate to construction services and related engineering, distribution, health and social services, those relating to tourism and travel, and some business services.<sup>321</sup>

The common law also applies to the establishment of investors and the act of investing is not subject to any particular formality of approval or authorization.<sup>322</sup> The new Investment Code provides that the creation or expansion of a business should follow the law requirements established in the Code of Private and Public Enterprises and the Commercial Code.<sup>323</sup>

The incorporation of a company is subject to the settlement formalities, signing of the statutes, deposit of the capital, the authentication of statutes and acts, registration and official publication.<sup>324</sup> Additionally, the Commercial Code provides further requirements for business registration with the Commercial Court and other conditions for the presentation of information.<sup>325</sup> The new Code of private and public companies provides in article 14 that foreign enterprises that do not register a company in Burundi can also establish a branch office or an agency with the same rights and conditions of a Burundian company.<sup>326</sup> Under the provisions of the Commercial Code, investors can choose various legal forms of incorporating their companies in Burundi, such as: 1. Private Limited Company 2. Public Limited Company 3. Limited Liability Company 4. Cooperative Society.<sup>327</sup> Minimum shareholders required: From two to fifty (2 to 50) Minimum three (3) for a limited company (member of the Board of the SA must have at least a share of the company). One (1) for a Limited company (a Limited company cannot be the sole shareholder of a company. minimum two (2) for the cooperative society.<sup>328</sup>

As observed above most of the laws in Burundi still follow the colonial approach and land acquisition is not an exception as shall be discussed below.

### **3.3.4.1 Land Acquisition**

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<sup>320</sup> Investors guide to Burundi (2012) at 5.

<sup>321</sup> Investors guide to Burundi (2012) at 3.

<sup>322</sup> Burundi Investment promotion Authority (thereafter Burundi Investment Promotion Authority) available at [www.investburundi.com/applicable-sectors](http://www.investburundi.com/applicable-sectors) (accessed on 13/April/2013).

<sup>323</sup> Investors guide to Burundi (2012) at 5.

<sup>324</sup> Investors guide to Burundi (2012) at.6.

<sup>325</sup> Burundi Investment promotion Authority at 12.

<sup>326</sup> Article 14 of Law No. 1/24 of 10 2008.

<sup>327</sup> Burundi Investment promotion Authority at 15.

<sup>328</sup> Burundi Investment promotion Authority at 17.

In terms of land ownership, it is governed by the law 1/008 of 1986(Land Code).<sup>329</sup> The Land Code takes the colonial approach that favoured the dual method of statutory and customary law to classify land.<sup>330</sup> The use of these two systems is therefore the source of many inconsistencies and ambiguities. Recognizing this problem, the Ministry of Environment, Physical Planning and Public Works prioritized security of land tenure, land registration and the definition of tenure. In this sense, the Department initiated a comprehensive reform of the sector. A draft reform of the Land Code has recently been put forward providing simplified acquisition and land registration procedures (for urban land, intensively managed land and wetlands) that will allow a unification of the two existing regimes.<sup>331</sup>

Foreigners or physical persons enjoy the same rights and protection as nationals; A few restrictions related to the right of foreigners to purchase property in full ownership exist.<sup>332</sup> However, if a commercial business is registered under Burundian law, the latter becomes Burundian and thus this distinction becomes no longer applicable; Land for agriculture or livestock can be assigned to them only in terms of concessions for emphyteusis or use; Different procedures for the acquisition of excite regarding whether they belong to the public or private domain.<sup>333</sup>

As already witnessed from the other member state countries there is no difference in protection of investor's property. This is also not different for Burundi as indicated below.

#### **3.3.4.2 Tax and fiscal incentives for attracting foreign direct investment**

Burundi has a number of taxes as other EAC member states and some of these include, Income tax, general tax on companies which is 35%, Income tax on companies which have registered a loss that is 1% turnover. Withholding tax at the source dividend of 15%.<sup>334</sup>

It should be noted that all new investments in Burundi are automatically entitled to; Waiving of mutation on the acquisition of property rights and land Deduction of 37% as tax credit on the amount of depreciable invested good. No refund are offered to the fiscal administration with disposed assets that raised tax credit for a period of five years, Tax credit during the implementation of investments for new businesses or for the extension of existing

<sup>329</sup> Preamble law 1/008 of 1986(Land Code).

<sup>330</sup> Burundi Investment promotion Authority.

<sup>331</sup> Article 8 of law 1/008 of 1986(Land Code).

<sup>332</sup> Burundi Investment promotion Authority at 25.

<sup>333</sup> Burundi Investment promotion Authority at 27.

<sup>334</sup> BURUNDI - Africa Legal Network available at [www.africalegalnetwork.com/wp.../Investment-Guide-Burundi.pdf](http://www.africalegalnetwork.com/wp.../Investment-Guide-Burundi.pdf) (accessed on 13/April/2013).

businesses.<sup>335</sup> Reduction of 2 % and 5% in the rate of tax credit on the profits of companies that respectively employ between 50–200 employees and over 200 employees are available. The rationale for this is to encourage employment.<sup>336</sup>

Burundi also has quota and duty-free access to major international markets (such as the European Union (EU) and the United States (US)).<sup>337</sup> Burundi also enjoys free access to regional African markets through its membership of various regional economic communities such as Economic Community of Central African States (ECCAS), the Common Market for Eastern and Southern Africa (COMESA) and the (EAC).<sup>338</sup> Burundi is a member of various international organizations and for as such as the United Nations and the African Union, and has been and continues to be supported by the European Development Fund, World Bank, IMF, African Development Bank, and others.<sup>339</sup>

Performance requirements or incentives are applied fairly and uniformly to both international and domestic investors. To encourage investment Burundi applies investment incentives to both international and domestic companies in the form of income tax deferrals, and exemption from import and export duties as noted above.<sup>340</sup> To qualify for these incentives, however, the investor must meet special requirements concerning the size of the investment, the number of jobs created, and the location of the business. For example, a business may be granted extra incentives to locate and invest in rural areas.<sup>341</sup> There is no general requirement that the business purchase goods from local sources. An exception is made, though, for companies licensed for export only which operate in the Free Economic Zone (FEZ). Companies which take advantage of FEZ tax incentives are required to purchase goods in Burundi, where possible.<sup>342</sup>

There is no requirement that Burundian nationals own shares in the foreign investment, or that technology be transferred to Burundian entities over the time of the investment.<sup>343</sup> The share of the foreign-owned equity in the investment need not be reduced over time. No

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<sup>335</sup> Burundi Africa Legal Network [www.africalegalnetwork.com/wp.../Investment-Guide-Burundi.pdf](http://www.africalegalnetwork.com/wp.../Investment-Guide-Burundi.pdf) (accessed on 13/April/2013).

<sup>336</sup> Burundi Investment promotion Authority at 50.

<sup>337</sup> Investors guide to Burundi (2012) at 8.

<sup>338</sup> Burundi Investment promotion Authority at 51.

<sup>339</sup> Investors guide to Burundi (2012) at 10.

<sup>340</sup> Investors guide to Burundi (2012) at 4.

<sup>341</sup> Burundi Investment promotion Authority at 52.

<sup>342</sup> Burundi Investment promotion Authority at 53.

<sup>343</sup> Investors guide to Burundi (2012) at 5.

"offset" requirements, whereby major procurements are approved only if the foreign supplier invests in items related to the host country, are required.<sup>344</sup>

Burundi also does not impose conditions on permission to invest, except for companies that apply for special incentives, such as specialized tax advantages embedded in the Investment Code.<sup>345</sup> The Government of Burundi does not impose enforcement procedures on companies, and investors are not required to disclose proprietary information to the government as part of the regulator process. Burundi does not impose any discriminatory or excessively onerous visa residence, or work permit requirements that would hinder a foreign investor's mobility, or operate tariff barriers that would constitute preferential or discriminatory export or import policies.<sup>346</sup>

It should be appreciated that each EAC member state tax incentives differ greatly. This is dependent on each state and the factors that sound it. As already noted member states that are land locked that is Rwanda, Uganda and Burundi carefully allocate their incentives, this is mainly because since they are land locked their economies mainly depend domestic tax. This is not the position of Kenya and Tanzania as shall be witnessed when we discuss Tanzania.

### **3.3.4.3 Dispute settlement**

Burundi's judicial system upholds the sanctity of contracts. In case of a dispute involving foreign interests, a Centre for Arbitration and Mediation have been established by the Government to handle such issues.<sup>347</sup> Additionally the plaintiff has the option of referring its complaint to either national courts or an international arbitration.<sup>348</sup>

The challenge for Burundi to attract significant FDI inflows is considerable. However, the country has made a promising start by creating the appropriate conditions for attracting FDI and for having it contribute to reconstruction and economic growth. Investment promotion and facilitation will require continuous and coherent efforts from the government, coordinated at the national level and supported by an active and sustainable assistance from the EAC.

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<sup>344</sup> Burundi Investment promotion Authority at 55.

<sup>345</sup> Investors guide to Burundi (2012) at 6.

<sup>346</sup> Burundi Investment promotion Authority at 58.

<sup>347</sup> Investors guide to Burundi (2012) at 21.

<sup>348</sup> Investors guide to Burundi (2012) at 45.

Like any other EAC member state, Tanzania has also taken centre stage to see to it that it creates an environment that is conducive for FDI as shall be observed below.

### **3.3.5. Legal and Regulatory Framework of Foreign Direct Investment in Tanzania**

Tanzania embarked on major economic reforms in the mid-1990s with the aim of liberalizing the economy and making it more business-friendly. The Tanzania Investment Act No. 26 of 1997 is the main act guiding investment activities.<sup>349</sup>

The Tanzania Investment Centre (TIC) is the one stop shop for handling all investment issues in mainland Tanzania. It was created under the Investment Act of 1997, replacing the earlier Investment Promotion Centre (IPC), and is well regarded by investors.<sup>350</sup> The principal role of the TIC is investment facilitation – that is, to help investors obtain the authorizations, approvals, registrations and licences needed to operate their businesses in the country.<sup>351</sup>

The TIC's role includes providing guidance to investors on setting up businesses in the country and obtaining work permits and visas. It has officers from relevant government departments – the Lands Department, the Labour Division, the Revenue Authority, the Directorate of Trade and the Business Registration and Licensing Agency seconded to it to support its facilitating role.<sup>352</sup> Facilitation services include incorporating or registering business enterprises, advising on tax matters and processing tax exemptions, processing business licences and processing immigration permits.<sup>353</sup>

Incorporation of companies in Tanzania is done under the Company's Ordinance Chapter 2002.<sup>354</sup> Investors wishing to establish a limited liability company must first clear the name for the proposed company before filing an application with the Business Registration and Licensing Agency (BRELA).<sup>355</sup> To register a company with BRELA, investors must file an application with the appropriate registration fees (denominated in dollars in the case of foreign investors and Tanzania shillings in the case of local investors), the proposed name of the company, certified copies of the Memorandum and Articles of Association (MEMARTS), a notice of the situation of the registered office in the country of domicile and a list of the

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<sup>349</sup> The Tanzania Investment Act No. 26 of 1997.

<sup>350</sup> Part II of the Tanzania Investment Act No. 26 of 1997.

<sup>351</sup> Investment guide to Tanzania (2005) at 51.

<sup>352</sup> Investment guide to Tanzania (2005) at 49.

<sup>353</sup> Section 6 of the Tanzania Investment Act No. 26 of 1997.

<sup>354</sup> Preamble of the Tanzania Company's Ordinance Chapter 2002. (thereafter the Tanzania Company's Ordinance 2002).

<sup>355</sup> Part II of the Tanzania Company's Ordinance 2002.

directors of the company and persons resident in the country who are representatives of the company. BRELA will ensure that the company name has not been registered before and issue a Certificate of Compliance on being satisfied with the proposed name and MEMARTS.<sup>356</sup>

Foreign nationals are hence free to own any percentage of shares in locally registered companies. In private companies registered under the Companies Ordinance Chapter 2002, a shareholder wishing to dispose of his/her shares in such a company must give the first offer of refusal to existing shareholders before offering the shares to other parties.<sup>357</sup>

All enterprises also operating in Tanzania must register with the Business Registration and Licensing Agency (BRELA) under the Ministry of Industries and Trade and operate a business licence. The process varies in accordance with the entity being registered. The requirements include the presentation of duly completed TFN 221 forms (available from the TIC), along with the Certificate of Incorporation, a Tax Clearance from the Tanzania Revenue Authority (TRA), Residence Permits Class A or B (in the case of foreign investors) and proof of business premises.<sup>358</sup>

The process also includes an inspection of the premises by a Land and Health Officer to clear their suitability for the intended business. Resident Permits Class A are issued to self-employed foreigners (investors) with the Certificate of Incentives issued by the TIC.<sup>359</sup> The procedure for processing these permits is undertaken at the Immigration Services Department of the Ministry of Home Affairs and requires a covering letter from the applicant, six photographs, a curriculum vitae, educational certificates if applicable, company registration, Memorandum and Articles of Association (MEMARTS), evidence of business premises and sectoral approval from any relevant ministry. The application can be processed through the TIC.<sup>360</sup>

Resident Permits Class B are issued to employed foreigners and require a covering letter or letter of appointment, five photographs, curriculum vitae, academic qualifications (preferably copies of diplomas), job description for each individual expatriate, organizational structure of the company showing clearly the number and types of posts filled by or lined up for

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<sup>356</sup> Part II of the Tanzania Company's Ordinance 2002.

<sup>357</sup> Part II of the Tanzania Company's Ordinance 2002.

<sup>358</sup> Investment guide to Tanzania (2005) at 55.

<sup>359</sup> Section 17 of the Tanzania Company's Ordinance Chapter 2002.

<sup>360</sup> Section 19 of the Tanzania Company's Ordinance Chapter 2002.



expatriates, a letter of clearance from the Government, and membership certificates from local professional bodies such as those for engineers, lawyers and accountants. Foreign professionals are required to pass examinations set by the relevant local professional body, for example the Engineers Registration Board.<sup>361</sup>

The laws and regulations in Tanzania have been put in place to provide a legal framework conducive to the functioning of a market economy.<sup>362</sup> They include laws dealing with capital markets, mining investments, banking and financial institutions, land ownership, taxation, foreign exchange, petroleum exploration and development, and export-processing zones.<sup>363</sup> Tanzania is also a signatory to a number of bilateral treaties for the promotion and protection of foreign direct investment. Tanzania is also a signatory to the following regional and international treaties and organizations, among others: The South African Development Community (SADC), which includes countries in the southern African region, namely Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. The EAC, bringing together five countries in the East African region – Kenya, Tanzania, Rwanda, Burundi and Uganda.<sup>364</sup> The African, Caribbean and Pacific Group of States (ACP), under the fourth ACP-EEC Convention (Lomé IV) of 1989, signed in 1990, and the Partnership Agreement signed in Cotonou, Benin, on 23 June 2000.<sup>365</sup> It should be noted that the property rights and protection in Tanzania are not so different from its other EAC members however its important Tanzania member to ACP and this is mainly because of its geographic location. However this has not changed Tanzanian is commitments to the EAC and objectives of economic growth through increasing FDI inflows in the region.

### **3.3.5.1 Land acquisition**

Land Under section 4 (1) of the Land Act 1999 as amended, all land in Tanzania belongs to the State and is acquired for use through: Rights of occupancy granted by the government; derivative rights granted by the Tanzania Investment Centre; and Sub-leases created out of the rights of occupancy granted by the private sector.<sup>366</sup> Rights of occupancy are granted on both short and long terms, ranging from 5 to 99 years. The periods of derivative rights and

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<sup>361</sup> Section 19 of the Tanzania Company's Ordinance Chapter 2002.

<sup>362</sup> Investment guide to Tanzania (2005) at 46.

<sup>363</sup> Investment guide to Tanzania (2005) at 56.

<sup>364</sup> Investment guide to Tanzania (2005) at 53.

<sup>365</sup> Investment guide to Tanzania (2005) at 54.

<sup>366</sup> Section 4 (1) of the Land Act 1999 as amended Laws of Tanzania.



sub-leases range from 5 to 98 years. This clearly differs from other EAC member states land policy ,since the since the Tanzania investment centre has powers to allocate land ,which is not the case in the member states as already discussed above.

Tanzania has also signed a number of bilateral treaties on investment and on taxation and incentives as will be expounded on here below.

### **3.3.5.2 Tax and fiscal incentives for attracting foreign direct investment**

As elsewhere, taxes in Tanzania fall into two broad categories – direct and indirect taxes. Direct taxes corporate profit tax. A profit tax is levied on all businesses and calculated on the basis of either actual profit or estimated profit, depending on the tax regime applicable to the taxpayer.<sup>367</sup> Under the amended Laws on Investment and on Taxation adopted in July 2004, the tax on profits is 30% for all taxpayers resident and non-resident. The corporate tax for resident (i.e. locally incorporated) a company is the same in all five EAC countries, with a time-limited reduction for listed companies in Kenya. For non-resident companies, it is higher in Kenya but not in Tanzania, Rwanda, Burundi or Uganda.<sup>368</sup>

Indirect taxes are Import, excise duties, value-added tax (VAT) and suspended duties. They are the most important indirect taxes in Tanzania. The Customs Union Protocol of the EAC, which went into effect on 1 January 2005, has spelt out the rules and regulations that are to govern trade inside and outside the Community.<sup>369</sup> The member states have agreed on a three-band Common External Tariff (CET) of 0%, 10% and 25% for raw materials, intermediate goods and finished goods respectively. (In addition, there is a “sensitive list” of items on which tariffs higher than 25% may be charged.)<sup>370</sup> As for trade within the EAC, Tanzania, Rwanda, Burundi, and Uganda will levy declining tariffs on goods imported from Kenya over the next five years, after which intra-EAC trade is to be duty-free.<sup>371</sup>

Suspended duties ranging from 10% to 40% are imposed on selected products to address the problems of trans-shipment and dumping of substandard goods, and, more broadly, to protect local infant industries. Export duties are levied on only a limited number of items, such as

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<sup>367</sup> Investment guide to Tanzania (2005) at 55.

<sup>368</sup> IMF, Kenya, Uganda and United Republic of Tanzania: Selected Issues, 1 December (2006) at .10.

<sup>369</sup> Investment guide to Tanzania (2005) at 55.

<sup>370</sup> Investment guide to Tanzania (2005) at 56.

<sup>371</sup> ‘Investment incentives’, available at <http://www.tic.co.tz/> (accessed on 14/April/2013).

timber and certain animal products, including most seafood, to address environmental, biodiversity and conservation concerns.<sup>372</sup>

Value-added tax VAT was introduced on 1 January 1999. It is chargeable on a wide range of goods and services supplied in Tanzania and on the import of goods. The basic principle is to tax each stage of production, allowing each supplier credit for the tax paid, so that the ultimate impact is on the final consumer. Taxable items attract VAT either at the standard rate of 20% or at the zero rates. Zero-rating applies to the export of goods and services, and certain charges related to international transport. On imports, VAT is payable at 20% of the value of the import, including any customs duty, insurance and freight charges.<sup>373</sup>

Certificates of Incentives are also granted to foreign investors when the investment exceeds \$300,000 and to local ones when it exceeds \$100,000. A Certificate of Incentives provides official recognition to the investor and an entitlement to special incentives, depending on the sector in question.<sup>374</sup>

The time taken to process a Certificate of Incentives for investors who have submitted an application fulfilling the requirements for being granted the Certificate is 14 days from the date the application is received. In the case of mining and petroleum exploration and development, the TIC plays a limited role.<sup>375</sup>

Foreign investment policy in Tanzania is intended to steer the country away from a centrally planned economy and towards a market economy. Following the economic liberalisation measures adopted by Tanzania, all sectors are open to foreign investment. The incentives available to investors include: Unrestricted right to international arbitration in the case of disputes with the Government; Import duty drawbacks on raw materials; Zero-rated VAT on goods manufactured for export; Straight-line accelerated depreciation allowance on capital goods; Unrestricted right to repatriate profits and capital; Fast track to obtain other permits such as residence/ work permits and industrial and trading licences with the assistance of the TIC; Permission to employ five foreign expatriates upon following procedures laid down by the Immigration Department for the issuance of Residents' Permits; and Recognition by the

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<sup>372</sup> Tanzania Revenue Authority *Taxes and Duties at a Glance 2010/2011 Tanzanian Tax Guide* (2010) at 1.

<sup>373</sup> Tanzania Revenue Authority *Taxes and Duties at a Glance 2010/2011 Tanzanian Tax Guide* (2010) at 2.

<sup>374</sup> 'Corporate Tanzania: Business, Trade and Investment Guide (2010/2011) at 2. available at, [www.corporatetanzania](http://www.corporatetanzania) (accessed on 14/April/2013).

Tanzania Investment Centre, 'FAQ Related to Investing in Tanzania' available at <http://www.tic.co.tz/> (accessed on 14/April/2013).

<sup>375</sup> Tanzania Revenue Authority, *Taxes and Duties at a Glance 2010/2011*, p.2; PKF, *Tanzanian Tax Guide 2010* p.2.

Government, which helps to facilitate assistance needed from the Government.<sup>376</sup> The Government of Tanzania has taken a fore front in ensuring that it becomes one of the best investment destinations in the region. It has done this through the numerous incentives it was put in place so as to attract as much FDI as it can .It has also extended it to dispute settlement.

#### **3.3.5.4 Dispute settlement**

The legal and judicial system in Tanzania provides for the mediation of disputes. The Commercial Court of Tanzania was established in 1999 as a division of the High Court dealing with mediation and arbitration of disputes of a commercial nature.<sup>377</sup> There is also a Lands Division of the High Court dealing with land matters. Finally, the Industrial Court of Tanzania, an independent Court established under the Permanent Tribunal Act No. 41 of 1967, amended by Act No. 3 of 1990, handles labour disputes.<sup>378</sup>

As also one of the members of the MIGA, MIGA provides an umbrella of deterrence against government actions that could disrupt insured investments and helps resolve potential disputes to the satisfaction of all parties both of which enhance investor confidence in the safety of investments and encourage the flow of foreign direct investment. In order to prevent a potential claims situation from escalating, we provide dispute resolution services to all of our clients. In order to militate against the risk of loss in the case of investment disputes, it requires investors to notify MIGA as early as possible of difficulties with a host government that might give rise to a claim of loss under the guarantee. To date, MIGA has been able to resolve disputes that would have led to claims in all but two cases. It has paid four additional claims resulting from damage due to war and civil disturbment. This has made the EAC a favourable investment destination, since investors are certain that they will not be taken advantage of. And this has really boosted FDI inflows in the region.

### **3.4 Conclusion**

It's evident from the above discussion that all the East African states recognize the potential benefits of having a balance on FDI for the host economy and it's often substantial impact on economic growth. It can therefore be expected that the current national FDI laws of the EAC

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<sup>376</sup> 'Corporate Tanzania: Business, Trade and Investment Guide 2010/2011' available at [www.corporatetanzania.com](http://www.corporatetanzania.com). (accessed on 14/April/2013).

<sup>377</sup> Tanzania Investment Centre, 'FAQ Related to Investing in Tanzania' available at <http://www.tic.co.tz/> (accessed on 14/April/2013).

<sup>378</sup> Investment guide to Tanzania (2005) at 57.

member states which currently apply more FDI restrictive rules continue to periodically evolve towards less FDI hospitability. Uganda, Rwanda and Burundi are in the process of revising their commercial laws and it is hoped that the laws will be more liberal and friendly towards foreign direct investments. It can however be generally observed that the foreign investment laws of East African states are hospitable. Notwithstanding the principle of state sovereignty, it would be of great importance if the states had uniform investment laws as shall be discussed in the next chapter, and this process can begin with the adoption of the model investment Code that is in place and reviewing domestic legislations as shall be discussed in the next chapter.



## CHAPTER FOUR

### THE EAST AFRICAN INVESTMENT MODEL CODE 2002 VS THE INVESTMENT DOMESTIC LEGISLATIONS OF MEMBER STATES

#### 4. Introduction

In this chapter, emphasis shall be given to the model investment code of the East African Community (EAC) and the investment domestic laws of the member states member states of the EAC.<sup>379</sup> A concurrent comparative shall be made on the domestic legislation in the areas that have been excluded from FDI, the treatment and protection of foreigners, fiscal incentives and dispute settlement. The reason for looking at only those areas is mainly because ,they directly affect FDI inflows in the region and also there is still more need of reform to be done in those areas so as bring them in line with the EAC investment code hence making the road to harmonisation of trade in the EAC easy and faster. Hence the member states members whose foreign investment laws in the above mentioned areas are considered to be below standard recommendations shall be proposed here and expounded on more in chapter five.

#### 4.1. Exclusions of some sectors from foreign direct investment in the East Africa Community

The present section focuses on the part of East African member States FDI laws that prohibit investment in particular sectors of the economy or in specific circumstances. This is important to mention each member state has preserved certain sectors to local investors hence it's important to point out why this so. The scope of activities open to foreign investments varies substantially across national systems.<sup>380</sup> While in some East African countries foreign investors have the freedom to participate in virtually all economic activities, in others there can be an important number of circumstances or sectors or sub-sectors in which foreign investment is excluded.<sup>381</sup> Although the EAC member states are playing a various role as

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<sup>379</sup> The East African Investment Model Code July 2006.(hereafter the East African Investment Model 2006).

<sup>380</sup> Part I of the East African Model Investment Code 2006.

<sup>381</sup> Doing Business in the East African Community (2012) at 80.

discussed- in attracting foreign investors and even in sectors saved for local investors, the foreign investor still has an influence on its investment patterns.<sup>382</sup>

Virtually all legal systems, including those of the countries that are considered as having some of the most liberal and FDI hospitable countries in the World, do exclude foreign ownership in particular sectors or on specific grounds.<sup>383</sup> In countries characterized by a high level of hospitality towards FDI, such prohibitions are often limited to a significant extent to sectors or circumstances in which national security concerns, or at least superior national interests, are involved.<sup>384</sup> The latter can include sub-sectors in the energy industry with the objective of ensuring the provision of energy to the local population at all times.<sup>385</sup>

The EAC model Investment Code recognises in section 5 the sovereignty of every partner state and thus states that subject to compliance with the requirements of the laws of the member states, a foreign investor shall invest and engage in any business activity in the partner state which any local investor of a partner state may undertake.<sup>386</sup>

It is provided in section 10 (2) (a) of the Uganda Investment Code Act that “No foreign investor shall carry on the business of crop production, animal production or acquire or be granted or lease land for the purpose of crop production or animal production; but a foreign investor may provide material or other assistance to Ugandan farmers in crop production and animal production”.<sup>387</sup> However there are some companies in Uganda which are exempted from the application of this section by virtue of rule 2 of the Investment Code (Acquisition of Land by Foreign Investors) (Exemption) Instrument.<sup>388</sup> The rationale for the restriction may be attributed to the fact that the foreign investors would require large chunks of land and deprive the locals of the much needed land in the country, and the other reason being that the country is trying to diversify its economy from agriculture based to industries based by requiring that foreign investors invest in other ventures like industrialization.

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<sup>382</sup> Bos HC & Secchi C *Private Foreign Investment in Developing Countries*, (1974) at 36-37.

<sup>383</sup> IBRD Private Foreign Direct Investment in Developing Countries Working Paper No.149 (1973) at 9.

<sup>384</sup> *Doing Business in the East African Community* (2012) at 26.

<sup>385</sup> See generally Moran T H. & Graham E M *Does Foreign Direct Investment Promote Development? Institute for International Economics*, (2005).

<sup>386</sup> Bos HC & Secchi C *Private Foreign Investment in Developing Countries*, (1974) at 36-37.

<sup>387</sup> Section 10 (2) (a) of the Uganda Investment Code Act Cap 92.

<sup>388</sup> Statutory Instrument 92-1. The companies exempted are: Annamemi Agro-Products (U) Ltd, Channan Agricultural Company Ltd, Kibimba Rice Scheme Company Limited, Mukwano Industries Ltd, Nsimbe Estates Ltd, Rwenzori Highlands Tea Company Ltd and Tilda Uganda Ltd.

In the case of Kenya, Kenya Investment Authority may issue investment certificate in respect of any new business enterprise upon the application of any person proposing to invest in or establish that enterprise.<sup>389</sup> The second Schedule to the Act contains activities that a foreign investor may not invest in without getting a licence from the relevant department of the sector, they include; Petroleum operations, Tourism, Forest produce, Manufacture of excisable goods, Ferries, Manufacture under bond, Bank, Financial institution, mortgage finance company among others.<sup>390</sup> In Kenya like in Tanzania, a foreign investor can invest in virtually all sectors of the economy as long as he obtains the requisite licence as noted above.

In Rwanda foreign investors are also free to invest in any sector as there are no restrictions. It's provided in Article 20 of its foreign Investment law that "Subject to the provisions of this Law, foreign investors may invest and participate in the operation of any business in Rwanda."<sup>391</sup>

Although the provision is subject to other provisions in the law, one notes that there are no provisions in the law that restricts a sector of the economy to local investors. As long as the foreign investor can fulfil the other conditions to do with licensing, he can invest in any sector of the economy.<sup>392</sup> This has the effect of encouraging foreign investment into the country. However the citizens may be subjected to hardships in a situation where the foreign investor is investing in essential services and security related materials. The investor will be more concerned with the profit and as such may be forced to close abruptly at the time of loses and leave the citizens without the much needed essential services like water.<sup>393</sup>

Uganda unlike Kenya, Tanzania, Rwanda and Burundi excludes crop and animal husbandry sectors for foreign investment. The safe guarding of national interests, or even the sensitive character of the industry, as the justifying rationales of FDI exclusions generally warrants the host country's control over its economy, or avoiding or reducing possible negative impacts of certain FDI operations.<sup>394</sup> But in Uganda none of the FDI exclusions provided in the Uganda Investment Act are motivated by national security concerns. Thus, Uganda needs to open up its restricted sectors for foreign investments as long as the restrictions have no bearing to security concerns.

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<sup>389</sup> Section 4 of the Kenya Investment Promotion Act, 2004.

<sup>390</sup> Second schedule of the Kenya Investment Promotion Act, 2004.

<sup>391</sup> Article 20 of the Investment Code Law No 14/98 of 18/12/1998.

<sup>392</sup> An Investment Guide to Rwanda. (2006) at 50.

<sup>393</sup> An Investment Guide to Rwanda. (2006) at 50.

<sup>394</sup> Section 10 of the Uganda Investment Code Act Cap 92.



## **4.2 Foreign ownership and restrictions**

A distinction can be made between three broad kinds of foreign ownership restrictions: asset ownership restrictions in general, real estate acquisitions. The latter category could be conceptualized as including both restrictions on the ownership of equity as well as restrictions on the foreign decision-making power in a foreign direct investment entity.<sup>395</sup> The issue of national provisions favouring entities which meet certain requirements of minimum local ownership or control over entities that do not do so, is narrowly related with the issue of national treatment versus the favouring of local over foreign investors.

The application of the law on the foreign ownership of equity in a foreign investment entity can be applicable in general or only in specific sectors of the host economy.<sup>396</sup> In addition the percentage can vary, sometimes substantially, from one sector to another. Several national systems in which foreign equity ownership restrictions apply as a general rule exempt foreign investors from it when they establish in specific zones, often called ‘free zones’ or ‘special economic zones’.<sup>397</sup> The phenomenon of foreign investment laws prohibiting or restricting the acquisition of real estate by foreign investors has significantly reduced over the years but remains relatively present in many systems.<sup>398</sup> In Uganda the restriction on the acquisition of real estate is only restricted to the land tenure. A non-citizen whether an investor or not cannot acquire a freehold or mailo land (ownership of the land in perpetuity), but can acquire a lease on the land for a maximum of 99 years.<sup>399</sup> It should also further be noted that the East African investment code is silent on ownership of land by foreigners, and this creates a danger, when it comes to the harmonisation of investment laws. Since each member state has a different Land tenure system the EAC should envisage a way of creating a uniform procedure of acquisition of land by foreigners, without affecting the domestic legislations of member states.

## **4.3. Fiscal Incentives and Attraction of Foreign Investments**

This section of the chapter considers all governmental measures or actions from which direct investors benefit or could benefit. Defined narrowly, it refers to measures which are directly in relation with the foreign investment and that impact directly on the fact cost of a project or on Incentives in the broad context of foreign investment the returns from the sale of a

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<sup>395</sup> Doing Business in the East African Community (2012) at 51.

<sup>396</sup> Doing Business in the East African Community (2012) at 52.

<sup>397</sup> Doing Business in the East African Community (2012) at 53.

<sup>398</sup> Doing Business in the East African Community (2012) at 54.

<sup>399</sup> Section 39-40 of the Uganda Land Act as amended 2007.

project's product.<sup>400</sup>The narrow definition, contrary to the broader one, does not include measures to improve the host country's infrastructure, the relaxing of environmental or labour standards, or investment promotion activities, but rather measures such as subsidies, taxi holidays or incentives, exemption of import duties for equipment or raw material, and many others.<sup>401</sup>

Providing incentives is a frequently used strategy to attract foreign direct investors. Host countries are interested in FDI that is most productive for its national economy; incentives are often available to selected category foreign direct investors.

International law recognizes the sovereign right of each state to tax aliens' resident or owning property within its territory.<sup>402</sup> However, the establishment of unfair tax discrimination against foreign nationals and their property is regarded in international practice as an unfriendly act which may give rise to protest or retaliation by restoration.<sup>403</sup>

What has not been subjected to legal test, however, is the issue of tax discrimination which favours aliens and operates against indigenous persons. As a result of this gap in jurisprudence, the leaders of a number of developing countries recognize the need to exploit the above sovereign right in international law in order to attract foreign investors through lofty fiscal incentives.<sup>404</sup>

The East Africa Community Model Investment Code provides for exhaustive lists of incentives it encourages the member states to give foreign investors.<sup>405</sup> In order to ensure beneficial effect, it is not unusual that the incentives are conditioned. For example, the transmission of specific knowledge to locals can be one of the conditions to benefit from a particular tax provision. Part IV of the Investment Code Act of Uganda provides for facilities and incentives.<sup>406</sup> A foreign investor who is entitled to incentives is issued with certificate of incentives. A holder of a certificate of incentives is entitled to among others; a drawback of

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<sup>400</sup> Seid S H. *Global Regulation of Foreign Direct Investment* (2002) at 40.

<sup>401</sup> Seid S H *Global Regulation of Foreign Direct Investment* (2002) at 43.

<sup>402</sup> Nwogugu E I *The Legal Problems of Foreign Investment in Developing Countries* (1965) at.9-10.

<sup>403</sup> Schwarzenberger. *G Foreign Investment and International Law* (1969) at 3-11.

<sup>404</sup> The statement of Ghanaian President, October, 1960, 'Foreign Capital and Ghana Economic Policy' (1960) and the Opening address of the Prime Minister of Ceylon at the 10th Session of E.C.A.F.E at 9.

<sup>405</sup> Part 111, Annexure 1 of the Model Code provides for both fiscal and nonfiscal incentives in part 1 & 11.

<sup>406</sup> Section 5 of the Uganda Investment Code Act Cap 92.

duties and sales tax payable on imported inputs used in producing goods for export.<sup>407</sup> However an investor who engages in activities in the third schedule of the Act is not entitled to enjoy incentives on payment of dividends of shareholders who are not citizens of Uganda or to citizens of Uganda resident abroad and on externalization of profits or proceeds on disposal of assets.

For the case of Tanzania, its provided in section 19 that a business enterprise in respect of which a certificate of incentive is granted shall be entitled to the benefits which are applicable to that enterprise under the provisions of the Income Tax Act, 1973, the Customs Tariff Act 1976, The Sales Tax Act, 1976, or of any other written law for the time being in force.<sup>408</sup> Although this appears to provide many incentives to the foreign investor, it would be better if the incentives were pointed out in the Tanzania Investment Act for ease of reference to the investor. As it is the case with Uganda.

The Investment Promotion Act of Kenya does not provide for direct fiscal incentives as a way of attracting investments. Part 111 of the Act provides for investment certificate benefits which only relate to work permits after payment of requisite fees.<sup>409</sup> The Act however provides in section 15 (2) (a) (iii) that the Investment Authority shall in promoting and facilitating investment assist foreign and local investors in obtaining incentives or exemptions under the Income Tax Act, the customs and Excise Act, the Value Added Tax Act or other legislation. The Act does not clearly spell out the incentives that a foreign investor is entitled to.<sup>410</sup>

In this regard, Rwanda's foreign investment law has the most incentives for foreign investors such as; Exemption from import and duties and sales taxes, common incentives, work permits and first arrivals privileges and Additional incentives for free export economic zones.<sup>411</sup> Just like Rwanda, Burundi also has extensive facilities and incentives for foreign investors.

The stability and contents of a host country's tax regime, especially of the provisions directly affecting foreign investors, is an important element when appreciating the attractiveness of its investment climate. The tax rate applicable on the relevant tax base and the existence of

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<sup>407</sup> Activities in the third schedule to the Act include; Whole sale and retail commerce, Personal services sector, Public relations business, Car hire services and operations of taxis, Bakeries, confectioneries and food processing for the Ugandan market only, Postal services and Professional services.

<sup>408</sup> Section 19 of the Tanzania Investment Act 1997.

<sup>409</sup> Part III of the Investment Promotion Act 2004.

<sup>410</sup> Section 15 (2) (a) (iii) of the Investment Promotion Act 2004.

<sup>411</sup> Investment Code Articles 29 to 34 of Law No. 1/24 of 10 of 2008.

double taxation treaties between countries are important factors for a potential foreign investor. The investment climate's attractiveness can substantially increase when a host country provides tax incentives applicable to foreign direct investors.<sup>412</sup> A system can contain tax incentives that are generally available to both local and foreign investors complying with the conditions, but also tax incentives which are exclusively applicable to foreign investors.<sup>413</sup>

This issue as to whether tax incentive determines the investment climate's attractiveness has been a subject of debate. Lowenferd observes that it is not at all clear whether or not fiscal incentives are the major foreign investment determinants. In Mexico, a study conducted on the role of fiscal incentives in attracting foreign direct investment revealed that only 4.2% of the total number of investors that were subjected to the investigation were influenced by fiscal incentives.<sup>414</sup>

Similarly, a study undertaken in Jamaica revealed that two out of a sample of fifty-five investors were attracted by fiscal incentives.<sup>415</sup> On the other hand, a similar study undertaken in Korea revealed that fiscal incentives were second to development of markets and management growth in attracting Japanese and American investors to Korea.<sup>416</sup> In Singapore, the results from a similar exercise revealed that fiscal incentives were not important determinants of foreign direct investment.<sup>417</sup>

It seems that the contents of a particular incentive does not per se determine the decision making process of the foreign direct investors. The specific incentive has to be placed in the context of the country's general investment climate. It is in that context that United Nations Conference on Trade and Development (UNCTAD) stresses, "Incentives are secondary to more fundamental determinants, such as market size, access to raw materials and availability of skilled labour. Investors generally tend to adopt a two-stage process when evaluating countries as investment locations. In the first stage, they screen countries based on their fundamental determinants. Only those countries that pass these criteria go on to the next stage of evaluation where tax rates, grants and other incentives may become important. Thus it is

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<sup>412</sup> Investment Code Articles 29 to 35 of Law No. 1/24 of 10 of 2008.

<sup>413</sup> See generally De Backer S & Binyingo O *A new Investment Code for a new Burundi* (2008).

<sup>414</sup> Stanford G B & Christensen J B *Tax Incentives for Industry in Mexico* (1959).

<sup>415</sup> Young P A C 'A study of Tax Incentives In Jamaica' (1967) NTJ 298.

<sup>416</sup> Chi A *Treatise on Alien Direct Investments, in T.K. Mabula, The Effectiveness of Fiscal Incentives under the Industrial Development Act 1977* (unpublished LL.M dissertation Boston: Harvard University 1981) 50.

<sup>417</sup> Hughes H & Seng Y P *Foreign Investment and Industrialisation in Singapore* (1973) at 10-25.

generally recognized that investment incentives have only moderate importance in attracting FDI<sup>418</sup>.

It should be noted that extensive incentives as in the case of Rwanda and that suggested by East Africa Community Model Investment Code if accorded to the foreign investors at the expense of local investors can be a ground for discouragement. Local initiatives may not be able to compete with their foreign counterparts that are relieved of much of the tax burden. Hence a balance in the award of these incentives must be attained so as to reach the desired goal of harmonisation of trade laws.

#### **4.4. Dispute Resolution**

The law applicable to the settlement of disputes between direct foreign investors and the host State is an important factor. The availability of international dispute settlement procedures for such issues can constitute an important advantage for the former and a determinative factor in the decision making process. The World Bank Guidelines on settlement of disputes provides that disputes between private investors and the host State will normally be settled through negotiations between them and failing this, through national courts or through other agreed mechanisms including conciliation and binding independent arbitration.<sup>419</sup>

In this context, Kenya adopted the Convention on the Settlement of Investment Disputes between States and Nationals of other States.<sup>420</sup> Rwanda Foreign Investment law provides *inter alia* that in the event of any dispute, all efforts shall be made to settle the dispute through negotiations towards an amicable settlement.<sup>421</sup> The Tanzania Investment Act 1997 also provides for amicable settlement of dispute but in the event that it fails, the dispute shall be settled in accordance with the rules of procedure for arbitration of the International Centre for the Settlement of Investment Disputes.<sup>422</sup> The spirit of this section is also found in The Investment Code Act of Uganda.<sup>423</sup>

Burundi also ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, a dispute with the Burundian government (regarding an

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<sup>418</sup>United Nations Conference on Trade and Development *Tax Incentives and Foreign Direct Investment, A Global survey*, Geneva, ASIT Advisory studies no.16. UNCTAD/ITE/IPC/Misc.3.

<sup>419</sup>Article 5(1) of the World Bank Guidelines on the Treatment of Foreign Direct Investment. Under Article 5 (2) of the same guideline provides that independent arbitration for the purpose of the guideline include any ad hoc or institutional arbitration agreed upon in writing by the State and the investor or between the State and the investor's home State where the majority of the arbitrators are not solely appointed by one party to the dispute

<sup>420</sup>Adopted under Section 2 of The Investment Disputes Convention Act Cap 552.

<sup>421</sup>112Investment Code Article 39 of Law No 14/98 of 18/12/1998.

<sup>422</sup>Section 23 (2) (b) of The Tanzania Investment Act 1997.

<sup>423</sup>Section 28(2) of the Uganda Investment Code Act Cap 92.

eventual expropriation, for example) could also be brought before the International Center for Settlement of Investment Disputes (ICSID).<sup>424</sup> The ICSID is an autonomous institution of the World Bank Group based in Washington DC, which provides facilities for the conciliation and arbitration of disputes between member countries and investors who qualify as nationals of other member countries and therefore guarantees the impartial and efficient resolution of disputes.

All the East African countries have good dispute resolution mechanism at least on the paper. The practice though is that cases take so long to be disposed off due to back log and the always recommended ICSID in Washington is far from East Africa and this makes it expensive to get redress in the event of investment dispute from it.<sup>425</sup> Also multinational corporations usually have stronger bargaining power than the host country when it comes to say negotiating a dispute surrounding technology transfer agreements. EAC should come up with and strengthen the existing investment dispute resolution mechanism where disputes from Member states can be referred to for arbitration. To check on the back log of cases in the member states, more judges should be appointed and posted to specialized divisions of the high court to handle and dispose of foreign investment related disputes.

#### **4.5. Conclusion**

The vision of EAC reads “prosperous, competitive, secure, stable and politically united East Africa; and the Mission is to widen and deepen Economic, Political, Social and Culture integration in order to improve the quality of life of the people of East Africa through increased competitiveness, value added production, trade and investments”. While this is a very laudable vision, and one that can be achieved, it is a huge challenge and requires bold and fundamental decisions at the highest level. It is clear that every other country in the world is working to improve its economic outlook in order to attract more FDI. Unfortunately for the EAC, many of these countries are experiencing economic growth at rates that are far superior to those obtaining in EAC. Thus, for EAC to achieve its vision of deepening Economic, Political, Social and Culture integration by 2030, it will need to do better than a number of regions which currently have a higher GDP in order to overtake them by 2030.

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<sup>424</sup>See generally De Backer S & Binyingo O A new Investment Code for a new Burundi (2008).

There are a number of critical steps that the EAC as a regional block needs to take in order to ensure that the investment environment in the region is greatly improved. They are all inter-related and it is no use just picking one or two of them, they all have to be implemented as a package. To start with, there is need to harmonise the various laws that border on investment and make sure that the process of implementing the Regional Investment Policy is hastened and completed soon rather than later. In this regard, nothing short of a complete re-vamp of the legislation and regulatory procedures surrounding the investment process will lead to an improvement. However, when one examines the number of laws involved, it is clear that it will be a difficult call to achieve. This will therefore require strong political will on the part of the member states government.





## Chapter five

### Conclusions and Recommendations

#### 5.1 Conclusions

In concluding this research paper, a number of issues must be highlighted. To start with, it is clear from past efforts that, although some may label it superficial, the East African Community (EAC) has demonstrated reasonable commitment to ensuring that the business climate is favourable to FDI. It was in this context that in 2002, the EAC passed the East African Investment Model Code Act to amalgamate the EAC Privatization Agency, East African Business Council (EABC), EAC Export Processing Zones (EPZs) and the Small Enterprises Development Board was done to form the EAC Development strategy. The objective of amalgamating these bodies was to streamline the processes for investing in EAC and thus provide for an enabling environment for investment and doing business.

Further, in spite past efforts and regardless of whether they can be termed successful or not, EAC's efforts, both at policy and host-country institutional levels, remain an on-going endeavour. A number of serious challenges still remain unresolved and if the EAC is to become an attractive destination for FDI, both member state governments and the EAC must undergo serious structural reforms as prescribed in the recommendations.

What this paper has also shown is that the EAC does not have a binding investment policy in place yet it just has model code, which member states are at liberty to adopt or not. Although the process of making it binding to its member states is underway, it is erratic and dragging. As a result, the fragmented and sometimes even contradictory legislation and the institutions they engender have to confuse the investment environment in the region.

Furthermore, and may be as a consequence of the above, host-country institutions, including the member state investment promotional agencies, have not been performing in the manner that would make their member states and the EAC the deserving destination for FDI. The current EAC institutional framework also does not clearly specify roles and mandates overlap, at times even contradicting. Most member state institutions lack adequate funding and staffing levels fall short of the required numbers as per their mandates. The issue of lack of consistency in policy formulation and implementation has just made it even more difficult for these institutions to perform effectively, let alone efficiently. Changes in policy are frequent and unpredictable, with, in most cases no apparent logic for the change beyond

politics. This is a major impediment to investment as investors are frightened by a volatile policy regime. This is an issue that is well documented as a commonly recurring complaint, and applies to all aspects of doing business in the region. Anecdotal evidence refers to over 500 different types of legislative procedures, licenses, approvals, certificates, etc. that can apply in one form or another to a company seeking to invest in the EAC region. Even if such a figure was way out by 100%, it still represents a formidable barrier to enterprise and FDI promotion.<sup>426</sup>

## **5.2. Recommendations**

The vision of EAC as already identified in chapter four reads “prosperous, competitive, secure, stable and politically united East Africa; and the Mission is to widen and deepen Economic, Political, Social and Culture integration in order to improve the quality of life of the people of East Africa through increased competitiveness, value added production, trade and investments”. While this is a very laudable vision, and one that can be achieved, it is a huge challenge and requires bold and fundamental decisions at the highest level. It is clear that every other country in the world is working to improve its economic outlook in order to attract more FDI. Unfortunately for the EAC, many of these countries are experiencing economic growth at rates that are far superior to those obtaining in EAC. Thus, for EAC to achieve its vision of deepening Economic, Political, Social and Culture integration by 2030, it will need to do better than a number of regions which currently have a higher GDP in order to overtake them by 2030.

There are a number of critical steps that the EAC as a regional block needs to take in order to ensure that the investment environment in the country is greatly improved. They are all inter-related and it is no use just picking one or two of them, they all have to be implemented as a package. To start with, there is need to harmonise the domestic laws that border on investment mainly in the areas of land acquisition, taxation ,incentives offered to investors , the protection of invested property and dispute settlement. Commitment to ensure that the EAC investment model code is adopted by its member states should be given soon and not later. In this regard, nothing short of a complete re-vamp of the legislation and regulatory procedures surrounding the investment process will lead to an improvement. This is clearly the best course of action. However, when one examines the number of laws involved, it is clear that it will be a difficult call to achieve. This will therefore require strong political will on the part of all member state governments.

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<sup>426</sup> See generally Doing Business in the East African Community.(2012).

The problem can be solved through the following:

In the short-term, the One-Stop-Shop function of the East African Investment Authority (EAIA) should be fully established which will be the umbrella of all the member state investment promotion agencies, so that it can undertake all the necessary bureaucratic functions on behalf of investors. In addition, the Ministry of Commerce, Trade and Industry and other ministries should leave the promotion of investment to the EAIA and concentrate on their core activity of policy development. They should not get involved in the functions of an executive agency. This, however, does not mean that they could hold occasional promotional activities whenever it is necessary, especially with regard to the creation of an overarching framework within which the EAIA should operate effectively. For example, in situations where it is necessary to establish government-to-government arrangements as facilitation for new flows of investment, the Ministry of Commerce, Trade and Industry and other ministries could play a strategic role.

In the longer term therefore, the EAC needs a National Investment Policy. This is the only sure and effective way to harmonise the various laws that border on investment. This will also assist in reducing the cost of doing business and make the EAC competitive and attractive as a desirable investment destination.

Developing a national investment policy is not a simple task that can be done on the basis of crude research and discussion among the few stakeholders in EAC member state only. There are many issues that will have to be addressed in the policy document. Therefore, serious consultations are critical with all stakeholders both local and foreign, and public and private in order to identify all the critical issues and key areas to concentrate on. Therefore, those to be tasked with this mammoth venture, particularly the Ministry of Commerce, Trade and Industry in each member state, need to understand the depth of the task and the financial implications this could come with. It would also be important to agree on the composition of a Steering Committee and all other sub-committees that will oversee the preparation of the policy document. The Steering Committee and all other sub-committees should be predominately composed of private sector representatives. The time-line for this process will also be critical to consider upfront.

In developing this policy, there are a number of overarching principles that must be adopted. To start with, the formulation of the policy should be driven from within the Ministry of Commerce, Trade and Industry in each member state. This should be done using mostly local

expertise so that the staff of the Ministry can learn from the process and are able to use the experience in the future development of other policy documents. In the long run, this will help reduce on the cost of consulting „experts“ from abroad. Furthermore, the approach to the new policy should be even-handed so that support to the development of domestic enterprise is not overlooked in favour of attracting new foreign investments (FDI) into the country. This is very important as both will play important roles in the future development of the region.

In addition to the above, the EAIA itself would need extensive surgery and restructuring so that it becomes more effective and efficient in its functions. It may also be prudent to split up the EAIA into two organizations, one dealing with domestic enterprise development and the other focusing on attracting new foreign investments. The EAIA must re-position itself as a professional organization of world-class standard with the emphasis on investment promotion, investor facilitation and customer service. The central features of the new EAIA should be the separation of the elements that are essential for successful investment promotion from those that are not essential.

The mission of the EAIA, in relation to the development of domestic industry needs to be examined and then measurable goals leading to the achievement of this mission need to be developed. These goals need to be agreed upon with the private sector, as it is the private sector that will ultimately deliver on these goals. This can be achieved within the process of developing the Investment Policy discussed earlier. The EAC needs to be reminded, on a continuous basis, that it is people and companies that create wealth and jobs, not governments. The job of EAC should be to facilitate entrepreneurs and companies. Changes must be put in place in each EAC member state that encourage and assist the creation of new companies, both by local and foreign entrepreneurs. With regard to the selection of priority sectors for promotion, the EAC should exercise caution as it may lead to punitive exclusion of some sectors which could themselves be potential driver sectors.

Ultimately, the new EAIA must be adequately empowered both in terms of budgetary allocation and autonomy in order to perform its functions effectively and efficiently. It is not possible to determine from the outset what the ultimate structure for the new EAIA or agencies empowered to promote investment will be. However, one thing is critical and that is the necessity for an adequate budget and autonomy to get on with the job and not have the stage crowded by a host of other players confusing the investment environment. Allocating adequate resources is the only sure way to enable the EAIA to perform its functions to

international best practice standards. This is an area where EAC falls behind the competition and thus requires urgent attention.

In addition, all such activities must be undertaken in collaboration with and within the framework of the new EAIA. Even where it becomes necessary for ministries to come in, may be because there is need for government-to-government negotiations, these activities must be embedded in the context of the EAIA.

Finally, beyond tidying up the bureaucratic mess caused by conflicting legislation and public sector procedures, the new National Investment Policy must make sure that the provision of strategic infrastructure is streamlined. The new investment policy should pull together the strategic plans of all the infrastructure providers in the region to ensure that they are all aiming for the same strategic goals. This will lead to greater efficiencies within and across sectors. This is one of the many aspects that the EAC must resolve if the region is to shift upwards in international ranking for FDI destinations.



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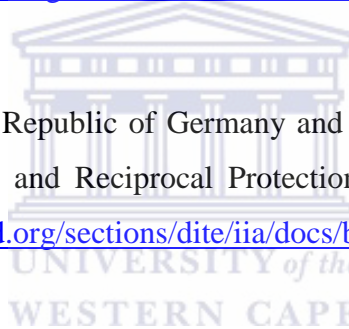
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