Foreign Direct Investment and Global Value Chains: Implications of Bilateral Investment Treaties in Kenya

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Abstract

The link between foreign direct investment (FDI) and economic development has seen the increased importance of FDI to developing countries and the use of bilateral investment treaties (BITs) as a key instrument in their development strategies. In addition, global value chains (GVCs) are at the heart of current issues relating to investment and trade as engines for economic growth. The unequivocal link between these three key concepts presents an opportunity for developing countries. Vastly, BITs are signed between a developing and developed country and they contain basic provisions that typically guarantee certain standards of treatment for the foreign investor, the assumption being that, host country incentives to provide fair and equitable treatment will attract FDI. However, recent trends have seen increased number of BITs between developing countries so that, a BIT is not only a device to stimulate inward FDI flow but also as a measure to encourage and protect outward FDI. This paper is set on two goals: firstly, to find out what role BITs play in attracting FDI in Kenya and how they can increase Kenya’s GVC participation. Secondly, what are the implications of BITs on Kenya’s sovereignty and national policy? Answers to these pertinent questions will provide timely insight and perspective to policy makers as well as have strong implications on re-defining Kenya’s investment for growth agenda.

Key words: Foreign Direct Investment, Global value chains, Bilateral Investment Treaties, Implications, trade, incentives, Kenya

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The Context

At the heart of developing countries’ agenda is the need to achieve economic growth. Foreign direct investment (FDI), as a key element of globalization and of the world economy, is a driver of employment, technological progress, productivity improvements, and ultimately economic growth (Anyanwu, 2012). This has seen FDI become an important component of developing countries’ growth agenda with an increase in the number of developing countries signing bilateral investment agreements (BITs) with developed countries with the hope of attracting much needed capital flow into their economies.

A prominent feature of globalization that has shaped international trade dynamics and investment patterns and that has affected competitiveness is global value chains (GVCs). The reduction of transport and communication costs, the acceleration of technological progress and the removal of political and economic barriers to trade has exponentiated the opportunities for international fragmentation of production. The new paradigm is based on an inter-national network of individual and autonomous suppliers specializing in specific phases of the production process located in different countries (Amador & Cabral, 2014). This has led to rising trade in intermediate products and has seen competitiveness based on tasks and not necessarily on goods.

However, a large part of developing countries and in particular, Africa, has not been incorporated systematically into GVCs or even regional value chains except only as suppliers of primary inputs or raw materials for the manufacturing processes located in manufacturing hubs elsewhere (Draper, 2013). This means then that these countries are capturing little value from trade. UNCTAD (2013) notes that global investment and trade are inextricably intertwined and GVCs can play an important role in economic development. It is important to note that potential benefits of GVCs are not automatic and therefore, policies matter, including a set of coherent and mutually reinforcing trade and investment policies, as well as the right overall development strategies.

This provides the crux of this research paper; are bilateral investment treaties between Kenya and other countries avenues for substantial trade and investment growth and do they play a role in incorporating Kenya into GVCs? And what is their impact on Kenya’s national policy space?
FDI, BITs and GVC trends

Understanding the forces of globalization requires the understanding of FDI by multinational corporations (MNCs) and the recognition of the role that GVCs play. The investment-trade nexus is made complete by the role of MNCs in international production networks. These provide the link between FDI and GVCs with cross-border trade of inputs and outputs taking place within their networks of affiliates, contractual partners and arm’s-length suppliers. UNCTAD (2013) notes that TNC-coordinated GVCs account for some 80 per cent of global trade in 2012.

Global investment strategies are a central issue in international trade. Toted as an important commitment device that attracts foreign investors, the number of bilateral investment treaties (BITs) ratified by developing countries has grown dramatically over the years. The BIT provides investors with legal protections which include non-discriminatory treatment of investors and investments and the right to freely transfer investment-related funds (Gitonga, 2012). By the end of 2012, there were 2857 BITs with 20 new BITs signed in 2012, the lowest number of new agreements in any year according to the 2013 world investment report (UNCTAD, 2013). In comparison, there were 2573 BITs as of 2006 which would mean an average of 47 BITs per year. This is further explained by the fact that countries increasingly favor a regional over a bilateral approach to international agreements (IIA) rule making and take into account sustainable development elements. FDI flows rose by about 11% in 2013 while inflows to developing economies reached a new high of US$759 billion, accounting for 52% of global FDI inflows in 2013.

The understanding of GVCs demands the total analysis of value added and the components involved. The three key components as outlined by UNCTAD (2013) are highlighted below:
1. Foreign value added (foreign value added as a share of exports) indicates what part of a country’s gross exports consists of inputs that have been produced in other countries. It is the share of the country’s exports that is not adding to its GDP.
2. Domestic value added is the part of exports created in-country. It is the share of the country’s exports that contributes to GDP (domestic value added trade share). The sum of foreign and domestic value added equates to gross exports.

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1 UNCTAD, World Investment Report, 2007
As a share of GDP, domestic value added measures the extent to which trade contributes to the GDP of a country.

GVC participation is the extent to which a country’s exports are integrated into the international production networks by either using foreign value-added in a country’s own exports or value added supplied to other countries’ exports.

Although the degree to which a country’s exports are used by other country’s for export generation can be seen as less significant by policy makers, the participation rate is an important indicator of the trade-investment nexus and thus helpful in exploring these links.

Most African countries are characterized by exports of natural resources and commodities and their participation in GVCs involves little foreign and domestic value added. While other sectors such as the automotive and electronic industries have well defined GVC pathways, extractive industries rank very low as they require little foreign value added. However, this does not mean that they are the least relevant. They serve as fundamental starting points of many GVCs as they constitute value added inputs in many other industries exports. Similarly, the services sectors ranks low in the use of value added such that developing countries with a large share of services exports such as South Asia have a low share of foreign value added (UNCTAD, 2013). The involvement of services in GVCs typically occurs through value added incorporated in exported manufactured goods. More than 60% of global FDI stock is allocated to services activities, a significant part of which is linked to GVCs.

A key observation by UNCTAD(2013) is that a value chain for a particular product may span many different industries so that an industry may consist of and be part of many value chains.

China has become the world’s largest exporter and this merely shows that countries can flourish from integrating into GVCs (Draper, 2013). He further adds that imminent fundamental changes to the GVCs could lead to a dramatic shift in the location of GVCs. Some of the reasons given include:

Firstly, recent developments in the climate change debate and especially in the EU trading system on reduction in carbon miles create pressure on airlines and is likely to promote reductions in the ‘length’ of value chains in order to reduce carbon emissions.

Secondly, as emerging players continue to secure access to various production resources, the price of these resources is likely to increase and therefore shift the dynamics of GVCs. These

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2 See more at www.unctad.org
developments have major implications on developing countries and especially those in Africa wishing to be part of the GVCs. It is thus necessary for them to examine their trade policies and especially the role of services in manufacturing value chains and the broader dynamics centering on trade in intermediate products.

Drivers of FDI

Research has shown that FDI is driven by several non-exclusive factors which are the driving forces behind MNCs decisions about where to locate key aspects of their GVCs. Draper and Lawrence (2013) point out that since their decisions are long term, MNCs pay keen attention to certain factors and these factors in turn have great implications on trade policies of host countries. Firstly, MNCs are concerned about importing intermediate goods cheaply and most effectively. A host country’s decision to thus apply import protection measures as part of its trade policy in itself undermines the rationale behind GVC attraction. Secondly, the availability of an adequate and reliable network of infrastructure is important to MNCs. Roads, institutions, skilled labor are all part of the infrastructure matrix that MNCs find crucial to their operations. In most African countries however, these are in short supply and thus affect the decision of MNCs to invest.

Blonigen B. (2006) notes that while certain economic factors such as taxes are presumed to highly influence FDI, literature shows that tax policy does not affect FDI in a straightforward manner. The use of BITs as a way to enhance FDI across member countries is challenged by findings that there is little evidence that BITs increase FDI activity. According to Hallward-Driemeier (2003), BITs are heralded by their proponents as an important means of attracting new foreign direct investment (FDI). Yet there has been little examination of whether these instruments actual affect the allocation of foreign investment.

The Scenario in Kenya: FDI and BITs

According to UNCTAD (2014), FDI trends in 2013 show that inflows increased by about 11%. In addition, the global rankings of the largest recipients of FDI also reflect changing patterns of
investment flows. For example, in 2012, four developing economies ranked among the five largest recipients in the world; and among the top 20 recipients, nine are developing economies. Unfortunately, none of these developing countries are in Africa. However, Africa experienced an upward growth of outward FDI in 2012 albeit by a small margin as compared to previous years (Figure 1).

**Figure 1: Kenya’s FDI Flow**

![Graph showing Kenya's FDI Flow from 2007 to 2012](image)

Source: Author based on UNCTAD FDI database

As observed in figure 1, FDI inflows to Kenya dropped sharply in 2007-2008 mainly due to political instability in the country coupled by global financial crisis. FDI outflow has been on the decline since 2009 with gradual increase in 2012.
Figure 2 highlights the differences in the trends between inward and outward FDI stocks. A sharp increase is observed in the inward stock from year 2000-2012 while only a gradual increase is observed in the outward stock. In this period between year 2000-2012, Kenya signed and ratified all of its 12 BITs. Although this cannot be said to explain the exponential growth in inward FDI, there might be a positive correlation.

Kenya cannot be excluded from the list of countries that have seen an increasing number of investment agreements. As of June 2013, Kenya had signed a total of 20 agreements; 12 BITs and 8 other international investment agreements (IIAs). This study only considered BITs and found that out of the 12 BITs, 8 out of these were between Kenya and countries in the EU. The other countries were in Africa and Asia (Figure 3).
Previous empirical research done is not conclusive as to the magnitude and significance of the effect between BITs and FDI (Bellak, 2013). While it is not possible to ascertain the true impact of BITs on FDI, the trend in figure 3 confirms observation in literature that most BITs are signed between developed and developing countries as a means of attracting much needed FDI.

The interlink between trade, investment and GVCs is through the productive networks of TNCs and it is important to look at the share of trade that these TNCs contribute to developing countries. TNC-coordinated GVCs account for some 80 per cent of global trade and UNCTAD (2013) points to two main reasons why the role of TNCs in trade in developing countries is higher. Firstly, trade in these countries is mostly concentrated in a small number of large exporters and importers with high productivity mainly TNCs and their affiliates. Bellak (2013) points that under the general objective of profit maximization, the motivation for FDI is mostly resource seeking, market seeking, strategic asset driven and efficiency seeking. Secondly, the share of extractive industries in the exports of these countries is highest and as it is evident, it is mostly the TNCs who are involved in the extraction and trade of natural resources.
Looking at figure 4 which details FDI stock in Kenya by country of origin, the share of FDI covered by a BIT is significant. Kenya has signed a BIT with seventy five per cent of these countries being developed countries and this further feeds into the theory that BITs are signed with the hope of attracting much needed FDI. Although Kenya has not signed a treaty with South Africa and the US\textsuperscript{3}, there is still a significant flow of FDI from these countries into Kenya. With the increasing relevance in global trade of certain developing countries such as China and South Africa, we observe the increased role they play as a source of FDI to Kenya. While this study cannot conclude substantially that multinational corporations base their foreign investment decisions largely on the availability of BIT protection, it can be observed that BITs have a positive correlation to the flow of FDI into Kenya. The presence of TNCs in Kenya provides the avenue for Kenya to integrate itself into GVCs.

\textbf{Figure 4: FDI Inward stock in Kenya by country of origin}

![Graph showing FDI stock in Kenya by country of origin](image)

Source: Author with data from UNCTAD FDI/TNC database

\textsuperscript{3} Kenya and the rest of the EAC countries are currently negotiating the US-EAC Trade and Investment Partnership Agreement.
However looking at Kenya’s outward FDI stock by country of destination in 2012 (figure 5), a totally different trend is observed. Seventy five per cent of the countries Kenya’s FDI flows to are developing countries while 25 % are developed countries. Of all these countries, Kenya has signed a BIT with only one of the countries. This confirms the previously observed observation that BITs are mainly signed to attract FDI and not so much to promote and protect investments of the host country in the territories of the other contracting partners in a BIT. However, Kenya has a significantly high stock of FDI in France with which it has signed a BIT.

**Figure 5: FDI outward stock by country of destination**

![Figure 5: FDI outward stock by country of destination](image)

Source: Author with data from UNCTAD FDI/TNC database
Kenya’s GVC participation

In addition to FDI stock in the country which signals the presence of multinational companies and the consequent participation of Kenya into GVCs, a look at Kenya’s intermediate trade will further inform this study. This is because as previously mentioned in this paper, the participation rate is an important indicator of the trade-investment nexus and thus helpful in exploring these links. GVC participation includes the extent to which a country’s exports are integrated into the international production networks by either using foreign value-added in a country’s own exports or value added supplied to other countries’ exports.

Figure 6: Kenya’s Intermediate goods trade

Source: WITS

Figure 6 details the extent to which Kenya is integrated into the global value chains. While it is not possible to ascertain from the data the nature of the imports or the exports; whether foreign value added or natural resources, this graph paints a relative clear picture on Kenya’s GVC participation. The red part represents domestic value-added which is the part of exports that contributes to Kenya’s GDP while the blue part represents foreign value added. According to UNCTAD (2013), the total of these two is part of the the overall GVC participation.
Implications on policy

From a policy point of view, the impact of BITs and especially for developing countries continues to attract attention, the biggest debate being on their impact on sovereignty of the host country. Hallward-Driemeier (2003) notes that there is little examination and remarkably little attention paid to the implications of the strength of the rights bestowed to the investor and obligations assumed by the host country. This is evidenced by the increasing number of cases at international centre for settlement of investment disputes (ICSID) by May, 2014; 284 concluded cases so far with 187 pending ones. There is only one case involving Kenya at ICSID and it was closed in 20064.

This has led to several countries including India, South Africa, Indonesia, reviewing their BITs or terminating all their BITs altogether (Khor, 2014). This has been prompted by the strong increase in the number of cases between investor and host country as investors claim change in government policies affect their future profits. Many countries have been asked to pay large compensations to companies under the treaties. The biggest claim was against Ecuador, which has to compensate an American oil company US$2.3bil (RM7.6bil) for cancelling a contract5. The system empowering investors to sue governments in an international tribunal, thus bypassing national laws and courts is made possible through the investor-state dispute settlement (ISDS) system which is contained in most BITS that countries sign among themselves to protect foreign investors’ rights (Khor, 2014).

In order to fulfill the second objective of this study, this paper samples legal texts6 of five of the twelve BITs Kenya has signed with other countries to investigate the wording and find possible areas of concern. To elucidate, the study will expound on each of the obligations highlighted in table 1 and show how these present possible future concerns.

4 See more at https://icsid.worldbank.org/ICSID/FrontServlet
6 Sourced from unctad.org/IIA databases
Table 1: Obligations present in BITs signed between Kenya and five other countries.

<table>
<thead>
<tr>
<th>Type of obligation</th>
<th>Germany</th>
<th>Netherlands</th>
<th>Slovakia</th>
<th>UK</th>
<th>France</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fair and equitable treatment</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Free transfer</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Compensation for losses</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Prohibition of Expropriation and provision of compensation thereof</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Dispute settlement through ISDS</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes with the option of local courts</td>
</tr>
<tr>
<td>Termination of Agreement</td>
<td>Yes (15 years)</td>
<td>Yes (20 years)</td>
<td>Yes (20 years)</td>
<td>Yes (20 years)</td>
<td>Yes (20 years)</td>
</tr>
<tr>
<td>Contracting partner to promote Small and Medium Enterprises</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>

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*Losses owing to war or other armed conflict, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party.*

*Article 4:5 Shall grant, in accordance with its laws and regulations, incentives, treatment, preferences or privileges through policies or specific measures to its own investors for the purpose of promoting small and medium*
Fair and equitable treatment

Most BITs, including those signed by Kenya and sampled by this study, contain a provision obliging both state parties to the treaty to provide fair and equitable treatment to investments made in their territory by nationals of the other party. Such a provision according to Tralac (2013) potentially allows foreign investors to seek compensation if the conditions under which their investment was made (including any applicable domestic regulations) are later changed in ways detrimental to their interests.

Recently Kenya terminated mining licenses granted at the beginning of 2013 and introduced new drilling charges and/or royalty schemes in the interest of the country. Spalding and King (2013) point out that affected foreign mining companies with investments in Kenya may be able to bring compensation claims against Kenya before international investment arbitration tribunals. This includes exploration and development properties since compensation claims are not restricted to active mining properties.

Expropriation

In line with common practice, all the sampled BITs prohibit the nationalisation or expropriation of foreign investments as well as any ‘measures having an equivalent effect’, except where this is undertaken in a non-discriminatory manner for a public purpose in line with domestic law. As it is, this provision allows for an investor to claim indirect expropriation which according to Stephenson and Carroll (2009), is often alleged to occur when a State's regulation of a particular industry reduces or eliminates the economic viability of the investment the subject of regulation.

However since some measures not meant for expropriation may have an incidental or indirect adverse impact on the economic value of an investment and some may aim to protect or enhance legitimate public welfare objectives, these should be explicitly provided for in the BITs.

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*enterprises and emerging industries on its territory, provided that investments and the activities of investors of the other Party Contracting will thereby not be significantly affected.*

Free transfer

All the sampled BITs clearly state that the host country shall ensure to investors of the other Contracting Party the free transfer, into and out of its territory, of their investments and transfer of payments related to investments. Key issues in this area relate to the type of foreign currency that the investor is entitled to convert into and the applicable rate of exchange. Unlike the general national treatment obligation the transfer provision actually results in the foreign investor receiving more favorable treatment than a host country’s own investor. SouthCentre (2010) further adds that transfer of funds provisions are among the investment provisions that often give rise to the greatest concerns on the part of developing host countries since the adverse consequences of capital flight can be severe.

Only two of the BITs, Kenya-Slovakia and Kenya-France have provisions that allow for safeguard measures in case movements of capital cause or threaten to cause serious difficulties for macroeconomic management. However, they state that “these measures are temporary and should be eliminated as soon as conditions permit”. Taking into consideration the high number of FDI stock from countries with which Kenya has signed a BIT, the free transfer provision provides high risks.

Compensation for losses

This obligation provides that investments that suffer losses owing to war or other armed conflict, a state of national emergency, revolt, insurrection or riot in the territory of the host country, shall be accorded by the host country, as regards restitution, indemnification, compensation or other settlement. While this provision provides security for foreign investments, it presents a magnitude of obligations to Kenya. Only two of the sampled BITs have this provision.

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10 These include: a) principal and additional amounts to maintain, develop or increase the investment; b) returns and any other income accruing from investments; c) proceeds obtained from the total or partial sale or disposal of an investment, including the sale of shares; d) proceeds from total or partial liquidation of investments; e) compensation resulting from expropriation; f) earnings and other remuneration of personnel engaged from abroad and working in connection with an investment.
Dispute settlement through investor-state dispute settlement (ISDS) system

All the BITs sampled allow for international investor-state arbitration which allows investors to access a system of international arbitration mostly through the international centre for the settlement of investment disputes (ICSID). This is a standard feature of BITs and according to Tralac (2013), one much prized by investors, as it means they are not restricted to pursuing a dispute against a particular country through that country’s own legal system. Only the Kenya-France BIT allows for arbitration through local courts in addition to through the ICSID, all the rest provide from arbitration through ICSID. According to Khor (2014), “the international investment arbitration system is monopolised by a few big law firms, the tribunals are riddled with conflicts of interest and the arbitrary nature of tribunal decisions”. This he concludes, is why so many countries including developed European countries such as the EU, Australia and Malaysia are themselves having second thoughts about the ISDS. UNCTAD (2013) further notes that the functioning of ISDS has revealed systemic deficiencies relating to legitimacy, transparency, lack of consistency and erroneous decisions, the system for arbitrator appointment and financial stakes.

After South Africa’s overhaul on its policy on BITs, it provides in its draft Promotion and Protection of Investment Bill that investors can only bring a dispute to a South African court or to the South African government for mediation (Tralac, 2013).

Prohibition of contracting partner to promote Small and Medium Enterprises

This is an obligation present in the Kenya-France BIT that states “the contracting partner shall grant, in accordance with its laws and regulations, incentives, treatment, preferences or privileges through policies or specific measures to its own investors for the purpose of promoting small and medium enterprises and emerging industries on its territory, provided that investments and the activities of investors of the other Party Contracting will thereby not be significantly affected”\textsuperscript{11}.

\textsuperscript{11} See Kenya-France BIT Art. 4(5)
While the promotion of small and medium enterprises (SMEs) falls within the national policies of Kenya according to its development blueprint, Vision 2030, the condition that such preferential treatment will thereby not affect the activities or investments of foreign investors cannot be guaranteed and therefore poses as a hindrance for the successful execution of development objectives the country may wish to pursue without attracting litigation.

**Lessons from elsewhere**

Kenya could borrow best practices from other countries that have been successful in creating the balance between FDI and GVCs. China, as mentioned previously is an example of a developing country that has successfully integrated into GVCs and come out a big winner. The approach has been through Special Economic Zones but while China has welcomed foreign companies, it has always done so with the objective of fostering domestic capabilities. Gitonga (2010) notes that to that end, China used a number of policies to ensure that the benefits that accrue such as technology transfer, skills transfer among others are transferred to the local population and strong domestic players would emerge. Foreign investors were required to enter into joint ventures with domestic firms (for instance in mobile phones and in computers).

South Africa is another country that has made successful attempts to amend its policy on BITs and has even gone further to terminate some of its BITs with Belgium, Spain, Germany, and Luxembourg. South Africa can be lauded for “taking the lead” in seeking to rebalance the rights and responsibilities of states and investors but only if foreign inflows of investment are unaffected and if the government uses its policy space to enact measures genuinely in the public interest (Tralae, 2013).

**Conclusion and the Way Forward**

The linkage between FDI, BITs and GVCs is important and especially for developing countries who wish to be bigger players in global trade as these three concepts can act as catalyst for Africa’s broader economic transformation, if supported in a strategic manner. It is important to
note that potential benefits are not automatic and therefore, policies matter, including a set of coherent and mutually reinforcing trade and investment policies, as well as the right overall development strategies.

With the increasing importance of GVCs in global trade, developing countries and especially African countries can position themselves and especially considering possible future shifts in location of GVCs due to factors such as reductions in the ‘length’ of value chains in order to reduce carbon emissions as well as increase in the price of various production resources due to increased demand. It is thus necessary for them to examine their trade policies and especially the role of services in manufacturing value chains and the broader dynamics centering on trade in intermediate products.

Regarding the first objective of this study of how BITs influence FDI and Kenya’s integration into GVCs, this study has found that Kenya has twelve BITs with different countries most of which are developed countries. While there seems to be a positive correlation between FDI growth and increase in BITs, this cannot be ascertained especially since there is FDI inward stock from countries that Kenya has not signed a treaty with such as South Africa and the US. FDI inward stock as well as the level of trade in intermediate goods in Kenya shows the extent to which the country is integrated into global value chains.

The second objective of the study was to find out the effect of BITs on Kenya’s sovereignty. A key observation was that the obligations in BITs affect inward investments and not so much outward investments. With a sample of five BITs, seven obligations were found to be potential areas of concern; fair and equitable treatment, investor-state dispute settlement, compensation for losses, transfer of profits, expropriation and small and medium enterprises promotion.

In conclusion, the study looks at success stories from China which has successfully integrated into GVCs through FDI but not without strategic policies in order to maximize the benefits. South Africa as well is another country that has implemented reforms in its BITs policy to promote public interests. Although this is seen as a bold move in ascertaining South Africa’s policy space, the effects of the reforms are yet to be seen. Kenya can borrow leaf from such countries.
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