

**THE INTERFACE BETWEEN
FOREIGN DIRECT INVESTMENT AND
CORRUPTION IN KENYA:
LEGAL & INSTITUTIONAL ISSUES**

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G62/P/8126/003**

**This Thesis is submitted in
Partial Fulfilment of The Requirement
For the Award of The Degree of
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DECLARATION

I declare this is my original work and has not been submitted for examination in any other university.

Signature:



KARANJA KABAGE

Dated Friday October 28, 2005

Signature:



PROF PATRICIA K-MBOTE
SUPERVISOR

Dated Friday October 28, 2005

DEDICATION

For the memory of my mother LILLIAN WAMBUI KABAGE, who died on February 10, 2005

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It is through the guidance and unending quest for clarity and focus of my Supervisor Dr Patricia Kameri-Mbote that I have been able to complete the thesis. I am most appreciative of her demands because they made me walk an extra distance.

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To my wife Wanjiru, as ever before she has taken the blunt of my absence and daily disturbances especially at the odd hours when I have had to wake up. She has been and continues to be invaluable and always shall be. I do not take her patience for granted.

I nevertheless take full responsibility for any and every mistake and/or omission.

TABLE OF STATUTES AND INTERNATIONAL TREATY

Table of Statutes and International Treaty

The Kenya Constitution

The Judicature Act Cap 8

The Prevention of Corruption Act Cap 65

The Ethics Public Act

The Economic Crimes and Corruption Act

The Promotion and Investment Act

The Income Tax Act Cap 470

The Arbitration Act

United Nations Convention Against Corruption

National Environmental Management Authority (NEMA)

Privatization Bill

Public Procurement and Disposal Bill

TABLE OF ABBREVIATIONS/ACRONYMS

UNDP	-	United Nations Development Program
WTO	-	World Trade Organization
MNC	-	Multinational Corporations
TNC	-	Transnational Corporations
FDI	-	Foreign Direct Investment
CLARION	-	Centre for Law and Research International
CBK	-	Central Bank of Kenya
KACC	-	Kenya Anti-Corruption Commission
UNCTAD	-	United Nations Conference on Trade and Development
APNAC	-	African Parliamentarian Network Against Corruption
FIAS	-	Foreign Investment Advisory Services
IPS	-	Independent Prosecution Service
AGOA	-	African Growth and Opportunity Act
OECD	-	Organization of Economic Co-operation and Development
NIC	-	National Investment Council
IPC	-	Investment Promotion Centre
KIA	-	Kenya Investment Authority
AG	-	Attorney General
DPP	-	Director of Public Prosecutions

CHAPTER I

(a) Introduction

1.1 Background

Kenya like many Developing Countries, is ever short of development and financial resources from the time of independence and one of the few such sources is Foreign Direct Investment (FDI) defined to include equity capital, reinvested earnings and intra-company loans but is distinguished from portfolio investments, which is the accusation of securities. FDI aims at a lasting interest with significant influence on the management and policies of the foreign company. There at least four different motives for firms to invest in another country:¹

Resource seeking – aim to exploit natural resources not available in home country or availability of cheaper raw material for instance oil in Nigeria;

Market seeking – access new market due to their size or growth in host country and neighbouring countries;

Strategic asset seeking – take advantage of locational benefits e.g. during apartheid in South Africa (S.A.) companies were located in Botswana and Namibia to capture S.A. market;

Efficiency seeking – take advantage of cost-efficient production by seeking to produce in as few countries as possible.

The traditional view of FDIs is that they increase capital growth in addition to the transfer of technology and spillovers via imitations, competition and/or training. Determinants of FDI (may vary with the type of FDI) are divided into two factors “push factors” (also called horizontal factors) are those existing in the Home Country e.g. interest rates while “pull factors” (known as vertical factors) are those existing in the host country.²

Besides the availability of natural resources; other factors influencing the flow of FDI include macroeconomic stability, and other policies; investment incentives; size of market and growth; cost and quality of labour force in addition to good infrastructure both physical and financial. Country risk in terms of economic and political uncertainty (perception of risk in

¹ Oludele Akinloye Akinboade, Franz Krige Siebrits & Elizabeth Wambach Roussot; *Foreign Direct Investment In South Africa*, pages 6-7

² Sunday Khan & Lydie Bamou; *Analysis of Foreign Direct Investment Flows To Cameroon* page 11 para 2-3 and page 16-18 (see supra 2 pages 10-14 and SA study 13)

Africa is very high) besides openness of the economy and the locational advantage and high return on investment. Agglomeration, reflecting the existence of other foreign investors and Institutional environment typified by existence of corruption and bribery, level of bureaucracy, fiscal and financial incentives, legal framework especially as pertains to protection of property rights and enforcement of contracts influence consideration for destination of FDI.

Since 1980's Kenya has been facing declines in inflow of FDI³ but there was a jump in FDI in 2000 reflecting investment by mobile phone companies⁴. In the 70's Kenya accounted for 87% FDI inflows in East Africa and by 2000, it only accounted for 22%⁵. Most of Kenya's FDI is from developed countries.

1.1.2 Evaluation of Business Environment In Kenya

Kenya's business environment in the 70's was favourable with high GDP growth rate particularly during the coffee boom of 1976/77 and a large regional market within East African Community (EAC)⁶;

However, the 80's saw a sharp decline due to costly structural adjustment programs advocated and pushed by the IMF and World Bank, collapse of East African Community (EAC) resulting in reduced market, the level of democratic space was curtailed with introduction of one party system in 1982, mismanagement of the economy leading to rise of debt ratio to GDP and running down of foreign reserves, falling public infrastructure and governments failure to implement policies⁷; Despite reforms in the 90's e.g. liberalization of interest and exchange rates and removal of price controls; there was no surge in FDI to Kenya since the incentives were off set by high cost of doing business in the country, ethnic clashes, corruption and lack of donor confidence⁸.

The establishment of Export Processing Zones (EPZs) - 74% majority of which are foreign owned, mostly by Sri-Lankans and Indians, they are mainly in the garment industry due to opportunities offered under the African Growth and Opportunity Act (AGOA);⁹ Putting

³ Francis Mwege and Rose Ngugi; *Foreign Direct Investment In Kenya*: page 2 para 4

⁴ Supra page 3 para 1

⁵ Supra

⁶ Supra page 4 para 3

⁷ Supra page 4-5

⁸ Supra page 5-6

⁹ Supra page 7 para 1

together of the Investment Code which is to be enacted soon,¹⁰ and offering of Tax incentives e.g. all EPZ investors enjoy a 10-year tax holiday; the Establishment of Kenya Anti-Corruption Commission Authority (KACA);¹¹ the Publishing of Judicial Code of Conduct and Ethics resulting in suspension of judicial officers accused of corruption¹² marked a landmark decision for Kenya.

The Government has enacted some measures legal and institutional, aimed at creating an environment conducive to attracting FDI but apparently without much success. Why then as a country are we unable to attract the Investors inspite of the great natural endowments, advantageously placed geographical location and political stability since independence? High level corruption and practices by Kenya Government Officials have been blamed as one of the principal causes of failure to attract of FDI.

These are troublesome questions for a student of International Trade and Investment Law. As a consequence, this provoking and disturbing scenario underpins the genesis for my thesis. I shall lay emphasis on the interface between FDI and corruption, addressing legal and institutional issues that make Kenya a poor choice for FDI. The project shall trace the sources and types of FDI, investigate whether the allegation of corruption prevalent in the country is the underlying reason which makes Kenya an unattractive destination for FDI. In the process my research shall address the question on whether legal and corruption issues are the only impediments to the flow of FDI.

In an interview with the Minister for Finance he stated that:-

We have a good investment climate. What is spoiling it is the perceived corruption and the message that NARC is worse than KANU. The impact of FDI in Kenya has not been felt since inflows have been low. We are still suffering from the bad image that had been created in the 90s. It will take time before this image goes away.¹³

The Minister commented further that despite the major efforts being made

The negative trend towards investment has happened at a period when the government has implemented macroeconomic reforms in form of liberalized payment system, removal of foreign exchange controls, friendly tax reform and trade liberalization measures. It also has taken place at a time when the government has launched privatization program and come up with very attractive investment incentive measures. What comes to mind is after all these

¹⁰ Supra page 7 para 3

¹¹ Supra page 8 para 3

¹² Supra para 4

¹³ The Hon D Mwiraria, Minister for Finance Interview with the Author on February 10, 2005

initiatives, what else needs to be done? What has actually contributed to the poor performance of investment inflows?¹⁴

What underpins the failure to attract investment, is it for instance linked to widespread corruption as recently manifested by allegations of the Anglo Leasing and Finance Company Ltd's scandal? However, the Minister was not acknowledging the prevalence of corruption which is quite obvious to observers in the scene.

1.2 Background To The Problem

There is insignificant impact of Foreign Direct Investment on Kenya's development viewed against the backdrop of inflows of FDI to other select African and South East Asian Countries of Korea, Malaysia, Singapore and Thailand. The often cited reasons are corruption in the administration of justice, institutional and regulatory weaknesses besides the rundown state of infrastructure, and hopeless utilities.

Corruption in the judiciary revealed by the Integrity and Anti-Corruption Committee of the Judiciary of 2003, which preceded the purge of 23 Judges and 80 Magistrates in 2003, a historical phenomenon, is probably only symptomatic of the malaise that afflicts the entire fabric of the judiciary and commercial litigation in particular. In Justice Ringera's words:-

The compilation and presentation of this report is the greatest 'judgement' I have ever written. I say this because the right to a fair trial by an impartial court is one of the fundamental human rights enshrined in the constitution and the Judiciary is given the pivotal place in all disputes political and commercial included. Your trial by an impartial court is imperative and nothing subverts the impartiality of the court than corrupt judicial officers charged with the administration of justice. The Judiciary is like infrastructure and one question investors ask is the state of the rule of law in a country; not just in the books/statutes but in its enforceability. Other arms of government may be corrupt but a corrupt judiciary is more fatal as it can lead to the decline of a country if administration of justice is compromised.¹⁵

The aggregate Kenya Bribery Index 2003 by Transparency International, ranks Judiciary as No.12 with an index score of 24 which reflects a very poor rating scale in the image of the

¹⁴ Kenya Technical Working Group on RIFF - *Investment – May 2001*, page 3

¹⁵ Justice Aaron Ringera, Director of Anti-Corruption Commission - Interview with the Author at the Integrity Centre Nairobi, on January 27, 2005

public.¹⁶ This undermines the credibility of the Judiciary as an independent tribunal for the dispensation of justice in commercial disputes.

1.3 Statement of The Problem

Corruption has impacted negatively on Kenya's ability to attract FDI. The legal and institutional basis for FDI have been eroded by corruption. According to UNCTAD (1999) Handbook¹⁷, Kenya has experienced sharp reductions in FDI between 1992 and 1994. There was some improvement in 1995 as FDI rose to US\$33 Million from the previous year's US\$4 Million.¹⁸ This increase, however was not sustained because in 1996, FDI fell to US\$13 Million.¹⁹ This sharp decrease in FDI is explained by factors referred to as "tipping factors". Reductions in FDI are slow initially but as the situation gets worse, FDI reaches a tipping point, which is characterised by almost irreversible reduction. The tipping point is the threshold beyond which investors no longer go to a country. Reversing the trend is a very difficult task because it may/will require the victim country (Kenya) to address many other issues other than those that caused the tipping in the first place. It appears that Kenya has reached a tipping point and reversing this will require major changes.

The above scenario is documented by the UNCTAD World Investment Report 2003 in its "Performance Index and Potential Index" which ranks countries by how they do in attracting inward FDI and what their potential is in that respect.²⁰ Kenya is ranked 118 in the Performance Index²¹ and 127 in the Potential Index²² (one of the last 20 countries).

1.4 Theoretical & Conceptual Framework and Literature Review

1.4.1 Theoretical and Conceptual Framework

My thesis is grounded on sociological jurisprudence given the effect and impact both FDI and corruption have on the wellbeing and the dignity of person, society and the country. It is

¹⁶ Transparency International - *The Kenya Bribery Index 2004*, page 9

¹⁷ International Trade and Development Statistics, *United Nations New York - UNCTAD (1999) Handbook*, page 250

¹⁸ Ibid

¹⁹ Ibid

²⁰ Page 9 paragraphs 3 – 4 & Page 10 paragraph 1

²¹ Table on page 10

²² Table on page 13 and 14

rooted in what Roscoe Pound, reputed to be the father of sociological jurisprudence, postulated as:-

When we die considering whether some interest ought to be preferred to some other, they must be weighed on the same plane (generally the social plane). Our appraisal will be distorted if we conceive of a clash as one between an individual interest and social interest.

Consequently, individual interests should be subsumed under broader social interests for purposes of comparative evaluation. Social interests include: first, general security in safety, health, peace and public order, acquisitions and transactions. Second, security of social institutions – family, religions, political and economic; third, general morals, fourth, conservation of social resources; fifth, general progress – economic, political and cultural; sixth ('and most important') the social interest in individual life – that each individual be able to live a human life according to the standards of society.²³

The prevalence of corruption goes contrary to the grain of Pound's doctrine. This is because corruption starts as an individual enterprise but engulfs the society becoming cancerous with the judicial system being co-opted into the vice.

In an effort to attract FDI, Kenya has promulgated the Investment Promotion Act, 2004. The aim is to create an investor friendly business environment. However, this continues to be undermined by corruption and this has been recognised by even the President when he said:-

Corruption is a big enemy of business. In Kenya, 15 years of high-level corruption left our people impoverished. Investors shied away from the country, and an economy that had seen some good times slowly drifted into negative territory. All this did not happen because our people are lazy or because the return on investment was low. No, it happened because the ruling class had been heavily compromised by a corrupt group of briefcase and fly-by-night businessmen.²⁴

1.4.2 Literature Review

In addition to other Literature review publications, my thoughts have been informed through the review of such books as *Economics: An Integrated Approach* by Benjamin Davis, *Challenging Corruption in Asia: Case Study and Framework for Action*, by Vinay Bhargava and Emil Bolongaita, *Curbing Corruption Towards a Model for Building the National Integrity* by Rick Stapenhurst and Sahr J Kpundeh and *Administrative Barriers to Foreign Investment: Reducing Red Tape in Africa* by James J Emery, Melvin T Spence, Jr., Louis T Wells, Jr., and Timothy S Buehrer.

²³ J W Harris - *Legal Philosophies*, London Butterworths 1980, page 235

²⁴ [http://www.fdimagazine.com/news/fullstory/php/aid/472/Kenya's new president sets out on path to recovery](http://www.fdimagazine.com/news/fullstory/php/aid/472/Kenya's_new_president_sets_out_on_path_to_recovery),

All these books and authors have been very relevant in advancing the thrust of the thesis. They have brought great insight into the issues of FDI and corruption.

The Foreign Investment Advisory Services (FIAS) Study of January 2004 on accelerating reforms to improve the Commercial Legal Framework and remove Administration and Regulatory Barriers to Investment, observes that Kenya is undergoing fundamental changes aimed at creating a Private Sector led growth that will accelerate recovery and reduce poverty.

For much needed potential private sector investor to materialise, Kenya must develop a considerably more investor friendly business environment. Administration barriers remain a substantial impediment to investors and can only be removed by more aggressive government reform measures. Success in this respect will not only substantially ease impractical problems, confronting private sector enterprises, but will also enhance efficiency and effectiveness of government operations to encompass the following:

Streamlining regulation and procedures and strengthening law enforcement which is critical at this stage. However, the momentum of reforms is still strong and speeding up the implementation is urgent requiring strong political will and institutional solutions. The ultimate success of removing administrative barriers will take fundamental change at all levels, not just piecemeal adjustments. It will require not just the effort of one ministry or agency, but the Government acting as a whole, which shall call for prioritizing and sequencing the recommended reforms will become critical at the stage of planning specific actions of implementation, both at the highest levels and within each institution.²⁵

The outlook of the World Investment Reports 2003/4 and other publications postulate that FDI injects financial resources into a host Country but this requires appropriate regulatory structures. The largest recipient of inflows in Africa are the natural-resource rich Countries among them Nigeria and Angola, while Kenya is off the radar.

Widespread corruption in Kenya is a notoriety found in the public documents as reflected in the Reports of Controller and Auditor General, Public Accounts and Public Investments Committees' Reports and a Select Committee finding that:-

Today corruption is so extensive and deep rooted that almost 56% of tax revenue is misappropriated corruptly in one way or another. In 1999, Kenya lost an estimated 130 billion shillings in revenue from tax evasion. This amounts to almost 20% of the national GDP²⁶.

²⁵ A Joint Service of The International Finance Corporation and The World Bank - Foreign Investment Advisory Services (FIAS) - June 30, 2004 Report

²⁶ *The Report of The Parliamentary Anti-Corruption Select Committee Volume I*, May 2000, Executive Summary – page 3

The Anatomy of Corruption by Centre for Law and Research International (Clarion) concludes:-

That corruption permeates the entire social fabric of this country and poses problems of monumental proportions to the social, political and economic future of the nation”²⁷ and that “Corruption exists and is practised both in the public and private sectors with the former recording frequent and monumental occurrences of corruption that place a heavy economic burden on the Kenyan public.”²⁸

Unfortunately there has been reluctance on the part of the successive Kenya Governments to prosecute the alleged offenders. This may explain, perhaps the reason(s) why public officials have treated the findings in these reports with impunity, making corruption an accepted and institutionalised way of life as we shall endeavour to investigate.

The worsening state of corruption in Kenya led on July 08, 1998, to the National Assembly appointing a Parliamentary Anti-Corruption Select Committee whose terms of reference were:-

THAT, while appreciating that the Government’s effort to stamp out corruption both in public and private sectors and noting with concern that rampant corruption has become so pervasive that it threatens any further socio-economic development and the future of the country; aware that corruption has become so entrenched that the existing legal framework under the Prevention of Corruption Act (Cap.65) and the Anti-Corruption Authority are not adequate to significantly reduce it or eradicate it; and noting further that corruption has kept away potential investors, and eroded the good image of Kenya; this House resolves to set up a Select Committee to study and investigate the causes, extent and impact of corruption in Kenya; identify the key perpetrators and beneficiaries of corruption; recommend immediate effective measures to be taken against such individuals involved in corruption and recover public property corruptly appropriated by them and the enactment of a Bill to provide for stiff penalties on all corruption related offences.²⁹

The plausible explanation for the unabated corruption within the Public Service has been attributed to public servants’ participation in private business. This started with the partial implementation of the recommendations by the Government of the findings of the Report of the Commission of Inquiry (commonly known as the Ndegwa Report) of May 1971. The thesis will examine the connection if any between Civil Service participation in private business and the prevailing corruption in Kenya.

²⁷ By Kivutha Kibwana, Smokin Wanjala and Akech Owiti - Clarion 1996, *The Anatomy of Corruption in Kenya - Conclusions and Recommendations*, page 196

²⁸ Ibid

²⁹ *Report of the Parliamentary Anti-Corruption Select Committee (Volume II)* - May, 2000, page 3

The role of Multinational Corporations (MNC) in the perpetuation and/or fuelling of corruption has been an issue especially in developing countries. This is typified by nations enacting legislations against corruption as typified by acknowledgement that:-

Until now, America was the only nation which outlawed the bribery of foreign officials. The USA's Foreign Corrupt Practices Act was passed in 1977, during the Jimmy Carter administration, following the Lockheed Aircraft scandal in Japan. US companies which break the law are liable to fines of up to \$2 million per violation and individuals up to \$100,000 and imprisonment for up to five years. Not every American businessman has turned lily-white since then. But there is broad agreement that the law has affected behaviour.

Now the USA is no longer going it alone. As well as the OECD convention, the European Union, the Council of Europe, the Organization of American States and the World Bank have all reviewed their regulatory procedures to eliminate bribery. Till now it was even tax deductible as a legitimate business expense in 11 OECD countries.³⁰

1.5 Objectives of The Research

1.5.1 The main object

Identify legal and institutional issues in the interface between FDI & corruption.

1.5.2 Specific Objectives

Specific Objectives of my thesis:

To identify the constraints due to the legal impediment(s), if any and to make appropriate recommendations for policy legal and institutional reforms which will contribute to Kenya being a strategic location for potential FDI.

1.6 Broad Argument Layout/Structure

The imperatives of World Trade Organization (WTO), globalization and the exigencies of the 21st Century which leave Kenya with few options than to engage in the international market place to compete for and attract the FDIs through a conscious husbandry of legal and institutional strategies to transform Kenya into a stable development environment and a friendly territory that attracts FDI.

³⁰ <http://www.forachange.co.uk/index.php?stoid=104>, 14/02/05

1.7 Assumptions/Hypotheses

- (1) Kenya does not so far have known mineral resources that can attract FDIs irrespective of the high corruption profile vis-à-vis other Countries such as Nigeria, Congo or Angola;
- (2) Kenya does not have sufficient market capable of attracting FDI due to low level of per capital income, which according to 2004 World Development Report is only US\$360;
- (3) Kenya does not have efficiency seeking FDI to be a source for off-shoring hence it faces competition from developing and developed economies;
- (4) Will privatisation of the Public Assets through the proposed Privatization and Public Procurement and Disposal Bills now before Parliament offer investment atmosphere conducive to FDI?;

1.8 Research Questions Sought To Be Answered

1. Can Kenya's investment environment attract FDI?
2. Is corruption a perception or a reality in Kenya?
3. What legal and institutional interventions work against Kenya as a preferred destination for FDI?
4. Is corruption in Kenya institutionalised viewed against the background of:-
 - (a) The Report of Commission of Inquiry – (The Ndegwa Report) of May 1971;
 - (b) The Parliamentary Anti-Corruption Select Committee – (The Kombo Report) of May 2000;
 - (c) Transparency International Report 2002/2003 findings;
 - (d) An Anatomy of Corruption in Kenya by Centre for Law and Research International (Clarion) 1996.

1.9 Methods To Be Used

To collect and collate data for the research the following methods will be employed:-

1. **Library Research** – This will entail use of publications, research papers, books, Statutes, Commissions of Inquiries and Bills before Parliament, publications written on FDI;

2. **Internet Service** – Will undertake research through the various websites, databases, academic publications, journals, multilateral institutions (WTO, IMF, World Bank) and other United Nations Agencies, Research Institutions i.e. Transparency International;
3. **Interviews** – Findings will be predicated on interviews with a number of Ministers, Officials and individuals as outlined herebelow, which constitutes primary data:
 - (a) Director, Kenya Anti-Corruption Commission;
 - (b) Minister for Finance;
 - (c) Minister for Planning & National Development;
 - (d) Minister for Trade and Industry;
 - (e) Director, Kenya Wildlife Service formerly of Investment Promotion Centre (IPC);
 - (f) Governor, Central Bank of Kenya.

There are four Chapters. Chapter I is the introduction and lays down the roadmap to the thesis. Chapter II outlines the exigencies of corruption and FDI. What synergies exist if any.

Chapter III deals with the Legal and Institutional Constraints to attracting FDI. Chapter VI draws conclusions and recommendations on the interface between FDI and corruption, myth or reality and the sociological jurisprudence and implications of corruption.

CHAPTER II – PART A

THE EXIGENCIES OF CORRUPTION AND FDI – WHAT SYNERGIES IF ANY?

The following gives the earliest manifestation of corruption which the colonizers induced the indigenous people of Kenya to be involved in.

2.1 The Prevention of Corruption Act (Cap 65)

The concern on corruption is not a phenomenon associated with the advent of independent Kenya as is sometimes assumed. It has a history going back to the colonial era when the prevention of Corruption Act was promulgated.

The Prevention of Corruption Act (Cap. 65) was enacted in 1956, not out of foresight that corruption was likely to occur in later years, but because corruption was then serious enough to warrant legislation to deal with it. The first signs of corruption are said to have been the gifts offered to certain African groups to provide protection against hostile communities to adventurous explorers and missionaries in their journeys through the African continent. By the 1990's corruption had become endemic and systemic.³¹

It can be summed up that the history of the struggle against corruption has been characterised by reluctance on the part of the political class to tackle the menace head on. However, the perception that corruption was one of the causes of poverty in Kenya and the withholding of donor support on account of allegations of corruption and poor governance forced the Government to establish a body to deal exclusively with corruption in all its manifestations. Hence the birth of the Kenya Anti-Corruption Authority in 1997.

2.2 The Report of The Commission of Inquiry, May 1971

In 1971 the Report of the Commission of Inquiry's recommendations on the participation of the public servants in private business, noted:-

The Government Code of Regulations contains a Section which lays down rules of conduct which are in general consistent with the principles we have stated. The essence of these rules is that officers acquiring certain private interests should bring them to the notice of higher authority and where appropriate seek approval of their actions; we regard it as essential that these provisions which are in fact designed to protect the individual Civil Servant should be rigorously observed. We have the impression that this has not always been the case in the past and if this is so we suggest that the Government should consider requiring at some specific future date that all senior officers should make a complete statement of their interests as required by the amended Rules on the basis that failure to have done so hitherto will not of

³¹ The African Centre for Economic Growth - *The Link Between Corruption and Poverty: Lessons from Kenya Case Studies*, Nairobi, Kenya, 2000, page 145 and Justice A G Ringera – *Role of the Kenya Anti-Corruption Authority in the Fight Against Corruption*, page 146

itself count against them. We realize this suggestion may be repugnant to the majority who have acted impeccably but we hope it would go far to convince public opinion that laxity or worse will not be tolerated.³²

The above underscores recognition that with the involvement of the public servants in business, potential conflict of interest was inevitable. The Commission in order to safeguard against the civil service excess recommended the creation of the office of The Ombudsman by noting that:-

to deal with the danger that fear and favour may operate behind the wall of official secrecy, and with the danger that powers may be abused, we have no hesitation in recommending as a matter of urgency the creation of a Kenya equivalent of the “Ombudsman” or Parliamentary Commissioner.³³

It is quite evident therefore that the Commission was alive to danger and the reality of propensity for the public servants being involved in corrupt practices by virtue of their position. Had the government taken the steps with respect to the private interests the report states that:-

the principles which should determine the acquisition and pursuit by Civil Servants of private interests. So far as the Code of Regulations is concerned we consider that Civil Servants should not, without the consent of the appropriate authority, engage in trade or acquire directorships. On the other hand we consider the existing provisions relating to the ownership of shares and other like investments to be out of date and recommend their abolition.³⁴

Commission’s recommended that:

That all public servants should adhere to a code of ethics, which we have detailed. That provided this code of ethics is observed, there is no objection to public servants owning property or businesses and that Government should consider requiring all Senior Civil Servants to make a complete statement of their interests.³⁵

However, the empirical evidence shows that the civil servants have not adhered to the code of ethics and only embraced “there is no objection to public servants owning property or businesses” with all the attendant ramifications of conflict of interest and corruption that go with it. In 2004, 33 years later, Parliament passed “The Public Officers Ethic Act.”³⁶ However, even with the passing of the law, secrecy has been maintained to the extent that it serves no useful purpose when declaration of wealth and interest are kept secret. The fallacy

³² *Report of the Commission of Inquiry 1970-71, Private Interests, pages 14-15*

³³ *Report of the Commission of Inquiry 1970-71, Accountability and Openness, page 23*

³⁴ *Report of the Commission of Inquiry 1970-71, Private Interests, page 259*

³⁵ *Report of the Commission of Inquiry 1970-71, Civil Service Responsibilities and Ethics, page 279*

³⁶ *The Public Officers Ethic Act 2004*

of this has been recognised by the Government and the President during the opening of the Ninth Parliament has proposed an amendment to the law to provide for total disclosure of the wealth and interest by all persons covered under the Act.

2.3 Anti-Corruption Select Committee 2000

On July 8, 1998, the National Assembly appointed Members who constituted a Parliamentary Anti-Corruption Select Committee to investigate corruption in Kenya. This Committee started its work on July 31, 1998 and the following were its terms of reference:-

Study and investigate the causes, nature, extent and impact of corruption in Kenya; Identify the key perpetrators and beneficiaries of corruption. Recommend effective and immediate measures to be taken against such individuals involved in corruption and recover public property corruptly appropriated by them and Recommend the enactment of a Bill to provide for stiff penalties on all corruption - related offences.³⁷

The formation of the Committee followed the passing of a motion by Parliament to constitute the Committee to investigate widespread allegations of corruption in the country. The impact of corruption is reflected by among others the following:-

Kenya has lost investors as well as foreign aid due to corruption. During the last 10 years, the Danish, British, Swedish and Norwegian governments have either withdrawn or scaled down their aid to Kenya. The government has therefore relied on deficit spending to meet its needs, thereby worsening the domestic debt situation.³⁸

The above underpins the grave impact of the alleged perception and/or reality of corruption has had in the entire garment of the national life of the country, to the extent of affecting not only aid support but also in curtailing the inflow of Foreign Direct Investment. In the final analysis, the consequences of corruption to the Kenyan society has degenerated to the extend that:-

In general, corruption has had a very profound negative impact on the Kenyan society and economy. This can be seen in the attitude of the Kenyan people where a high tolerance for corruption seems to have emerged amidst growing complaints that corruption is hurting the economy. Why this paradox? Rather than deal squarely with the causes of corruption, many Kenyans prefer to seek individual solutions to problems caused by corruption. Quite often, such solutions involve an individual engaging in further acts of corruption.³⁹

In one of its actions, the Parliamentary Committee recommended the following:-

³⁷ *Report of the Parliamentary Anti-Corruption Selection Committee*, Volume 1, May 2000, Nairobi, page ix

³⁸ *Report of the Parliamentary Anti-Corruption Selection Committee*, Volume 1, May 2000, Nairobi, page 5 and 6

³⁹ *Report of the Parliamentary Anti-Corruption Selection Committee*, Volume 1, May 2000, Nairobi, page 47 and 48

The Committee felt strongly that all Kenyans must participate in curbing corruption. There is urgent need to put in place tight institutional and legal framework backed with political goodwill and effective enforcement agencies.⁴⁰

To deal with the very many cases involving land disputes, maladministration, injustice and general misuse of office by civil servants, the committee recommends that the Attorney General tables a bill to implement the motion recently passed by Parliament for the establishment of the office of an OMBUDSMAN.⁴¹

It is observable that there has been a co-incidence of recommendations by both the Commission of Enquiry (Public Services Structure and Remuneration's Commission) on May 1971 (commonly known as the **Ndegwa Commission**) and the Parliamentary Anti-Corruption Select Committee for the creation of the office of Ombudsman. Both these Committees are almost 30 years apart, and both have seen the wisdom for the establishment of the office of the Ombudsman, in order to access to the ordinary people a forum for venting their grievances against complaints and malpractices and abuse of office by public officers. Anti-Corruption Select Committee further recommended the enactment of the Public Officers Ethics Act as well as the Anti-Corruption and Economic Crimes Acts from which the Kenya Anti-Corruption Commission is derived.

2.4 The Anatomy of Corruption In Kenya (1994/5)

The Centre for Law and Research International (CLARION 1994/1995), undertook the study titled "The Anatomy of Corruption in Kenya" in recognition of the following:-

[Among these problems are] the continuing, pervasive and significant corruption at all levels of Government where body in high-level positions – present and previous cabinet members and civil servants – seems to be confronted with legal proceedings in order to stop corruption. In this connection, Denmark's experiences with the Rural Development Fund (RDF) are quite symptomatic and disappointing. The Danish authorities can no longer accept the reasons given by the Kenyan authorities of the slow investigation work and legal proceedings against the people involved.⁴²

In their research findings, the authors noted that, according to the Kanu Manifesto 1992, the party was to apply the political will to root out corruption in the Civil Service. However, this was likened to:-

To know and not to know, to be conscious of complete truthfulness while telling carefully constructed lies, to hold simultaneously two opinions which cancelled out, knowing them to be contradictory and believing in both of them, to use logic against logic to repudiate morality while laying claim to it, to believe that democracy was impossible and that the party

⁴⁰ Report of the Parliamentary Anti-Corruption Selection Committee, Volume 1, May 2000, Nairobi, page 63

⁴¹ Ibid, page 76

⁴² Kivutha Kibwana, Smokin Wanjala and Okech-Owiti - *The Anatomy of Corruption in Kenya*, Nairobi, page v

was the guardian of democracy, to forget whatever it was necessary to forget, then to draw it back into memory again at the moment when it was needed, and then promptly to forget it again and above all, to apply the same process to the process itself – that was the ultimate subtlety; consciously to induce unconsciousness, and then once again, to become unconscious of the act of hypnosis you had just performed. A Prince who wishes to remain in power is often forced to be other than good. When the group whose support he deems vital to his survival is corrupt – be it the common people, the soldiers, or the nobility – he must follow their inclinations in order to satisfy them. In such a case, good deeds become his enemies.⁴³

The experience during the 1990s and early part of 2000 until the time the KANU party was ousted from power in the General Election of 2002, it presided over a corruption machinery which is clearly manifested by the above quotations. This is also reflected through various reports by the Controller Auditor General which have over the years given account of misappropriation of public funds where individuals have been named without any sanction being applied against the alleged officers in the public service. A very good example, is found in the list of Alleged Perpetrators Appendix 2(a), in the PIC and PAC Report covering financial years between 1974/1975 and 1995/1996 inclusive with a view to identifying the perpetrators of corruption and establishing to what extent recommendations of the two Committees have been implemented. In the reports, it has been noted that no action has been taken in most cases and the Parliamentary Committee documented those involved and the monetary values of the amounts in issue. The economic dimensions and the impact of corruption means that:-

corruption in Kenya's public sector is perpetrated through the parastatal sector where public enterprises continue to be the most important conduit for siphoning public funds by individuals. This process takes place in two main ways:

One is through joint ventures usually with private foreign businessmen and subsequent utilization of government guaranteed loans in the implementation of 'white elephant' projects. The second is the more prevalent one, where funds are plundered by the managers of the parastatals. Over the years, the Government has lost a lot of money in many of these ostentatious ventures which are usually of great political appeal but doubtful of economic viability. The more well-known and publicized cases of failed ventures include Ken-Ren Chemicals and Fertilizers Ltd., Turkwell Gorge Hydro-Electric Power Project, the Kenya Fibre Corporation, Kenya Furfural Company, the Kisumu Molasses Factory and the Nyayo Motor Corporation.⁴⁴

Among the resultant consequences of corruption is that the Danish government through its Development Agency, DANIDA had cut its aid to Kenya when it stated:-

In the past, corruption in Kenya was not that widespread, and the number of people involved was rather limited. However, in recent years it pervades the whole society. The reason is partly economic development which increasingly puts pressure on the individual family's

⁴³ Kivutha Kibwana, Somkin Wanjala and Okech-Owiti - *The Anatomy of Corruption in Kenya*, Nairobi, page 1

⁴⁴ Kivutha Kibwana, Smokin Wanjala and Okech-Owiti - *The Anatomy of Corruption in Kenya*, Nairobi, page 109

economy, but probably primarily a political structure which allows and at times even encourages corruption.⁴⁵

2.5 Findings of The Controller and Auditor General

The Controller and Auditor General Reports of 2000/2001 and 2001/2002 reflect a highlight of some corrupt and irregular expenditures by Ministries to consternation of any observer. For instance below is a shameful catalogue of the reports by the Controller and Auditor General, which recounts huge amounts of public funds being misused/mismanaged or corruptly lost with glaring impunity:-

2.5.1 Ministry of Finance

Irregular purchase of Jet Aircraft with the government paying US\$7,920,000 uncerntained training program, US\$1,829,121 on undelivered spare parts and US\$1,713,725 commitment fee that is yet to be recovered from the defaulting financiers.⁴⁶ The computerisation project of the Department of Government Investment and Public Enterprises (DGIPE) was contracted without following the laid down procedure while the various equipment supplied were much higher than the prevailing market prices.⁴⁷ Irregular procurement of vehicles at prices higher than the prices agreed in the supply contract.⁴⁸ Irregular store records⁴⁹ and excessive advances totalling Kshs.58,645,953 issued to District Treasuries from the Pensions Department remain unaccounted for.⁵⁰ Evasion of payment of duty and other taxes due to under-declaring value of imported goods, use of false exemption letters, making exemption claims under wrong schedules.⁵¹

Losses incurred by the Ministry of Finance during the period under review through the purchase of jet aircraft, computerization without proper procedure being followed, inflated vehicle prices, excessive advances issued to District Treasuries and Pension Department as well as payments of duty and other taxes due to under-declaring of values of imported goods by use of false letters amounts to KShs.977,557,393.

2.5.2 Office of the President

Confidential expenditure of Kshs.160,716,609 was not supported by a certificate from the minister as required,⁵² and “the government paid a firm that had sued for closure of its lodges Kshs.14,991,119.75 against the court award of Kshs.3,524,523. No explanation was offered for this irregularity.⁵³

2.5.3 Ministry of Roads & Public Works

A contract for Kshs.1,151,457,735.70 was entered into with a foreign Company and paid but only Kshs.1,022,284,702.20 is reflected in the Ministry accounts leaving out an amount of Kshs.129,173,033.50,⁵⁴

45 Ibid, page 171

46 *Report of the Controller and Auditor General for the year 2001/2002 and 2000/2001*, page 9 para 28-33

47 Ibid., page 10 para 34-37

48 Ibid., page 12 para 40-41

49 Ibid., page 13 para 43-45 and page 20 para 73

50 Ibid., page 23 para 83

51 Ibid., page 29 para 104

52 Ibid., page 52 para 207

53 Ibid., page 52 para 210

54 Ibid., page 98 para 374

Omission of donor aid and expenditure totalling Kshs.30,000,000,⁵⁵

Tenders for Kshs.1,166,345,459 on repairs to government houses were not advertised as is required but were given to specific contractors to bid for.⁵⁶

2.5.4 Ministry of Lands and Settlement

Expenditure of Kshs.42,519,133 was unsupported by the relevant documents,⁵⁷

Four contracts for the development of roads and drains totalling Kshs.685,346,956 were not signed by the government and the contractors were appointed by selective tendering.⁵⁸

2.5.5 Ministry of Home Affairs, Heritage and Sports

Grants totalling Kshs.8,081,871 were given to individuals and organisations who are not registered with the Ministry and whose requests had not been deliberated on by the panel,⁵⁹.

2.5.6 Ministry of Agriculture and Rural Development

Exclusion of expenditure totalling Kshs.196,758,542 from the Development Appropriation Account.⁶⁰ In addition to unauthorised expenditure amounting to Kshs.19,388,606 and no description of items charged.⁶¹

Compensation and ex-gratia payments amounting to Kshs.7,701,357.55 were unauthorised and inadequately supported with letters bearing forged *signatures*.⁶²

2.5.7 Ministry of Health

Over expenditure of Kshs.203,657,448 on Personal Emoluments and other Personal Allowances,⁶³ and "Expenditure on stalled and abandoned projects."⁶⁴

2.5.8 Ministry of Local Government

Unsatisfactory expenditure of Kshs.1,587,208,444 under the Roads Maintenance Levy Fund,⁶⁵ in addition "Seven Municipal Councils and two Town Councils were noted to have irregularly misapplied a total of Kshs.87,165,802.15 in paying staff salaries and other expenses."⁶⁶

⁵⁵ Ibid., page 99 para 375
⁵⁶ Ibid., page 102 para 387
⁵⁷ Ibid., page 169 para 640
⁵⁸ Ibid., page 171 para 645
⁵⁹ Ibid., page 82 para 330
⁶⁰ Ibid., page 87 para 341
⁶¹ Ibid., page 87 para 342
⁶² Ibid., page 88 para 346
⁶³ Ibid., page 107 para 435
⁶⁴ Ibid., page 112 para 456
⁶⁵ Ibid., page 118 para 485
⁶⁶ Ibid., page 118 para 486

The impunity with which the government of Kenya has tolerated abuse and misuse of public resources makes one wonder whether this was not a case of complicity between the public officials and the political leadership. This is informed by the fact that there is no history of successful persecutions inspite of compromise of well documented instances by the Comptroller and Auditor General of public funds being squandered by officials in the government as typified by his Reports of 2000-2001 and 2001-2002. It has become an annual ritual of misuse of public funds without the Attorney General taking legal action to prosecute those involved.

This has led to evolvement of an incurable culture which causes the concerned officials/servants to act as though they are a law unto themselves. The perception of the investors is therefore one of a country where corruption is tolerated and the rule of law is not respected, making it untenable for inflow of FDI with the attendant consequence of eroding the confidence of the investors already in the country

2.6 Findings of Transparency International

The Kenya Bribery Indices of 2003/2004 and 2004/2005 published by the Transparency International in Kenya reflects the national survey on the magnitude of bribery in Kenya. The survey captures corruption as experienced by ordinary citizens in both public and private organisations. The respondents provided information on the experience in the bribery in which organizations they encountered bribery, where they paid bribery, how many they paid and what they paid for. Bribes are categorized into five purposes:- Law enforcement, regulatory, access to service, business and employment covering incidences, preferences, severity, frequency, costs and size.

According to the report, the survey for 2003 reflects a decline from 65% - 40%. Further, in the report of 2004, the bribery situation reported a decline from 40% - 34%. A comparison of the size indicator for the above period reflects realignment on ranking and significant drop of the amounts. For instance, in 2003, Public Universities ranked number one at KShs.35,412.00 to a significant drop of KShs.1,554 bribery in 2004.⁶⁷ Also see Appendices I and II.

AVERAGE SIZE OF BRIBE, KSHS

APPENDIX I

RANK	ORGANIZATION	2003			2002		
		NATIONAL	URBAN	RURAL	NATIONAL	URBAN	RURAL
1	Public Universities	35,412	30,923	50,000	4,644	6,750	2,923
2	Department of Defence	27,917	19,871	67,000	9,433	8,451	21,038
3	Public Colleges	10,658	12,822	1,669			
4	State Corporations n.e.s.	10,188	11,574	1,108	1,911	3,390	1,442
5	Financial Institutions n.e.s.	7,477	10,428	1,575	738	277	6,000
6	Ministry of Labour	5,680	5,800	4,000			
7	Ministry of Education	5,226	5,407	5,125	2,001	4,437	1,079
8	Teachers Service Commission	4,555	4,295	5,719	3,120	3,819	2,428
9	Immigration Dept	4,467	4,771	1,607	10,450	22,523	714
10	Ministry of Lands	3,620	4,063	2,250	944	923	1,571
11	KPLC	3,180	3,113	3,468	1,079	981	11,104
12	International Organizations	3,053	3,532	69	1,341	12,400	719
13	Public Schools	2,746	5,977	454	1,850	2,536	1,807
14	National Social Security Fund	2,212	2,151	3,100	1,489	1,673	1,686
15	Ministry of Public Works	2,035	2,035		3,260	3,358	601
16	Judiciary	1,836	1,694	2,056	2,328	2,459	2,498
17	Central Government, n.e.s.	1,816	2,478	1,232	1,008	931	1,219
18	Kenya Railways	1,761	1,761		1,415	1,982	375
19	Public Hospitals	1,731	2,881	557	279	372	258
20	Private Sector	1,686	1,490	3,430	1,245	1,217	1,543
21	Ministry of Health	1,625	1,988	1,050	275	672	118
22	Trade Unions	1,572	1,572				
23	Kenya Revenue Authority	1,486	2,535	818	1,976	2,094	2,126
24	Telkom Kenya	1,485	1,602	667	3,120	3,819	2,428
25	Nairobi City Council	863	866	617	314	325	92
26	Min. of Agriculture/Livestock Dev.	746	17,500	114	2,609	3,611	931
27	CSOs	720	832	554	7,683	8,281	6,250
28	Provincial Administration	636	998	477	955	1,429	586
29	Kenya Police	635	778	443	354	489	142
30	Mombasa City Council	585	564	4,000	232	202	311
31	Co-operative Societies	484	720	332			
32	Local Authorities, n.e.s.	457	557	403	327	285	439
33	Religious Organizations	455	1,343	404	431	341	1,074
34	Ministry of Water Development	414	253	2,800			
35	Kisumu City Council	414	435	100	318	412	175
36	Registrar of Persons	352	422	194	579	635	584
37	Postal Corporation	104	89	100			
38	Kenya Commercial Bank	100	100		535	635	4,519

AVERAGE SIZE OF BRIBE, KSHS

APPENDIX II

RANK	ORGANIZATION	2004			2003		
		NATIONAL	URBAN	RURAL	NATIONAL	URBAN	RURAL
1	Teachers Service Commission	13,115	4,500	15,700	4,555	4,295	5,719
2	Kenya Police	10,831	1,654	18,030	635	778	443
3	Judiciary	3,606	4,700	3,197	1,836	1,694	2,056
4	Ministry of Lands	3,037	2,126	4,688	3,620	4,063	2,250
5	Postal Corporation of Kenya	2,769	2,769	0	104	89	100
6	Ministry of Education	2,700	8,200	585	5,226	5,407	5,125
7	Immigration Department	2,644	2,950	2,400	4,467	4,771	1,607
8	National Social Security Funds	2,021	2,308	300	2,212	2,151	3,100
9	Public Colleges	1,968	1,775	2,656	10,658	12,882	1,669
10	Kenya Tea Development Agency	1,958	700	2,041			
11	Ministry of Culture, Gender & Sports	1,816	200	1,938			
12	Co-operatives	1,811	1,821	1,807	484	720	332
13	Kenya Revenue Authority	1,571	1,525	1,822	1,486	2,535	818
14	Public Universities	1,554	1,433	3,000	35,412	30,923	50,000
15	Kenya Power & Lighting Company	1,403	765	4,369	3,180	3,113	3,468
16	State Corporations n.e.s.	1,286	920	2,204	10,188	11,574	1,108
17	Nairobi City Council	1,266	1,069	3,433	863	866	617
18	Central Government n.e.s.	1,211	897	2,488	1,816	2,478	1,232
19	Kenya Commercial Bank	1,200	0	1,200	100	100	0
20	Provincial Administration	1,093	1,894	512	636	998	477
21	Registrar of Persons	939	1,125	818	352	422	194
22	Ministry of Water Development	927	1,002	356	414	435	100
23	NGOs/CSOs	886	769	891	720	832	554
24	Private/Sector n.e.s.	750	203	1,193	1,686	1,490	3,430
25	Ministry of Health	713	785	250	1,625	1,988	1,050
26	Public Hospitals	611	755	547	1,731	2,881	1,050
27	Public Schools	602	718	529	2,746	5,977	454
28	International Orgs/Dip. Missions	500	500	0	3,053	3,532	69
29	National Health Insurance Fund	500	0	500			
30	Local Authorities n.e.s.	427	367	535	457	557	403
31	Coffee Board of Kenya	409	0	409			
32	Ministry of Agriculture/Livestock	381	178	551	746	17,500	114
33	Financial Institutions n.e.s.	269	265	500	7,477	10,428	1,108
34	Religious Organizations	172	840	149	455	1,343	404

The subtle message from Transparency International is the observation that:-

Corruption is present in almost any country, but has the most devastating effects in developing economies, because it hinders any advance in economic growth and in democracy. It wastes resources by distorting government policy against the interests of the majority and away from its proper goals. It turns the energies and efforts of public officials and citizens towards easy money instead of productive activities. It hampers the growth of competitiveness, frustrates efforts to alleviate poverty and generates apathy.⁶⁸

The characterization by TI is manifested by the Kenya situation, which seem to sustain the unfortunate phenomenon of widespread poverty yet the world over unprecedented growth and development is taking place. This means everybody suffers.

2.7 African Parliamentarian Network Against Corruption (APNAC)

On November 03, 2003 in Nairobi, The President of Kenya, The Hon Mwai Kibaki, opened the First Regional Conference of the African Parliamentarians Network Against Corruption (APNAC) under the theme “New Challenges in the Fight Against Corruption.”⁶⁹

The President was very forthright in his determination to deal with corruption. This is typified by His statement to the effect that:-

My strategy against corruption has recognised that success is dependent on my commitment as the Head of State. My willingness and commitment to lead from the front in the fight against corruption continues to create the enabling environment in which the battle is taking place. This is not to say that the fight against corruption is smooth sailing. Corruption, as you have all learnt, fights back. But for us, success is certain because fighting corruption is part of the great transformation that we promised the Kenyan people. In the war against corruption, therefore, our most determined soldiers are the ordinary people of this country. There may be individuals labouring under the impression that the anti-corruption fight will not reach them. They are mistaken. In the fight against corruption, we say, forward ever, backward never.⁷⁰ He added that

⁶⁸ United Nations Development Programme - <http://magnet.undp.org/Docs/efa/corruption.htm>, June 26, 2005

⁶⁹ *First Regional Conference of the African Parliamentarians Network Against Corruption (APNAC)* November 3 – 4, 2003 Nairobi

⁷⁰ *First Regional Conference of the African Parliamentarians Network Against Corruption (APNAC)* November 3 – 4, 2003 Nairobi pages 18-19

Over the next five years, our aim is to stigmatise corruption in Kenya. We seek an end to the days when those who have lived on ill-gotten wealth are admired. We seek an end to the days when those who have looted public coffers are invited to use the proceeds to build churches and hospitals. We seek an end to the days when those who have bankrupted public institutions are elected to parliament and called ‘Honourable’⁷¹

and finally he concluded that

Today, we are here to both inaugurate and consolidate APNAC. As Kenyans, we want to share with others and to learn from them. Let us also take the opportunity of this event to network and inspire one another. Looking at the impressive crowd in front of me, I am heartened that the ranks of generals in the fight against corruption continue to grow and to organise.⁷²

The commitment shown by the President is reflective of recognition that the vice is not only debilitating in its effect but also extremely retrogressive and is a serious impendment to the socio-economic and political developments of Kenya. Corruption therefore if not eliminated has the potential to even undermine the very existence, survival and the integrity of the nation. Recent developments in the public procurement process have raised doubts on the effectiveness of the measures to deal with the vice. A typical example is:-

2.7.1 Allegations of Scandal

For instance questions have been raised as to the genuine commitment of President Kibaki’s Government to zero tolerance of corruption. This has arisen due to allegations of people in the Government being involved with Anglo-Leasing Finance Company Ltd’s scandal, which surrounds lack of transparency in the procuring procedures. This is a case of where the NARC Government entered in a contract worth:-

KShs.2.7 Billion with Anglo-Leasing under which the company was supposed to provide certain contractual services to the Immigration Department. The services reportedly include the provision of state-of-the-art anti-terrorist-proof Kenyan passports. The Finance Minister and his Permanent Secretary are among those who are allegedly closely associated with the issue.

⁷¹ *First Regional Conference of the African Parliamentarians Network Against Corruption (APNAC) November 3 – 4, 2003 Nairobi page 19*

⁷² *First Regional Conference of the African Parliamentarians Network Against Corruption (APNAC) November 3 – 4, 2003 Nairobi page 20*

In an open letter to the President of Kenya, by Actionaid International (Kenya) on July 24, 2004, highlighting corruption, it cited seven incidences of corruption involving procurements. All these cases are alleged to involve Senior Government Officials.

2.8 Perspectives of Ministers and Public Officials on Corruption

I held a series of meetings with some government Ministers and Public Officials on the issue of corruption in Kenya whose perspectives are reflected in the interviews:-

2.8.1 Hon David Mwiraria, Minister For Finance

In the reasoning of the Minister, Kenya has a good investment climate but the baggage of the past continues to haunt us. Hence perception is very overbearing. The country is no more corrupt than Uganda and Tanzania, the difference is that there are people in the Kenya government who would want it to come down and are thus painting a bad image of the government. With relation to the British High Commissioner's accusations of corruption they are instigated by the fact Kenya has withdrawn some of its contracts from British firms, examples are: De-La-rue who have been printing money for Kenya but now other suppliers have been invited to bid for the tender. Further Kenya no longer buys Land Rovers from U.K. and instead purchase Toyotas. These smacks of hypocrisy on the part of the British Government. However according to the Minister, the country's relationship with the IMF is good but Britain has been campaigning against Kenya where they didn't want the IMF meeting to take place but the USA, France and the Scandinavian countries resisted and the meeting took place.⁷³

2.8.2 The Minister For Planning & National Development

According to Prof Nyong'o, several changes have been implemented following the recommendations of Parliamentary Anti-Corruption Select Committee. These include The Anti-Corruption and Economic Crimes Act, the Ndung'u Commission report on land relied heavily on the findings of the Parliamentary Anti-Corruption Committee Report of May 2000. Nevertheless, the question of restitution and prosecution is still unsolved.

⁷³ Hon David Mwiraria, Minister for Finance – Interview with the Author on Friday February 04, 2005

Corruption in Kenya is very real, especially in the defence contracts where there are no checks and balances to oversee the procurement system.

In the final analysis Kenya is ripe for foreign investments but we need to effect political change, public sector reforms and proper management of government resources to curb corruption. Economic growth will also go a long way in eradicating corruption. To achieve this we must have effective legal institutions.⁷⁴

2.8.3 Minister For Trade & Industry

According to Dr Kituyi corruption in Kenya is real although a lot of anxiety has been created over the issue. The major weakness being slow prosecution of perpetrators of corruption from the previous regime, nevertheless, at times corruption has no bearing on FDI and donor aid variables keep changing for example Equatorial Guinea has very high corruption but inflows of FDI continue being very high.

The Anti-Corruption and Economic Crimes Act are part of measures taken by the government for medium and long term fight against corruption. However, people want to see early blood.

The Minister was of the view that Multinationals are major consumers and abettors of corruption. For a long time they have benefited from corruption and dictatorship in Kenya and the western World generally kept quiet.⁷⁵

2.8.4 Dr Andrew Mullei, Governor - Central Bank of Kenya

Kenya has not come out of the woods as seen through the eyes of the international press since corruption is still a major issue in the country though efforts to fight corruption and cleaning up the mess of yesterday are in progress while ensuring the country does not infringe on Human Rights.

Dr Mullei confessed that CBK was adversely mentioned in the Goldernberg Inquiry. He added that the governor is an appointee of the government and gets instructions from the

⁷⁴ Hon Anyang' Nyong'o, Minister for Planning and National Development – Interview with the Author on Thursday February 10, 2005

⁷⁵ Hon (Dr) Mukhisa Kituyi, Minister for Trade and Industry – Interview with the Author on Thursday March 10, 2005

executive and follows instructions otherwise he would be guilty of insubordination. Unlike in the USA where the governor is answerable to congress, while in Kenya he is answerable to the President and gets orders from him. To that extent the Governor of CBK in Kenya is still susceptible to manipulation because he does not have the independence to make decisions without undue regard to political consideration.

It is imperative for researchers to be aware of the link between corruption and FDI as different standards are used for different countries depending on the nature of FDI.⁷⁶

2.8.5 Director of Kenya Anti-Corruption Commission

The mandate of KACC include among other following duties:-

- (i) The investigatory role covers the investigation of anti-corruption and economic crimes as defined in the Act.
- (ii) The educative role entails the education of members of public on causes and dangers of corruption with a view of eliciting their support.
- (iii) The advisory role includes examining procedures in public bodies to discover corrupt practice and loopholes for corruption with a view of recommending changes.
- (iv) The restitutionary role involves investigating the loss or damage incurred to public bodies from corruption with a view of restituting or compensating for the same. The Commission has powers to seize unexplained assets by public officials and to apply for preservation/freezing of such assets.
- (v) The Commission carries out investigations after getting a complaint from any member of the public or on reference from the Minister, the Attorney General, the National Assembly or on its own motion.

Justice Ringera submits that it is important to understand that any office can be abused and the integrity of an office depends on the holder of such an office. The same is true of the Commission which according to S.10 of the Act ensures the independence of the Commission. However, he observed it is one thing to give a body statutory independence

⁷⁶ Dr Andrew Mullei, Governor – Central Bank of Kenya – Interview with the Author on Wednesday March 09, 2005

and it is another thing to have an independent person in that office. He added however that “Nothing would cause me to decline to investigate anyone”.

His perspective on the major weaknesses and constraint to the dispensation of justice is that, overall, we need more investment in the judiciary. There are approximately 50-60 judges and 200-300 magistrates to service a population of 30 million people. This is obviously not enough. But to increase the number of judges, the number of courts must also be increased. The government must look into putting up new courts and registries the same way they look for funds to build roads as efficient administration of justice is more important to an economy than may be perceived. He maintained Commercial courts haven't worked as they were intended to and the challenges arise from the fact that the Judges in this court were meant to have permanence leading to acquisition of the requisite expertise. This is not happening as judges are transferred frequently, a question only the Chief Justice can adequately respond to.

The number of Judges are too few and are overwhelmed by workload than judges in other divisions. This obviously affects their efficiency. Besides the Automation of judicial proceedings is long overdue for proper administration of justice to enhance:

- (i) The quality and accuracy of judicial proceedings would aid in making of judgements especially in the appellate courts where the record of the lower court is relied on in determining the outcome of an appeal;
- (ii) The judge would be left with more time to follow the proceedings and to apply his mind and have time to ask questions to clarify important issues without bothering to write down the court proceedings in longhand;
- (iii) Automation shall remove room for mischief as judges can record matters selectively.

Justice Ringera's perspective is that:-

Corruption is endemic and is deeply entrenched in our society and will not end in the next 5-10 years. His vision is to see a reduction of corruption by the time he leaves office. This he envisages to achieve through vigorous enforcement of corruption laws so that no one feels they are above the law. He observes in countries where corruption is low, it is because the rule of law works i.e. there is certainty of arrest, prosecution and conviction. He is of the

view that what drives corruption is greed not need and although improving public servants' salaries may reduce corruption, it will not eradicate it.⁷⁷

2.8.6 Director of Kenya Wildlife Service

The Director of Kenya Wildlife Service, Mr Kipng'etich, formerly, Director, Investment Promotion Centre, postulates that corruption increases the cost of doing business in Kenya yet Bangladesh is ranked as more corrupt than Kenya but their economy is growing at 8% mainly due to FDI. He attributes Bangladesh success to the fact that once you pay (the bribe) the whole system is open for you while in Kenya there is a block placed at every stage.⁷⁸

2.8.7 Retrospection of a Former Permanent Secretary

John Githongo, the former Permanent Secretary, Ethics and Governance in the Office of the President, in charge of advising the government on the wherewithal to fight corruption, who resigned on February 7, 2005, while delivering a lecture on Wednesday June 8, 2005 at Oxford University titled "**Justice Up For Sale In Kenya**" which he attributes to widespread corruption, said:-

You can easily buy justice in Kenya, the criminal justice system is in a mess and it needs urgent review. Graft was killing the poor. The bureaucracy of the Kenya's Judiciary has failed its citizens who have become prisoners of the system. Most African leaders are the main drive behind the graft. Corruption in Kenya starts at a personal level mainly with politicians and they bribe their way all through to the corridors of power. Corruption knew no boundaries, thriving nationally and internationally and has affected many sectors like energy and communications. Africa's biggest let-down in the war against corruption was its sense of respect and deference to the elderly.⁷⁹

⁷⁷ Justice Aaron Ringera, Director, Anti-Corruption Commission - Interview with the Author on Thursday January 27, 2005

⁷⁸ Mr Julius Kipng'etich, Director – Kenya Wildlife Service – Interview with the Author on Friday February 04, 2005

⁷⁹ The Standard Newspaper, Thursday June 9, 2005, Nairobi, Kenya, back page

On April 14, 2005, speaking in Berlin, Germany, Mr Githongo, a recipient of an award in International Anti-Corruption prize asserted that lack of willingness by the leadership (the presidents and prime ministers) in Africa makes it difficult to deal with corruption. Most of the leadership are the host to the corruption group.⁸⁰

This is characterised by lack of persecution of officials who are alleged to be corrupt. However, due to their perceived closeness to the powers that be, they get away with impunity after either misusing or outright theft of public resources. For two years Mr Githongo was in charge of directing efforts against corruption and hence he is expected to be more authoritative in his perspective.

The ministers and public officials interviewed concur that the prevalence of corruption in Kenya has impeded the flow of Foreign Direct Investment. However, what is lacking is a firm strategy to deal with corruption. For instance, the role of Kenya Anti-Corruption Commission (KACC) is purely investigatory, referring its findings to the Attorney General's office to either institute proceedings or decline to prosecute alleged cases of corruption.

The Anti-Economic Crime Act should be amended to provide for prosecutorial powers for corruption cases to be vested at KACC, otherwise the whole exercise of fighting corruption will become a seesaw game between the office of the Attorney General and the KACC, without making any difference to the current status quo. In the final analysis, Kenya shall be the loser.

2.8.8 The Complicity of The Multinational Corporations (MNC) In Corruption

It is an acknowledged fact that the major source of FDI's is the MNCs/TNCs. However, on a number of instances, they have been accused of engagement in the perpetrating of the vice. For instance, Titan Corporation of USA paid in way of penalties and fines

US\$.28.5 million after admitting bribery in the West African State of Benin. It was accused of funnelling more than US\$.2 million into the 2001 re-election campaign of President Mathieu Kerekou. At the time Titan was trying to get a higher price for a Telecommunication project in Benin. Titan pleaded guilty to falsifying its accounts and violating USA's anti-bribery laws.⁸¹

⁸⁰ The Daily Nation, Nairobi, Kenya, Thursday June 9, 2005, back page

⁸¹ BBC News World Edition - <http://news.bbc.co.uk/2/hi/business/4310331.stm>, August 3, 2005

Another example is the case of a Canadian Engineering firm Acres International which had been blacklisted by the World Bank because, according to the bank

The Company was engaged in corrupt activities to influence the Lesotho Highlands Development Authority, which was responsible for the multibillion-dollar Lesotho Highlands water project. The project uses dams to provide water to South Africa and electricity to Lesotho.⁸² James Wolfenson, World Bank President, issued a statement to the effect that “This action (blacklisting) is part of the Bank’s broad anti-corruption efforts initiated in 1996.”⁸³

The above is reflective of the complicity by some MNC/TNC with corrupt practices for purposes of acquisition of business contracts. Corruption therefore is an international problem, which should invite every Nation to enact laws to make the offence of bribing foreign, public (private) officials to assume extraterritorial jurisdiction as proposed under Article 42 of the United Nations Convention Against Corruption.

⁸² News Articles – Canada, <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=11300>, June 19, 2005

⁸³ ibid

CHAPTER II - PART B

THE IMPACT OF FOREIGN DIRECT INVESTMENT ON KENYA'S DEVELOPMENT

2.9 Foreign Direct Investment (FDI) is defined as:-

investment made by a foreign individual or company in productive capacity of another country, for example, the purchase or construction of a factory.”⁸⁴ Another definition for FDI includes “equity capital, reinvestment earnings, intra-company loans.”⁸⁵ According to World Investment Report of UNCTAD FDI is defined as “an investment involving a long-term relationship and reflecting a lasting interest and control by a resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident in an economy other than that of the foreign direct investor (FDI enterprise or affiliate enterprise or foreign affiliate).”⁸⁶

Given the above definitions of FDI, how well has Kenya done particularly over the last decades of 80s and 90s? This is reflected clearly in the following:-

Foreign Direct Investment (FDI) flows in Sub-Saharan Africa (SSA) shows shifts in their destination. Two decades ago, cumulative FDI in the East African (E.A.) region was predominantly in Kenya, which had 87% of foreign ownership of companies in the East African Region. In recent period, however, Uganda and Tanzania are taking up an increasing share. For example, in 2002, only 5.3% of foreign ownership in the E.A. region was in Kenya as compared to 48.2% and 46.5% in Uganda and Tanzania respectively. Further, FDI to Kenya was 31.8% of the total in Sub-Saharan African (SSA) in 1980 but this fell to less than 1% in the year 2002. In contrast, Uganda share in the SSA region rose from 1.6% to 3.1% and that of Tanzania rose from 1.8%

⁸⁴ www.cidse.org/puls/euafaglo.htm dated June 20, 2005

⁸⁵ Francis M Mwega and Rose W Ngugi - *Paper prepared for AERC Special Workshop on Foreign Direct Investment in Sub-Saharan Africa*, October 2004

⁸⁶ United Nations Conference on Trade and Development, *World Investment Report 2004 – The Shift Towards Services – Foreign Direct Investment*, page 345

to 3.0%. This trend shows that Kenya is increasingly losing foreign investment to its neighbouring countries.⁸⁷

During the decades of 1980s and 1990s, Kenya lost its past glory of being the preferred destination by foreign investors inspite of boasting one of the largest and most advanced economies in the region. This is attributable to the fact that:-

Kenya has not been able to capitalise on its position of regional economic leadership to attract significant inflows of FDI. The poor growth performance, lack of consistent structural reforms and deteriorating infrastructure over the past couple of decades have actively discouraged FDI and enticed some large trans-national corporations (TNCs) to reduce their operations in Kenya. By and large, Kenya has been left out of the global surge in FDI flows that started in the mid- and late- 1990s and benefited its neighbours in the East African Community as well as much of Africa and the developing world. FDI has nevertheless been key to the success of a few dynamic sectors, including horticulture and the airline industry, highlighting the potential role that it could play in the country's development.

The deterioration in Kenya's infrastructure services and rising costs, particularly at a time of major improvements in infrastructure in other parts of the developing world, have also induced many foreign investors already established in the manufacturing sector to divest or consolidate their operations out of Kenya in recent years. Although this has taken place partly as a consequence of worldwide strategies of consolidation of production centres by manufacturing groups such as Procter and Gamble (which moved its detergent production line to Egypt in 1999), Johnson and Johnson (which moved its production to Zimbabwe in 2000) or Colgate Palmolive (which has been gradually phasing down production in Kenya while preserving support services for the region in Nairobi), Kenya has in general been on the "moving in" side as a result of its relatively high operation costs.⁸⁸

⁸⁷ Rose W Ngugi & Owen Nyang'oro – Kenya Institute for Public Policy Research and Analysis (KIPPRA) - *Institutional Factors and FDI Flows: Implications for Kenya*, Discussion Paper Series

⁸⁸ United Nations - *Investment Policy Review Kenya (Unedited Advance Copy)*, February 2005

2.10 Sources and Types of Foreign Direct Investment

The United States of America, accounts for just “under a quarter of global FDI, outwards and inwards”⁸⁹ However, it will be noted that:-

Globally, trans-national corporations (TNCs) are the major source of FDI. Globalisation, a worldwide trend towards integration of markets, has led to a change in the FDI strategies of TNCs. Faced with increased international competition, TNCs’ global strategies seek to maximise their competitiveness, by locating facilities in multiple locations around the world. Thus, attracting FDI is increasingly dependent on the ability of countries to provide a favourable FDI regime and competitive factors of production.

A stable, efficient and professional environment that welcomes investors into most economic activities, without discrimination, is a necessary prerequisite for FDI inflows. Modern, legal and intellectual property rights, effective competition policies, a strong judiciary and minimum bureaucratic procedures are all important to attract foreign investors. However, the ultimate determinants of FDI are the competitive factors of production which no longer mean just cheap raw materials, labour and basic infrastructure but also require adaptable labour skills, sophisticated supplier networks and flexible institutions. While tax incentives can enhance a country’s attractiveness, if other factors are unfavourable, these will be insufficient to significantly increase inflows of FDI.⁹⁰

From the East, the Japanese multinational corporations as well as from South Korean and the emerging economies of Malaysia, Singapore and Thailand are steadily increasing their participation in providing a source of FDI.

2.11 The Importance Of Foreign Direct Investment

Foreign direct investment (FDI) provides a major source of capital which brings with it up-to-date technology. It would be difficult to generate this capital through domestic savings, and even if it were not, it would still be difficult to import the necessary technology from abroad, since the transfer of technology to firms with no previous experience of using it is difficult, risky, and expensive.

Over a long period time FDI creates many externalities in the form of benefits available to the whole economy which the TNCs cannot appropriate as part of their own income. These include transfers of general knowledge and of specific technologies in production and distribution, industrial upgrading, work experience for the labour force, the introduction of modern management and accounting methods, the establishment of finance-related and trading networks, and the upgrading of telecommunications services. FDI in services affects the host country’s competitiveness by raising the productivity of capital and enabling the host country

⁸⁹ <http://www.globalbritain.org/BNN/BN09.htm>

⁹⁰ <http://www.sarpn.org.za/documents/d0000948/page1.php> – June 19, 2005

to attract new capital on favourable terms. It also creates services that can be used as strategic inputs in the traditional export sector to expand the volume of trade and to upgrade production through product and process innovation.

By altering a country's comparative advantages and improving its competitiveness through technology transfer and the effects of myriad externalities, foreign as well as domestic investment can alter a country's volume and pattern of trade in many income-enhancing directions.⁹¹

2.12 Factors Determining FDI

There are many and varied factors which influence and determine the flow of FDI. The literature review on the subject indicates the following perspectives:-

Balasubramanyam (2001); Rogoff and Reinhart (2002); Ngowi (2001); UNCTAD (2003); Makoli (2003) summarizes the various determinants FDI flows to include macroeconomic stability, transparency and stability of the policy framework, policy incentives including both the fiscal and monetary incentives, distortion free market environment/effective competition policies, market size and growth, resource endowment, infrastructure, institutional factors including political, legal and regulatory factors and the global market interactions.

Recent studies have recognized the importance of other factors (other than the ones that have been seen to determine FDI – “traditional”) – “non-traditional”, as important in explaining the flow of FDI between and within countries. Nunnenkamp (2002), for example, argues that the importance of traditional determinants and the types of FDI associated with them has declined with globalization and that FDI in developing countries has shifted from market-seeking and resource-seeking to more (vertical) efficiency seeking FDI. Similarly, Biswas (2002) acknowledges that certain issues still remain to be explored regarding the determinants of foreign direct investment by a multinational corporation and the corporation's consequent choice of investment location. In this regard, they include both traditional (such as wage,

⁹¹ Richard G Lipsey and K Alec Chrystal , *Economics* , 10th edition, Oxford University Press 2004, page 641

infrastructure) and non-traditional (such as regime type, regime duration, property rights' issues) variables in the analysis of FDI flows.⁹²

One of the cornerstones of a country's determinant of FDI is the stability of the political institution. A democratic culture is important though not always so for instance China which, today is probably, the major recipient of FDIs yet still under an acknowledged communist one-party-regime, which is anything but democratic. However, for a developing country like Kenya, establishment of a free democratic, non-racial and non-ethnic society is an imperative to attract FDI given that it has no known strategic resource such as oil or valuable minerals. Under the circumstance, political factor is a major consideration for FDI flow as is clearly postulated herebelow:-

2.13 Political Risk

The political landscape in Kenya has been uncertain even though seemingly stable but to investors the political risk has been a major consideration on decision where to invest. A number of authors on the subject have a critical view of the situation.

Blomstrom (2003) indicates that among the factors that potential investors look up for include the rule of law, strong and clearly defined property rights, degree of corruption, regulation and local bureaucracy and political stability. Similarly, Balasubramanyam (2001) indicates that the efficiency of legal institution is important not only in ensuring that there is proper enforcement of contracts but also maintenance of law and order comes in handy to ensure security of people and property. A well-functioning legal system also provides protection of intellectual property rights, which is a source for competitive edge for most foreign direct investors, forming a capacity of providing credible commitment on the part of the state.

Further, Nordal (2001) observes that country risk and especially political risk constitute a large part of the total risk investors face when investing in emerging markets. Moreover, Rogoff and Reinhart (2002) argue that an obvious and powerful deterrent to FDI is political instability, with wars forming an extreme form of political

⁹² Rose W Ngugi & Owen Nyang'oro, Kenya Institute for Public Policy Research and Analysis - *Insecurity and FDI Flows* – Discussion paper series, page 10

instability. While wars are likely deterrent to FDI, wars are also often a source of inflation, which also affects FDI flow. Edwards (1990) also found the political instability as statistically significant irrespective of what other variables are included as regressors in his cross-country regressions. Note that the inclusion of political risk or political instability as a determinant of FDI derives from the theory of transaction costs according to which FDI is negatively affected by the risk of expropriation of investment by the host country government, an effect that is higher the higher is the political instability of the host country and the higher is the sunk cost of the undertaken investment (Altomonte, 1998). In a situation where there are high risks of insecurity, a firm may operate in incremental steps by starting with a smaller investment and hold out the prospect of additional investments in the future if the government agrees to maintain a certain level of security.⁹³

2.14 Macro-Economic Stability

The policies being pursued by Kenyans in the macro-economic front have not been encouraging.

In the recent past, countries have but in place various incentives to make them competitive locations for FDI attraction. Blomstrom (2003) indicates the various types of incentives used to attract FDI to include fiscal incentives such as tax holidays and lower taxes for foreign investors, financial incentives such as grants and preferential loans to MNCs, as well as measures like market preferences, infrastructure, and sometimes even monopoly rights. However, McGee (2003), looking at FDI in Southeastern Europe note that some countries attract foreign capital using tax incentives but tax incentives are more effective in countries that have good infrastructure and the other attributes needed to attract FDI. Similarly, Blomstrom (2003) indicates that in addition to investment incentives, the governments should also modernize infrastructure, raise the education levels and labour skills, and improve the overall business climate as part of their investment policy.

Phillips et al (2001) also note that investment incentives will only pay off once countries overcome their ethnic particularism and ensure that the fundamentals that attract investors are in place. These include access to resources; secure mobility of

⁹³

Rose W Ngugi & Owen Nyang'oro, Kenya Institute for Public Policy Research and Analysis - *Insecurity and*

people, goods, information and capital into, around and out-of the country; sound institutions – stable government, security of life and property, rule of law e.t.c.; and alertness to international opportunities and obstacles, as they appear. Ngowi (2001) recognize that apart from the incentives being offered, the presence of investment opportunities in a country is also important. He argues that the opportunities should be made known to potential investors through effective promotion, which includes marketing a country and co-ordinating the supply of a country's immobile assets with the specific needs of targeted investors.⁹⁴

What continues to be a fact is that even on the World Stage, Kenya is rated poorly as a destination for investors as indicated herebelow:-

2.15 The Infrastructure – Constraints and Weaknesses

One of the glaring failures of Kenya is its state of infrastructure, a major constraint and weakness affecting the attraction of FDI in the country. This deplorable condition keeps the country highly uncompetitive vis-à-vis other markets.

A long period of neglect, poor regulation and lack of financial resources have left much of Kenya's infrastructure in poor condition, both in absolute terms and in comparison with neighbouring and competitor countries. The World Bank's (WBES (2000) shows that investors rated the quality of infrastructure very poorly, in particular regarding roads, water and telecommunications (Table III.2). About 90 percent of over 100 surveyed investors rated the quality of roads and public works as "bad" or "very bad", placing Kenya in a much poorer position than Tanzania and Uganda, and dramatically worse than Egypt and South Africa. The same judgement holds true of telecommunications and water, whose quality investors also rated very poorly. Only in terms of electric power did Kenya rate similarly or better than Tanzania and Uganda, yet with only 24.3 percent of investors rating the quality of service as "good" or "very good", far below the satisfaction rates for Egypt and South Africa.⁹⁵

FDI Flows – Discussion paper series, pages 11-12

⁹⁴ Rose W Ngugi & Owen Nyang'oro, Kenya Institute for Public Policy Research and Analysis - *Insecurity and FDI Flows* – Discussion paper series, pages 14-15

⁹⁵ United Nations - *Investment Policy Review Kenya*, Unedited Advance Copy, Constraints and Weaknesses – Infrastructure, February 2005, page 69

2.16 UNCTAD World Investment Report 2003

The UNCTAD's World Investment Report 2003 Performance Index and Potential Index ranks countries by how they do in attracting inward direct investment and what their potential is in that respect?⁹⁶ Kenya is ranked 118 in the performance index⁹⁷ and 127 in the potential index⁹⁸ (one of the lagging 20 economies). When comparing performance and potential, a *four-fold matrix* has been drawn and it ranks countries as follows⁹⁹:-

Front-runners: countries with high FDI potential and performance;

Above potential: countries with low FDI potential but strong FDI performance;

Below potential: countries with high FDI potential but low FDI performance;

Under performers: countries with both low FDI potential and performance.

The current FDI downturn makes it all the more important for countries to retain their existing FDI especially with competition for FDI on the rise due to proliferation of investment promotion agencies¹⁰⁰. However, Kenya being in the last category makes it that much harder to attract FDI.

2.17 Conclusions

An analysis of the proceedings reflects a manifestation of corruption beginning with the enactment of the first law in 1956. The Ndegwa Report of 1971, which sanctioned participation of public officials in private business leading to allegations of serious cases of compromise and conflicts of interest. According to the Parliamentary Anti-Corruption Committee of 2000 the Ndegwa Commission was responsible for igniting widespread corruption by recommending "that civil servants could subsidize their wages by doing business while still in the employment state."¹⁰¹

There is however convergence on the prevalence of corruption in Kenya as is clearly evidenced by reports of CLARION, Transparency International and even the acknowledgement by the President in His address to the African Parliamentarians Network Against Corruption (APNAC) Conference held in Nairobi in November 2003. Interviews

⁹⁶ UNCTAD World Investment Report 2003, Page 9 para 3-4 & page 10 para 1

⁹⁷ Ibid., Table on page 10

⁹⁸ Ibid., Table on page 13 and 14

⁹⁹ Ibid., Page 12 para 2

¹⁰⁰ Ibid., Page 19 para 6-7

¹⁰¹ Report of the Parliamentary Anti-Corruption Select Committee Volume (I), page 3

with select Ministers and public officials, without exemption all recognize the select prevalence and the danger of corruption to the country.

The highlight of the reports by the Controller and Auditor General for 2000/2001 and 2001/2002 is a manifestation of callous mismanagement of public resources and a weak legal enforcement mechanism and largely wanting in political will to prosecute the perpetrators identified in the reports.

The editor and proprietor of Pioneer of India, Mr Chandan Mitra has observed that “India clearly qualifies in Machiavelli’s second category of a corrupt society, one in which the citizenry, while actively participating in the political process through elections, is primarily engaged in promoting its own ambitions to the detriment of the common good”.¹⁰²

The longterm corruption impact to Kenya is a state where:-

Corruption distorts policy making and priority setting. It raises transaction costs. It misallocates talent to rent-seeking activities. It undercuts the incentive system of a market economy by enabling people to acquire wealth without creating value. It unleashes envy and revenge on the part of those being exploited and victimized through corruption. It also undermines the legitimacy of the government.¹⁰³

The characterization of India by Mr Mitra is substantially applicable to the Kenyan situation. The negative effect of corruption in Kenya is graphically captured by the later quotation when during the KANU regimes’ last days in power, majority of Kenyans were disillusioned and questioned the legitimacy of their government. This was due to the widespread corruption, eventually leading to massive electoral victory for the opposition in the general election of 2002.

The impact of FDI to Kenya’s economic development shall depend on the country’s ability to create a conducive, administrative, legal and judicial institutional framework in addition to macro-economic stability attractive to investors. The need for a new constitutional dispensation to ensure greater certainty of the legal basis for executive, legislative, judicial decisions. The fight against corruption will spur substantial investments by both local and foreign investors. This has been evidenced through research which has observed that:-

¹⁰² Chandan Mitra - *The Corrupt Society*, The Criminalization of India from Independence to the 1990s, page 18

*See Niraja Gopal Jayal, ‘*Changing Conceptions of Public Morality*’, IIPA Journal, July-September 1995

¹⁰³ Edited By Andrew Mullei - From Kenya Case Studies, - *The Link Between Corruption and Poverty Lessons*, back cover

if the present efforts to deal with corruption in Kenya were to enable improve the rating by 100%, i.e. gaining an extra 3 points, the country can attract about 23% of FDI. However, this change alone is only enough to maintain the Kenya position at its present level. For it to gain more share in the SSA it needs to ensure other pull factors are taken care of. Reigning in corruption is also crucial for Kenya as it will increase the flow of external resources that are crucial for enhancing the investment climate.¹⁰⁴

Meanwhile corruption remains among the biggest obstacles to the growth and competitiveness of the economy.

¹⁰⁴ Rose W Ngugi & Owen Nyang'oro, Kenya Institute for Public Policy Research and Analysis (KIPPRA) - *Institutional Factors and FDI Flows: Implications for Kenya* – Discussion paper series

CHAPTER III

LEGAL AND INSTITUTIONAL CONSTRAINTS TO FOREIGN DIRECT INVESTMENT (FDI)

Among the laws that are relevant and which affect the flow of FDI in Kenya, are the following:-

3.1 The Constitution of Kenya

This is the supreme law of the land and according to Chapter I Section 3 it provides that:-

This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.¹⁰⁵

It is therefore the most important legal document to which all other laws are subordinate. The relevant section of the Constitution to any foreign investor is Section 75(1), which provides that:

No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied.¹⁰⁶

This section is the embodiment of the sanctity of the property of an investor or for that matter any individual in the country and it must therefore be faithfully followed as a safeguard against arbitrary acquisition of private property. It confers to investors certainty of security of their property. Nevertheless, one of the major complaints by investors against Kenya has been the delay in the dispensation of commercial justice through the court system despite the constitutional guarantee. They argue slow process through the system is not only expensive but is tantamount to the deprivation of private property.

3.2 The Companies Act – Chapter 486

This is the relevant statute which on a day-to-day basis governs the conduct of investors and

¹⁰⁵ Government Printer - *Laws of Kenya*, The Constitution of Kenya, Revised Edition (1998) 1992
Nairobi, page 6

¹⁰⁶ Ibid, page 45-46 – Section 75

to which they are expected to comply with. It has not been comprehensively reviewed for many years since 1948 and therefore it is recommended that the:-

Act needs substantial review to recognize the existence of CMA and realistic penalties on actions which contravene required procedures. The review of the Act should also incorporate recent changes concerning for example foreign shareholding on public companies, transfer of profits/dividends to foreign shareholders (i.e. after liberalization) and investment guarantees. Recent changes during liberalization should be incorporated.¹⁰⁷

One of the major drawbacks in the Companies Act is that it does not have the equivalent for the American Chapter 11, which protects the debtors from creditors and therefore the invocation of the appointment of a receiver manager under section 220 and 221 requires review to make them contemporary in so far as the modern practice is concerned. Receiverships in countries where most of the FDIs come from are a rare phenomenon given the development and changes that have occurred over the years, with respect to insolvency and company acts.

3.3 The Income Tax Act – Chapter 470

The major complaints by investors against the Kenya Revenue Authority is that whereas the department is very quick on the collection of taxes and levying penalties to the tax defaulters, it is extremely slow in processing refunds due to investors, a major disincentive to would be investors. The other concern of investors is the poor utilisation of the tax revenue and particularly lack of improvement of the infrastructure inspite of the increasing tax revenue being generated every year.

3.4 Investment Promotion Act 2004

On December 31 2004, The Investment Promotion Act 2004 became law. The principal purpose for the new law is to:-

promote and facilitate investment by assisting investors in obtaining the licenses necessary to invest and by providing other assistance and incentives and related purposes.¹⁰⁸

The Act has provided for two important institutions. The Kenya Investment Authority (KIA) which has replaced the Investment Promotion Centre (IPC), hitherto responsible for promoting investment activities among the foreign investors. Its overall mandate is “to

¹⁰⁷ Report on Kenya Technical Working Group on RIFF, May 2001 Study on page 26
¹⁰⁸ The Preamble of The Investment Promotion Act 2004

promote and facilitate Investment in Kenya.¹⁰⁹ The Act has also established The National Investment Council whose mandate among others is to:-

promote co-operation between the public and private sectors in the formulation and implementation of government policies relating to the economy and investment, to advise government and government agencies on ways to increase investment and economic growth in Kenya¹¹⁰

Section 27(I)(a)& (b).

However the new Act has been criticised for not creating a conducive climate for investors.

It has been said to have:-

introduced a critical barrier to FDI that should be lifted as a matter of urgency, while at the same time addressing concerns about statistical issues and potential abuse of the automatic entitlement to foreigners work permits. Beyond amending the Investment Promotion Act, and although many of the laws that determine the investment framework would benefit from being modernised, the weaknesses that must be addressed most urgently relate more to matters of implementation. Significant modernisation work can and should be done on the laws themselves, but this is likely to be a lengthy process. In the meantime, priority should be given to make the current body of law to work better, which is a challenge within reach as the principles laid out in the legal system are in many cases sound.¹¹¹

Other areas of weaknesses include over-involvement of government Ministers. About half the members of National Investment Council are cabinet Ministers thereby creating a potential conflict of interest. It is desirable to have the vast majority of its members from the private sector and very few government officials. This is so because the recommendations which shall be emanating from National Investment Councils are supposed to be implemented by the same Ministers who are members of the N.I.C.

Further more it is observed that:-

The role of KIA in policy coordination and monitoring should also be significantly expanded and strengthened. KIA needs to significantly boost its advocacy role to promote progress in issues of taxation, regulation and infrastructure development, as well as its promotion and aftercare efforts. Its role would also be key in monitoring progress in actions recommended by the NIC and in promoting and monitoring the coordination of dealings with investors across agencies, as it is mandated to do under the Act.¹¹²

¹⁰⁹ *The Investment Promotion Act 2004 - Section 15*

¹¹⁰ *The National Investment Council*

¹¹¹ United Nations - *Investment Policy Review Kenya, Unedited Advance Copy – Assessment*, February 2005, page 61

¹¹² United Nations - *Investment Policy Review Kenya, Unedited Advance Copy - Policy Implementation and Coordination* – Kenya Investment Authority, February 2005, page 62

3.5 The Restrictive Trade Practices, Monopolies And Price Control Act

This Act has not been amended to take cognisance of the fact that price controls have been eliminated. Further, the Act is antiquated with respect to facilitating mergers and acquisitions and requires amendment to bring it up to speed within a liberalized and globalized world markets.

3.6 The Privatisation Bill, 2004

The proposed Bill is intended to be:

An Act of Parliament to provide for the privatization of public assets and operations, including state corporations, by requiring the formulation and implementation of a privatization programme by a Privatization Commission to be established by this Act and for related purposes.¹¹³

The Bill is currently before Parliament for debate and hopefully to be enacted into a law. However, it faces an uphill battle within Parliament due to the fact that a number of legislators have expressed reservation on the privatization of public assets given that in the past those that had been privatized were more or less handed over to certain individuals at throw-away prices. Nevertheless, the target institutions such as Telkom, Kengen, KPLC etc are critical utility companies whose current levels of inefficiency and allegations of corrupt dealings have a direct impact on the possibilities of FDI flows into the country. Without reliable and efficient telecommunications and energy sectors, it is becoming increasingly difficult to attract the would be investors in the country due to the high losses attributable to these utility companies.

Nevertheless while there is a wide support, for the proposed law, the Bill has been criticized on several grounds, that of:

Developing a process which is not guided by clear objectives, allowing too little autonomy of the Privatization Commission, requiring close Cabinet approval of many actions, too little public access to information, the absence of a competition policy and for insufficient accountability for the management of the proceeds.

The Bill, however, has yet to be debated and, in the current political environment, it seems unlikely that the Bill will be discussed in 2004. Once discussed, it is also not clear that the Bill

¹¹³ The Government Printer - *Kenya Gazette Supplement No. 14 (Bills No. 4)*, Nairobi, March 31, 2004, page 55

will pass, not simply because of opposition to privatization itself, but also opposition in some corners to any bill proposed by the government, regardless of its merits. In general, the government as well as individual supervisory boards have the power to privatize individual entities, and certainly to farm out certain services to the private sector. In the absence of the mandate and framework provided by the Privatization Bill, some of these plans are being delayed, slowed down, or scaled back.¹¹⁴

3.7 The Public Procurement And Disposal Bill

The preamble of the Bill provides that this is

An Act of Parliament to establish procedures for public procurement and for the disposal of unserviceable, obsolete or surplus stores and equipment by public entities and to provide for other related matters.¹¹⁵

The importance of the proposed law is of such urgency and importance for government procurements due to its impact, the government, being the largest consumer of goods and services in the country. The current public procurement regime falls under the Exchequer and Audit Act Chapter 412, which are mere regulations that have been found wanting in terms of facilitating non-compromising procurement of government purchases. This is confirmed by the many tenders that have been overturned by the Complaints and Appeals Board provided under the existing regulations. The public procurement is also part of what is commonly referred to as the Singapore Issues under the World Trade Organization negotiations and both IMF and World Bank have made its passage into law a conditionality for further leading to Kenya.

Some of the major allegations of corruption in Kenya have been associated with the public procurements and hence it is critical for this Bill to be enacted into law and especially Section 33 whose principal objective is to deny any opportunity to a Minister, public official or their relatives to be involved in tendering for Government or parastatal services whether as individuals or corporate bodies, directly or indirectly. If the bill becomes law, it is expected to substantially impact in reduction if not elimination of corruption within government procurements process thereby facilitating FDI into the country.

¹¹⁴ Africa Private Sector Group (World Bank, KIPPRA & CSAE, Oxford) – *rapid business knowledge for development*, Investment Climate Assessment – Enhancing The Competitiveness of Kenya’s Manufacturing Sector: The Role of the Investment Climate – Kenya, November 2004

¹¹⁵ The Government Printer - *The Kenya Gazette Supplement No. 59 (Bills No. 21)*, The Public Procurement and Disposal Bill, Nairobi, 2003, page 701

3.8 The Kenya Anti-Corruption Commission

Since 1993, there has been various efforts to set up anti-corruption bodies. In 1993, the President set up the Anti-Corruption Squad made up mainly of Police Officers, whose mandate was to carry out investigations and advise the government on fighting corruption.

It was ultimately disbanded in 1995 following accusations levelled against some of its members for alleged involvement in corruption.¹¹⁶

In 1997, Kenya Anti-Corruption Authority was established under the Prevention of Corruption Act Cap 65 of the Laws of Kenya, which was amended via Act No. 7 of 1997. The Director was removed under controversial circumstances in 1998. In 1999, Justice Aaron Ringera was appointed as the Director of the Kenya Anti-Corruption Authority (KACA). This did not last long following ruling by a three-bench judge in the case Misc. App. No.302 of 2000 of Stephen Mwai Gachiengo and Albert Muthee Kahuria V Republic where the Constitutional Court ruled that:-

it is crystal clear that S.10 and S.11B of Penal Code Cap 65 are in direct conflict with S.26 of the Constitution. Whether or not KACA purports to act under the direction of the Attorney General in relation to prosecution, the exercise of the powers under S.11B of Penal Code Cap 65 offends the Constitution. By alienating powers conferred upon him by the Constitution the Attorney General was being escapist and is a mark of abdication of responsibilities bestowed on him by the Constitution. He should not have abdicated his duty to render the desired legal advise.¹¹⁷

The President thereafter formed the Anti-Corruption Police Unit (APCU). However, in 2003, the NARC Government enacted the Anti-Corruption and Economic Crimes Act to provide for prevention, investigations and punishment of corruption, economic crimes and related offences. Under this Act, it provided for the formation of the Kenya Anti-Corruption Commission. In late 2004, the Board was constituted. So far, there has not been major prosecutions against alleged corrupt individuals.

3.9 Arbitration Act 1995

This Act is important to the extent of facilitating international commercial arbitration and particularly with respect to recognition and enforcement of awards that are given by an arbitration tribunal in conformity with the New York Convention of June 10, 1958 which

¹¹⁶ (By Clarion) - Kenya State of Kenya Report Issue No.10, page 25

¹¹⁷ Republic of Kenya, In the High Court of Kenya at Nairobi, *High Court Miscellaneous Application No.302 of 2000*

provides for the recognition and enforcement of foreign arbitral awards. The relevant Article II(3) of the said Convention provides that:-

The court of Contracting State, when seized of an action in matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.¹¹⁸

The Kenyan courts have in the past been reluctant in recognizing the alternative dispute resolution mechanism provided under the 1995 Arbitration Act. Courts have tended to assume this takes away their jurisdiction when the arbitral process matters of commercial disputes, are submitted to the jurisdiction of the arbitration. An illustrative example is the TONONOKA. Where Justices of the Court of Appeal upheld an appeal by the appellant, Tononoka Steel Limited vis a vis The Eastern and Southern Africa Trade and Development Bank, the respondent. All the three judges concurred and two of them went further in their judgement and ruled that “the right of access to the courts of this country may only be taken away by clear and ambiguous words of the Parliament of Kenya.”¹¹⁹

To that extent therefore, it is important for the Arbitration Act to be respected by courts for investors to know that they can choose an independent forum for speedy settlement of disputes and the Kenyan courts will be accordingly guided as long as the Arbitration Clause is consistent with Article 11(3) of The New York Convention.

3.10 Judicature Act

Section 3 of the Act does not recognize treaties and international laws for purposes of their being applied in Kenyan courts of law.

Therefore, it is essential for an amendment to the Act to ensure recognition of treaties and international agreements. This is relevant because with the advent of the World Trade Organization as well as the globalization and liberalization of economies, our laws have to be as contemporary as possible in order to invite and encourage the participation of FDI in the country.

¹¹⁸ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 3rd edition, page 491

¹¹⁹ (Coram: Kwach, Tunoi & Lakha, JJ. A), *Civil Appeal No.255 of 1998*, In The Court of Appeal at Nairobi, page

3.11 The United Nations Convention Against Corruption

It is expected that this Convention will come into force in 2005. According to Chapter I, Article (1) on the Statement of purpose, there are three main aims of the Convention:-

- (i) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- (ii) To promote, facilitate and support international co-operation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
- (iii) To promote integrity, accountability and proper management of public affairs and public property.¹²⁰

In his statement, Kofi Annan, United Nations Secretary-General on the adoption by the General Assembly of the United Nations Convention Against Corruption, he stated that Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid.¹²¹

The background of this Convention is outlined in the following:-

In its resolution 55/61 of 4 December 2000, the General Assembly recognized that an effective international legal instrument against corruption, independent of the United Nations Convention against Transnational Organized Crime (resolution 55/25, annex I) was desirable and decided to establish an ad hoc committee for the negotiation of such an instrument in Vienna at the headquarters of the Centre for International Crime Prevention, Office for Drug Control and Crime Prevention. The text of the United Nations Convention against Corruption was negotiated during seven sessions of the Ad Hoc Committee for the Negotiation of the Convention against Corruption, held between 21 January 2002 and 1 October 2003.¹²²

The world is increasingly becoming resolute in its determination to curb the effect of corruption and this is clearly typified by the proposed United Nations Convention Against Corruption. This is therefore an important international legal instrument according to Article 42, which will create the international jurisdiction and criminalize corruption in its entirety. Kenya was one of the first signatories to ratify the Convention according to Muthoni Kimani, the Deputy Solicitor General, of the Republic of Kenya

¹²⁰ United Nations *Convention Against Corruption*, page 3

¹²¹ United Nations *Office on Drugs and Crime*, http://www.unodc.org/unodc/en/crime_convention_corrupton.html, June 25, 2005

¹²² *United Nations Office on Drugs and Crime*, June 25, 2005
http://www.unodc.org/unodc/en/crime_convention_corrupton.html

3.12 Conclusions

In view of the various Acts and Bills, it is clear that the legal and institutional challenges to FDI have been recognised at both national and international levels. The need to offer a conducive environment for purposes of encouraging investment flow in the country is also recognised. In the absence of an enabling legal framework, it is difficult to achieve the objective desired and Kenya shall remain a territory shied away by investors. This shall apply to any country whose legal and institutional instruments do not address a corrupt free environment.

CHAPTER IV

CONCLUSIONS AND RECOMMENDATIONS

4.1 **The Interface Between Foreign Direct Investment And Corruption – Myth Or Reality**

The literature studied during the research of this project, reveals a strong link between lack of attraction for FDI flows to Kenya and the prevalence of corruption in the country. Equally Ministers and public officials have acknowledged there exists a nexus between FDI and corruption. Kenya is not endowed with natural endowments such as oil and strategic minerals to become a major attraction for FDI resource seeking investors irrespective of the level of corruption, for example the case with Nigeria and Angola for instance.

Kenya in the decades of 1960s, 1970s and 1980s had the highest growth rate within the East African Region as this study has demonstrated. It is during the same time that it attracted disproportionately higher FDIs vis-à-vis its neighbours hence there is a correlation between the flow of FDI and the high level of development. The converse is true, during the decade of 1990s upto 2003 following allegations of corruption. This is contrasted with very impressive growth rates, which have been realized by both Uganda and Tanzania as clearly reflected in the Comparative Performance of Kenya with Selected Countries between the periods of 1981 – 2003 in the UNCTAD FDI/TNC database (WIR 2004) overleaf.

Table 1.1: Comparative Performance of Kenya with Selected Countries, 1981 - 2003 (dollars and percent)

Country	ABSOLUTE PERFORMANCE						RELATIVE PERFORMANCE													
	FDI inflows per year					FDI Stock	FDI inflows Per \$1000 GDP (dollars)								As percent of GFCF				FDI Stock	
	Million dollars					Million dollars	Per capita (dollars)												Per capital (dollars)	Per cent of GDP
	1981-1985	1986-1990	1991-1995	1996-2000	1996-2003	2003	1981-1985	1986-1990	1991-1995	1996-2003	1981-1985	1986-1990	1991-1995	1996-2003	1981-1985	1986-1990	1991-1995	1996-2003	2003	2003
KENYA	18.1	38.4	12.8	39.8	39.2	1,045.9	1.0	1.7	0.5	1.3	2.9	4.7	1.5	3.4	1.6	2.4	0.8	2.4	31.7	7.5
Botswana	49.8	72.4	-48.2	72.3	110.4	1,080.1	50.1	62.2	-36.1	71.9	41.8	31.1	-11.9	20.7	16.9	15.5	-4.5	9.1	540.0	14.6
Lesotho	3.9	11.7	19.2	30.1	31.0	427.1	2.7	7.1	10.6	15.4	10.4	22.7	22.8	34.5	2.9	4.9	3.9	7.5	213.5	38.0
Mozambique	0.4	5.0	32.0	178.5	205.0	1,841.6	0.0	0.4	2.1	11.2	0.1	2.1	14.9	53.8	0.1	0.7	7.2	24.3	96.9	42.6
Namibia	3.3	7.3	109.0	99.2	140.7	1,175.5	2.9	5.5	72.4	80.3	2.2	3.2	35.4	43.8	1.9	2.0	18.9	20.0	587.8	39.1
South Africa	87.5	-72.7	376.5	1,517.3	1,986.8	30,373.1	2.9	-2.1	9.5	46.3	0.7	-0.8	2.6	15.6	0.2	-0.4	1.7	10.3	675.0	18.5
UGANDA	-0.4	-0.6	54.0	200.9	220.7	2,042.2	-0.1	-0.1	2.8	9.5	-0.1	-0.2	12.5	36.8	-0.1	-0.1	7.0	19.1	78.5	32.9
U.R OF TANZANIA	8.8	0.3	46.4	260.4	282.2	2,582.5	0.4	0.0	1.5	8.1	1.4	0.1	9.0	32.4	0.6	0.1	4.4	19.9	68	26.8
Zambia	19	112.5	53.7	161.4	132.6	2,341.4	2.8	14.5	6.1	13.1	7.5	35.5	16.0	38.1	6.6	37.4	10.3	19.8	212.9	55.2
COMESA	894.2	1,401.40	1,542.6	3,393.3	3,656.3	51,900.3	4.2	5.6	5.2	10.4	10.2	12.4	13.6	21.7	4.3	4.3	7.7	12.1	136.7	29.4
Africa	1,879.3	2,850.40	4,497.9	9,136.2	11,513.8	167,111.3	3.8	4.9	6.7	14.5	5.2	6.8	9.6	20.2	2.1	2.8	5.3	11.4	196.5	25.3
Africa excl South Africa	1,791.8	2,923.2	4,121.4	7,618.9	9,526.9	136,738.3	3.9	5.4	6.6	12.9	6.3	9.0	12.5	21.7	2.5	3.8	6.5	11.9	169.8	27.6
Developing Countries	20,537.3	27,870.2	80,793.7	205,856.8	197,331.1	2,280,171.3	6.0	7.2	18.5	40.9	8.2	9.0	16.5	30.7	3.3	3.3	6.0	12.0	449.7	31.4

Source: UNCTAD FDI/TNC Database (WIR 2004).

In absolute performance Kenya's FDI stock by 2003 is US\$.1,045.9 Billion vis-a-visa stock of US\$.2,582.5 and US\$.2,042.2 Billions for Tanzania and Uganda respectively.

For the relative performance of FDI stock for the same period, Kenya had US\$.31.7 per capita while during the same period, Uganda had US\$.78.5 and Tanzania had US\$.68.5 per capita dollars. This is even more pronounced when one looks at percentage variance of GDP where Kenya's is 7.5%, while Uganda's is 32.9% and Tanzania's 26.8% respectively.¹²³

4.2 Legal And Judicial Reforms

An efficient and dependable legal and judicial system is a major impetus for the flow of FDIs as it is capable of facilitating faster commercial disputes resolutions. The country should hence undertake reforms in the Judiciary which will:-

Simplify and streamline the court procedures for commercial cases, improve court recording and records management, increase the resources and appointing more Judges and Magistrates specialized in commercial disputes settlement, recruit new staff and upgrade the skills of existing staff, facilitate the registration of property liens and access to credit information enhance debt recovery, introduce a small claims procedure to ease the pressure on courts and strengthen alternative mechanisms of dispute resolution to ease the pressure on courts.¹²⁴

4.2.1 Modernization and Computerization of the Judiciary

This will provide the necessary infrastructure conducive to making the work of the magistrates and judges much more conducive to quick dispensation of justice. Currently, the judiciary is stuck with archaic systems where Judges take court proceedings long hand which leaves them with little time to focus/observe the witnesses and counsels. It is a system prone to oversight by Judges and hence accurate recording by them cannot be guaranteed.

4.2.2 Empowerment and Independence of the Judiciary

Currently, the Judiciary in practice is still an appendage of the Executive despite the

¹²³ UNCTAD FDI/TNC Database (WIR 2004)

¹²⁴ Africa Private Sector Group (World Bank, KIPPRA & CSAE, Oxford) (*rped business knowledge for development – Investment Climate Assessment – Enhancing The Competitiveness of Kenya's Manufacturing Sector: The Role of The Investment Climate, Kenya, November 2004*)

pretensions of its independence. To realise true independence its Budget must be voted directly by Parliament and be paid from the consolidated fund. Presently it is part of the Attorney General's Office Vote. Thus the AG could compromise the independence of the Judiciary by creating unnecessary red tape for the release of funds to the Judiciary.

4.2.3 Increase in the Number of Judges

As have been noted earlier by Justice Aaron Ringera the number of judges are too limited for the population and the workload the Judiciary is called upon to dispense.

The Judicature Act Cap 8 of The Laws of Kenya limits the number of Judges under Section 7(1)&(2) who could be appointed. For the purposes Section 60(2) of The Constitution the number of puisne Judges of the High Court shall not exceed fifty and Section 64(2) of The Constitution the number of Judges of Appeal shall not exceed eleven.

Sections 60(2) and 64(2) of the Constitution and The Judicature Act Cap 8 should be accordingly amended to provide for unlimited number of Judges to allow for flexibility of the size depending on the demand for such appointments.

4.2.4 Commercial Courts

Although efforts have been made to create commercial courts to deal with commercial disputes, the purpose for, which was intended to expedite the process, this has not been realized as most Judges in the Commercial Courts are not specialized in matters of commercial disputes. There is need not only to identify, train and have specialized judges to handle commercial disputes but also to ensure that physical infrastructures are provided to the courts which have a conducive atmosphere for the Judicial Officers to execute their mandate.

The government should allocate sufficient funding not only to modernize and bring up to speed the courts buildings but also to offer relevant training and exposure to Judges in jurisdiction which have long history and experience in International Commercial disputes and as well as arbitrations.

4.2.5 Advertising of Vacancies for Judges

Although appointment of judges are in accordance with the advice of the judicial service

commission, ultimately it is the prerogative of the President as per Section 61(1) and (2) of the Constitution of Kenya. There is merit to change the modus operandi for the appointment of judges through advertising for vacancies in the judiciary to allow for opportunity to a wide range of backgrounds of the would be potentially qualified candidates. Further, the Constitution should be amended to provide for nominations of judges by the President as is the case in the United States of America. The Parliament should then confirm or reject such nominees. This will further enhance the independence of the judiciary because those appointed shall know they merit the positions to which they are eminently qualified and owe their allegiance to the country and not the appointing authority. If this process had been practised, there probably could not have been the need for the painful experience of dismissing so many Judges and Magistrates as happened in 2003.

4.2.6 Modernization of the Police Force

There has been recommendations for reforming and modernizing the Kenya Police Force. It is unthinkable that cases of corruption can be addressed adequately without having an efficient, highly motivated and well remunerated Police Force. This requires raising the academic (standards) benchmarks for those being recruited, purge the incompetents and the untrainable men and women of our police force.

This should mark the beginning of building a truly professional police force with high morale.

4.3 Accountability by Public Officers

A policy and/or code of conduct should be instituted to provide for suspension from the public service of any official, however high up, alleged to be corrupt and immediate inquiry instituted to clear or confirm such a public official. The current practice where corruption is alleged, is for such an official or Minister to either continue serving in the same positions or at worst is transferred to other departments and/or Ministries and the game continues. This has created a culture of impunity making containing or elimination of corruption a mirage.

A policy of strict accountability should be instituted to ensure every official is held to account for his/her actions of commission or omission.

4.4 Independent Prosecution Service

Kenya should establish an Independent Prosecution Service (IPS) headed by the Director of Public Prosecution to deal exclusively on criminal matters and separate from the office of the Attorney General.

The Agency or department should be operated as a constitutional office. This shall require the amendment to Section 26 of the Constitution which vests prosecutorial powers in the Attorney General. The Attorney General is practically a political appointee and should not have a tenure of office. This is because experience in Kenya has shown, that Attorney Generals are prone to political manipulation and/or influence. The Independent Prosecution Service (IPS) shall be responsible of all prosecutions in the country and have no powers to carry out investigations. This mandate should be left exclusively to the police, Criminal Investigation Department and Kenya Anti-Corruption Commission. The IPS should be resourced with the necessary human and financial wherewithal to carry out its mandate. The Director of Public Prosecution is the only one who should have security of tenure for a maximum period of ten years. He should be nominated by the President and confirmed by Parliament. In addition, DPP should make annual reports to Parliament just like the Controller and Auditor General does.

In the alternative to creation of Constitutional Office of DPP the Attorney General should cease to be an ex-officio member of parliament and to sit in the cabinet as the Chief Legal Advisor to the Government. This role should be reserved to the Minister for Constitutional and Legal Affairs. In the meantime, the justice portfolio should reside with the judiciary. If the Attorney General should enjoy the tenure of office but he/she should not hold office beyond age sixty-five or at most his/her tenure should be the same as Judges as presently the Attorney General can continue holding office for life.

The proposed changes are an imperative given the fact that investors in Kenya have little confidence in the administration of justice and the AG has largely been blamed, due to his reluctance to prosecute cases allegedly because of political reasons. In other words despite the constitutional guarantee of tenure for AG's he has not acted consistent with the protection afforded to him by the constitution.

4.5 A Culture Against Impunity

Corruption has been embedded in the society for quite some time now. We should not therefore be under any illusion that it will be easily eliminated. We can only hope to have it reduced substantially. It calls for imparting in the young generation in schools all the way to

universities, the virtues of honesty and the vices of corruption. It has to be a very deliberate and consciously executed program in demonstrating that the culture of corruption does not pay. As a consequence therefore, swift punishment as a deterrent will be desirable and specially making sure that a mechanism for asset tracing for those who have corruptly acquired property, restitution is enforced. The country must frown at the culture of corruption and it must be made to be an enterprise which is very costly. Zero tolerance must not only be preached but a mechanism for shaming those responsible should be instituted. This should also entail that such individuals do not get other public appointments and are excluded from future tendering of government related services, and thereby promoting a culture against impunity.

4.6 The National Capital, Nairobi

Nairobi produces 52% to 56% of the total gross national product of the country. However, due to its history of mismanagement and allegations of corruption, it has continued to decline in status and provision for services. To reform the national capital, it is recommended that it should be segregated from the purview of the Ministry of Local Government which administers The Local Government Act Cap 265 and be run independently under a Management Board to be reporting to the President and managed by a team of highly skilled and experienced Managers. This will eliminate the current gridlock where nothing in way of quality service delivery is happening. However, past practices of appointing political cronies to run Nairobi commissions should not be replicated.

The national capital must work for other institutions to function in the country. It must serve as a role model. The current non-functionality of the city is damaging prospects of serious investors, local or international.

4.7 National Environmental Management Authority

The National Environmental Management Authority established under Section 7 of the Environmental Management and Co-ordination Act, 1999, is responsible for overseeing the environment impact assessment processes and licensing.

The authority has been criticised due to demands for impact assessment studies to be undertaken prior to issuance of the environmental impact assessment license to projects. This

is causing long delays and unnecessary costs and is considered as a major disincentive to investors. There is need to review the procedures and programs of NEMA to ensure that no compromise to the environment nor is it a hindrance to investment inflows. In this instance, time is of essence because investors are not going to wait and will go where opportunities are abound.

4.8 Corruption and Private Sector

Although the findings of The Bosire Commission of Inquiry on Goldenburg scandal are not yet out, and being informed by what was being reported at the inquiry, there is prima facie evidence some people in the private sector have been either architects of corruption or heavily involved.

As a consequence, the case can be made for creating an oversight watchdog to address the corruption practices in the private sector. This is because ultimately the effect of such practices normally shall have the spill over effect on the public sector. It is also desirable if not an imperative that an ombudsman institution to specifically focus on abuse of office and corrupt dealings is instituted to supplement the role of Kenyan Anti-corruption Commission whose mandate is principally eschewed to addressing issues of major corruption in the public sector.

4.9 Campaign Financing

One of the major sources of corruption in any democratic or tyrannical societies is campaign financing of electoral process. It is incumbent upon parliament to legislate against excessive campaign funding otherwise it will be difficult to avoid cash-for-favour scandals associated with members of Parliament. Therefore strict regulation on campaign funds limits and sources from individuals and corporate organization should be defined, disclosed and enforced.

This is due to appreciation of the fact that a corrupt political process is the best fatherhood to future corrupt leadership.

5.0 Freedom of The Press

To nurture a democratic culture, the role of the media cannot be second guessed. This shall therefore call for the repeal of the Official Secrets' Act to facilitate disclosure of information of public interest. In Kenya, if it was not for a pro-active press, the country would not have known of "the Goldenberg scandal" which has had a most devastating effect on the economy of Kenya. However, the journalists need to be well trained, qualified and commensurately remunerated, because some have been alleged to be susceptible to bribery. This is typified earlier in the year when the Kenya Journalism Union Annual Awards was saddled with allegations of corruption and bribery.

5.1 The Epilogue

Corruption is neither a journey nor a destination. It is a destructive force and any society that tolerates it, shall be alienated from the global mainstream and gradually glide to a halt with possibility of the societal disintegration.

Kenya must create and invest in serious institutions, governmental and non-governmental which shall mainstream every facet of national life with virtues of a corrupt free society. The alternative is to be a pariah nation which shall be shunned by the International Community and above all investors who have the financial/capital wherewithal to substantially change the country's landscape in terms of technology transfer, wealth creation and infrastructural developments, necessary for impacting positively on the general standard of living of her people.

I have grounded the thesis on the philosophical basis that the law is a social phenomenon and to the extent, that the law is used to regulate the conduct of individuals and the society. It is my submission that a society which tolerates corruption is decaying from within and eventually it will collapse. This is because justice and corruption are incompatible and hence perpetrators of the vice care less or little about the society. This is encapsulated by B Kutchnisky whose result on research into the attitudes of criminals towards penalization of conduct is that:

Contrary to expectations criminals apparently do not have criminal attitudes – they are, at best, slightly more tolerant towards crimes than non-criminals.¹²⁵

¹²⁵

J W Harris, *Legal Philosophies*, London Butterworths 1980, page 242

It is the society's responsibility therefore to ensure that corruption is treated as crime because that is what it is. It has denied people of this country opportunities for development by discouraging the inflow of FDI, manifestations of which are reflected by high degree of unemployment, increasing crime, dilapidated state of infrastructure of unprecedented scale and unnecessary reputational cost to the country. Sanctions for corruption should be swift and restitutive, irrespective of the status or standing of an individual.

A good example is set by the South African President Thabo Mbeki who sacked Jacob Zuma, his Deputy President, implicated in a corruption trial of his former financial adviser Schabir Shaik who was convicted by a Durban court, South Africa, having found him guilty of the offence of corruption.

In his ruling against Shaik, the Judge said that both Shaik and Zuma had a "generally corrupt" relationship and that Shaik had both solicited bribes for Zuma from a French arms firm and paid himself in hopes of furthering his business interests.

Barely two weeks since he was relieved of his position in the cabinet yesterday June 29, 2005, Jacob Zuma was in court in Durban charged with corruption offence, which was postponed to October 29, 2005.¹²⁶

If Kenya is to be taken seriously, the President must take decisive and swift action against those in his Cabinet who have been mentioned in the corruption scandals during and before his administration came to power. This will then be a strong pointer to investors that the country is confronting the vice of corruption and hence build confidence conducive to FDI flows to the country.

¹²⁶ Nation Media Group Ltd (www.nationmedia.com) - *Daily Nation*, World – Corruption, Publication No.14162, Nation Centre, Kimathi Street, Thursday June 30, 2005, page 12

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