"THE MULTINATIONAL CORPORATION AND
GOVERNMENT CONTROL IN KENYA - WITH
SPECIAL REFERENCE TO THE MANUFACTU-
RING SECTOR"

By:

Christopher Mbuvi Mulei

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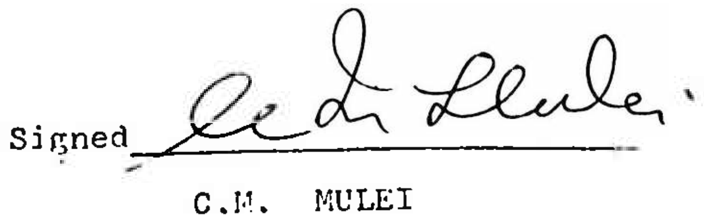

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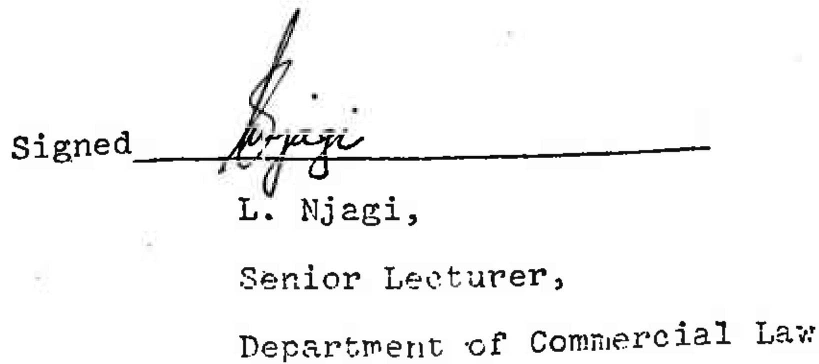

Signed

L. Njagi,

Senior Lecturer,

Department of Commercial Law

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ABBREVIATIONS

A.C.	–	Appeal Court, England.
Cir.	–	Circuit Court of Appeal (preceded by figure indicating circuit concerned)
C.M.L.R.	–	Common Market Law Reports.
Ch.D.	–	Chancery Division, England.
H.C.C.C.	–	High Court Civil Case, Kenya.
I.C.J.	–	International Court of Justice.
I.L.W.	–	Investment Laws of the World (compiled classified by International Centre for Settlement of Investment Disputes, New York).
Rev. Ed.	–	Revised Edition.
S.U.	–	Supreme Court (United States of America).

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SUMMARY

The continuing growing influence and power of the multinational corporation *vis-a-vis* the world economy and national economies is a phenomenon which has attracted the interest of scholars the world over and is of special concern to scholars in the so-called Third World where the impact of this form of business organisation is quite pronounced as regards the deforming of national economic sovereignty.

Why should a lawyer be concerned with an area which on the face of it seems to be the preserve of scholars in other fields of study like economics or political science? For those lawyers who like the sweet music of Latin terminology and other allied legal formalisms and euphemisms, a study of this nature does not excite their interest as to them what constitutes law is a series of citation of cases and reference to statutes willy nilly even if the level of scholarship is of a dubious kind. But even to this type of lawyer, and other conservative souls, the study of law within the realm of political economy has become a great reality. A lawyer to be an effective legislator or a defender of peoples' rights must understand the nature of the society around him for society is not for the law but that on the contrary law is for the society. The

nature of economic, political and social interactions within the society must be identified by the lawyer before he can resolve the conflicts thereof.

In our situation, the way in which the law is shaped and implemented depends on the framework of the socio-economic system - on the concrete historical conditions, the character of state power, the situation in class struggle, the international situation, and so forth.

In the first chapter of this study, an attempt is made to define, describe and analyse the multinational corporation. Numerous publications offer definitions of the multinational corporation which get bogged down in mere formalisation of descriptive type analysis which treats the multinational phenomenon in complete isolation from the various economic, political and social forces. Such considerations like size, the role of the headquarters and the number of countries in which the operations take place are fine points when describing the multinational corporation but they do not get us very far. The approach in this study is that the multinational corporation is a good manifestation of the capitalist process and that its tentacles on the international level have ramifications which affect not only a particular nation state but indeed affect class relationships within the state.

The prevailing opinion of the country's leadership is that the multinational corporation is a beneficient vehicle of development whose activities should be encouraged "in so far as these are in keeping with the country's aspirations". The approach here, however, is that the multinational corporation is inimical to the concept of economic sovereignty and that it encourages the prevalence of exploitation and dependency. As such then, this type of business organisations has to be briddled, to use that rather very alien word.

The study therefore of necessity concentrates on various measures of control (looked at against the existing incentives to foreign investors- Chapter II) with the end aim of establishing whether these controls are reliable remedies. Thus, it is deemed necessary to examine the relevant aspects of the legal invironment of the host country, in this case Kenya, which include, <u>inter alia</u> , taxation, freedom to repatriate earnings and capital, the degree of financial disclosure required, the extent to which equity participation by residents of the host country is required, the form of business organisations permitted, and the extent and terms to which nationals of the host country should be employed by the company. The reason for such exposition is to provide some idea of the range of policies which prevail and the instruments used to implement them.

The study puts forward the proposition that the present regulatory and monitoring devices for multinational corporations to the extent that they exist at all, are quite inadequate. The mode of various methods of control - screening and restricting foreign investments, devising national policies to promote local industry through tax mechanisms or government subsidization and ownership, seeking greater diversification in the sources of foreign investment capital and in training partners, and joining the forces fighting the prospects of international supervision and regulation of multinational corporations - only underscores cautious middle course which is no match for the sophisticated strategies employed by these corporations in protecting their assets and decreasing their vulnerability.

However, the study does not allege that the present legal structure governing the operations of the multinational corporation in the country has had no tangible results. However, the study vigorously attempts to show that the various laws and regulations have only the effects of reformism and that they in no way help in restructuring the economic set-up. This is so because there are clear limits of legal safeguards when the political, economic and social structure is solidly geared to a capitalist mode of planning. Thus law under Kenya's budding capitalist system is not able to plan or

direct its development: it has to be elastic, but ominously resists change in the most basic aspects of property relationships. In the circumstances, the present and future legal controls will at best be palliatives, so long as Kenya continues to internationalise home-country values and aspirations. With such high whole-scale importation of foreign values - political, legal and cultural - it is not possible to disengage from the unequal or unbalanced international economic relations whose bedrock constitutes alien standards and perspectives.

There exists a relationship between law and socio-economic structure. In particular, there is a relationship between the forms, content and values of our law and our still essentially capitalist structure; if the structure changes, law will change with it. Thus, to have a meaningful action with regard to the duties and responsibilities of the multinational corporations, it becomes necessary to have a fundamental change in the body politic in both political, social and economic terms.

CHAPTER [illegible]

INTRODUCTION

1. Preliminary Remarks

Undertaking a research project on the activities of the multinational corporation is quite a circuitous exercise but all the same stimulating and intellectually rewarding. The mention of the word "multinational" seems to evoke unmitigated weariness from business executives of the foreign controlled companies; they give the impression that the word is obscene and impolitic and as a researcher you are seen as a vulture undertaking the dirty job of raking the company secrets. Many of the executives interviewed were quick to state that their companies were not multinational, meaning that their companies were local since they invariably had "Kenya Ltd". after the name of the parent company;(1) a rather oblique way of looking at things, to say the least. It takes a great amount of terminological somersaulting to employ the ingenious argument that by merely registering a company locally the umbilical cord with the parent corporation is immediately severed. This approach was made more embarrasingly and annoyingly untenable by the stand of some of these executives to the effect that people undertaking studies on multinational corporations know nothing of what they wish to examine or know nothing of

the operations of the global corporation.[2] Two executives in fact insisted on learning the writer's definition of a multinational corporation. One of them went so far as saying that companies in the country should meet and make a policy stand to the effect that researches on multinational corporations should not be encouraged. But of course the paradoxical emphasis from these loyal multinational men is always: "Please get the point that we have nothing to hide". And the other popular myth is: "I am loyal to the Kenyan company and not the parent company." But it dawns very soon afterwards that the utterer of these words is a business executive in the classical sense: make profit for the parent company regardless of such "extraneous" considerations as social effects, etc. "We make cans and are not in the least interested in the academic approach of you people", one executive brusquely remarked in the course of a discussion.[3]

Why the sensitivity? The explanation for this attitude becomes clear in the course of the analyses in this tudy. In terms of scholarship, one cannot of course discount the general objectives of conveying information. However, the need to study the multinational corporation is not and cannot indeed be limited

a contribution to make but what is less certain is whether this structure should follow the pattern laid down in the United Kingdom. It is questionable whether law created in that country during the nineteenth century to satisfy the needs of capitalists operating in *laissez-faire* environment, and later amended to cater for a highly sophisticated industrial society which increasingly emphasizes big business can be considered suitable to regulate the commercial [illegible]. During the colonial era there was [illegible] reception of the ruler's statutes which included company legislation. *It is now pertinent to consider whether such law is a help or a hindrance to [illegible].*"(5)

A necessary question arising from the [illegible] quotation is: Can private enterprise [illegible] *meaningfully and positively* to national development? Before one can answer the above question, it is necessary to understand clearly what we mean by development, progress and what have you - for these are words which seem to be employed caressly in most of the studies on this subject. Even to the innocently ignorant

"[illegible] economic" development in toto defines quantitative measures as the criteria for determining growth or progress of a society. It is a truism, though cliche - laden, to say that the poor or the downtrodden continue to be poor while the rich continue to be rich. Even a conservative economist - a "perfect boy economist" in the eyes of the World Bank - like Professor Irma Adelman has stated:

> "(for) the longest part of development process - corresponding to the transition from the state of development of sub-Saharan Africa to that of the least developed Latin American countries - the primary impact of economic development is, on the average, to decrease both the absolute and the relative incomes of the poor. Not only is there no automatic trickle - down of the benefits of development; on the contrary, the development process leads typically to a trickle - up in favour of the middle classes and the rich."(6)

There has been a gladiatorial argument between the apologists of colonialism (bourgeois scholars)(7) and African progressives on the actual implications of colonialism. According to the former, the balance sheet has both "credits" and debits", and they often conclude that the good outweighed the bad. The African revolutionaries on the other hand maintain that

benefits from colonialism were small and that they were not gifts from the colonialists, indeed, there are those who feel strongly that colonialism had only one hand, that is, it was a one-armed bandit.

In his valuable book, <u>How Europe Underdeveloped Africa</u>, (8) Dr. Rodney makes the point that real African development is possible only on the basis of a radical break with the international capitalist system which has been the principal agency of underdevelopment of Africa over the last five centuries. The author also makes another important observation, namely: that development cannot be seen purely as an economic affair, but rather as an overall social process which is dependent upon the outcome of man's efforts to deal with his environment. Expansion of the economy leads inevitably to a change in the form of social relations. In his analysis, Dr. Rodney argues that all of the countries named as "underdeveloped" in the world are exploited by others, and that the underdevelopment with which the world is now preoccupied is a product of capitalist, imperialist and colonialist exploitation. Hitherto, African and Asian societies were developing independently until they were taken over directly by the capitalist powers. When that happened exploitation increased and the export of surplus ensued, depriving the societies of the benefit of their natural resources

and labour. Thus, we find that Africa, the birth-place of the Early Man with its past glorious civilisations, and a continent endowed by nature with more natural resources than any other continent on earth, continues to undevelop.

Any system in nature which distributes environmental resources to only a limited class or species is disfunctional and, by and large, this is the theology of capitalism. In an interview with an eminent Kenyan sociologist this point was stressed thus:"...this system which allocates the major part of natural resources to only a group is an anathema to interests of the species as a whole, and should not be allowed to develop."[9] Asked whether there were elements of capitalism in African traditional societies, Dr. Ndeti said that such elements are absent because they are linked to a religion of redemption, although conceding that they (the elements of capitalism) have now been infused into our social structure through foreign influence. According to Dr. Ndeti, the deve leopment of social stratification/East Africa has /in been influenced by a number of things.

There is the colonial input - Western ideas or capitalist ideas. This is the influence of Judeo-Christian traditions entailing the spirit of capitalism.

In terms of Calvinism, there are the ideas of redemption espoused. Simply stated the doctrine states that people who are successful materially on this earth are assured of the Kingdom of Heaven. Then there is the Darwinian or natural theology of the biological sciences. Here one uses the principles of natural selection in Darwinian sense to claim that those who are successful here and otherwise are better adapted to the natural world. This in effect means that those who cannot fit in this will be eliminated by the forces of elimination. "While you are there, you are also implying a basic differentiation in terms of our endowment; so that ranking system is a very basic thing in natural world and is invoked to achieve whatever goals". (10)

With these alien influences, there has come to be what can be called the innovative class. "These are people who in the 20th century concept or notion constitute the elite. They can be a spearhead of rational development - this is to say that social stratification _per se_ is not necessarily evil. On the other hand, these people can revert to oligarchies or autarkies or tyrannies in the Hellenic sense. What is important is the value position or orientation of these people. If their axis is in the West, then they are serving interests counter to their existence. On the other hand, if their axis is in Africa, it will

mean that they can de-stratify themselves. In that sense they can be an important factor in the area of rural and urban transformation."(11) But Dr.Ndeti added that the so-called African elite is a component of the internationalised class and that the grouping is an anathema to the existence of the real African.

What about dangers of "Black" Capitalism? Black Capitalism is not black in the sense of values - you have a few Africans controlling a segment of the economic structure, but their base is not Black ideology; they are just occupying the role of the White masters without necessarily making any efforts to marry this with Black values.
Dr. Ndeti continued:

> "In the present form, Black Capitalism is anathema to our development because there is no input which is ours; what we have are preformed structures. Black capitalism can be ours when we make metaintegration, that is, when we make it part of us beyond what we see and perceive."(12)

From the foregoing, it becomes obvious that so long as the we remain tied to the umbilical cord of the "Mother Country",our independence to plan and implement

[illegible] programmes will never meaningfully [illegible] off the ground. If such [illegible] colonial clutches means a travesty of "[illegible] behaviour", then it is just too bad: we [illegible] our eyes when the White man armed with the gun on one hand, and the Bible on the other, took our wealth, and even our manhood, away. How are the "captains of industry" aware of the woes of our country and the best ways of liquidating them?

Quite a number of companies in the country have implemented admirable welfare schemes for their workers and are in the limelight in following in the Nyayo[13] as far as giving donations is concerned. But the reality of the matter would seem to be the cognisance of the trend of events and one can be forgiven to term some of these efforts as "nothing more than a combination of subtle advertising, and good industrial and public relations which culminate in the increase of the sole objective, profits for the company. This can be categorised as nothing more than a policy of enlightened self-interest."[14] The concern for social responsibility, if any, stays anchored in callousness and inertia as the company's role in this area is "frustrated by the law which recognises property rights as the sole basis of ownership, control,

responsibility and benefit within the company framework.[15] Such capitalistic doctrine is of course based on the doctrine of <u>ultra vires</u> which basically says that any act which does not benefit the company is legally against the interests of the company. When therefore studying the effects of the multinational corporations' activities vis-a-vis the national economy, it will be important to examine their contributions or otherwise to the national development, which as we have seen earlier, will be a broader concept encompassing economic development as well as other elements namely social, political and cultural. Much will be said later as regards the first element, suffice it to briefly outline the impact on these elements by the global corporations.

The global corporations do not exclusively concern themselves with organising production but also exercise an influence on consumption patterns throughout the world. This is to say, these business concerns influence all levels of the process of allocation of national resources - chiefly in an indirect manner - by

[illegible] the

development and cultivation of such socio-cultural values, knowledge and habits as are in agreement with their fundamental interests.

In the paper,"Inappropriate Products and Techniques in UDC's: The Case of Breakfast Foods in Kenya", R. Kaplinsky notes that considered/relation/in to traditional breakfast foods and other modern alternatives, breakfast cereals provide nutrients to the consumer at a very high unit cost.(16) Kaplinsky observes that such breakfast cereals are largely for the consumption of the alien section of our society, and that "they are now being aggressivly marketed with the intention of inducing a more widespread pattern of consumption." The above writer further points out that choice of production often determines the choice of technology. A similar pattern occurs in regard to breakfast foods where inappropriate, high income products require inappropriate techniques of production.

In the second chapter of this study, an attempt is made to define, describe and analyse the multinational corporation. At this stage it will suffice to look at the distinguishing features of the multinational corporation as being that its operations are dispersed among two or more countries and that the nucleus of

[illegible] is based at the headquarters of the corporation, [illegible] in the home country. In such a set-up, the whole paraphernalia – tastes, managerial techniques, accounting systems – are in effect [illegible] to the local subsidiary of the parent company in the host country. The local office is usually manned by a multinational man for the headquarters in the home country, and at times, it could be an ideal local man but inevitably directed by the ever-present Financial Controller and Marketing or Sales Director.[17]

Not much has been written on the multinational corporation in Kenya, but two publications stand out in this regard. These are: Who Controls Industry in Kenya[18] and Readings on the Multinational Corporation in Kenya.[19] The former was sponsored by National Christian Council of Kenya and contains very useful information on ownership and equity of the various major companies in the country and the extent of directorate.

The latter is a critical survey by knowledgeable scholars on various aspects of the multinational corporation phenomenon in Kenya. This is a book which no doubt pricks the eye of the multinational man and in one discussion with an executive of a multinational corporation the advice offered was quite clear.

"If your approach is like that of Kaplinsky, then you cannot expect any help from us".[20] The writer(of this study) was advised (at no fee!) that there must be something inherently suspicious in a book which speaks of the local'petty bourgeoisie' instead of 'middle African class'![21]

It is apparent that within a scope of this study it is not possible to embrace all the types of multinationals operating in Kenya and accordingly no full-dress treatment will be given to multinationals in the following fields: Agriculture and Estates, General Trading, Services and Finance. The manufacturing sector is given more emphasis because this sector is presently the largest being undertaken by the multinational corporations and also in view of the importance given to the sector vis-a-vis the projected national industrial development. In the current Development Plan(1979-1983), the manufacturing sector ranks second to agriculture in importance in our economy. The rate of growth of the sector between 1972 and 1977 was of the order of 10.5% per annum about twice as high as the overall rate of growth of the whole economy. During the Plan, the manufacturing sector is projected to grow at the rate of 9% per annum. Accoring to the Plan, the sector provides considerable opportunities for employment. In 1977 it employed 118,000

people which [illegible] 2.1[illegible] of the total wage employment in the economy.

2. Kenya's Policy on Private Foreign Investment

In 1969 when an Agreement was signed between Kenya Government and Firestone E.A.(1969) Ltd. for building of a factory to make vehicle tyres in Kenya, Mr. Mwai Kibaki, then Minister for Commerce and Industry said the Government welcomed all those interested in investing in the country and assured them that there was every guarantee of industrial property.(22) Kenya, he noted, had reached an agreement with Firestone because it was willing to train many Kenyans in new technology,"for although the country could not reach the moon in its present stage of technology it wishes to get somewhere near."

The same theme was echoed by President Kenyatta when speaking at the foundation stone ceremony of the £5,800,000 Firestone factory on the Mombasa Road in the Industrial Area.(23) Mr. Kenyatta pointed out the Government expected foreign contribution to the economic well-being of the country. "We also expect them to employ our people and train them to acquire new skills." And when early in 1978, Mr. Thomas Bata, the Chief Executive of Bata, called on Mr. Daniel arap Moi,

then the country's Vice President, the latter urged more multinational companies to invest in Kenya "to create jobs for Kenya's youth."

Thus, the multinational corporation is seen in Kenya as a beneficient vehicle of development whose activities should be encouraged in so far as these are in keeping with the country's aspirations. Consequently, Kenya's attitude to private enterprise in general is to let it operate with as little government interference as possible, and the Government appears to be concerned to project an image of Kenya as a safe environment for private investments, as a country with political stability, free of "Communist" influence, with no desire for nationalisation of private assets and allowing relative freedom for repatriation of profits, interest and dividends. Under such liberal policy it is noteworthy that in the period May 1977 to April 1978 the inflow of new foreign investment was £10.6 million while the outflow of dividends was 17.7 million. In addition, a further £16.1 million was remitted overseas in the form of royalties, technical service charges, directors fees and other items associated with foreign investment.(24) The foregoing is so because of Kenya's commitment to a capitalist development strategy.

After the death of President Kenyatta, the newspaper, <u>International Herald Tribune</u> carried a story entitled "An African Legend: Symbol of Fight for Liberation."(25) In the article, the paper noted that the early years of Kenyatta's struggle for Black emancipation had stirred the radicalism of "several US black nationalists in music and politics to the extent that they dropped their slave names in favour of Kenyatta or called their groups 'Mau Mau'. The black community of East Palo Alto, Calif., is now known as Nairobi to honour the resistance to white rule which Mr. Kenyatta led. But once his post-independence moderation was apparent, he became better trusted by the likes of Henry Kissinger, General Motors and Union Carbide than by radical black youths."

What is crucial here is not so much the importance of Mr. Kenyatta as an individual but the system which he presided over. After all, for those who seriously advocate fundamental changes cannot escape the obligation of describing in outline the system they propose should replace the present one and to apply their analysis of today's problems to those which are bound to follow in the wake of change. We must know not only where we are, but also where we are headed.

The generic economic elements of Kenya's capitalist mode of development are well spelt out by Professor Sandbrook in his book, <u>Proletarians and African Capitalism - The Kenya Case 1960 - 1972</u>. The elements are the following:-

> "A conception of development as, at least in the short run, maximizing production rather than ensuring social equality; a decision that development in this sense can best be stimulated by the prod of the profit - motive and the associated institution of private property; a considerable reliance upon foreign capital and expertise to modernise the economy; and the official encouragement of indigenous entrepreneurship in both urban and rural areas... Kenya's economic dependence derives in part... from its reliance upon the inflow of foreign resources - both capital and skilled personnel- from a few advanced capitalist countries. This dependence is accentuated by the concentration of Kenya's trade with a few industrialised states, a trade in which Kenya supplies mainly primary products (coffee and tea usually constituting about half of its exports) in exchange of manufactures."(26)

With the continued entrenchment of large scale

foreign owned enterprises in Kenya, various considerations have to be taken into account in view of the country's long-term goal of economic independence. The multinational corporation has come under increasing attack from scholars, politicians, trade unionists and even some civil servants who regard this type of business organisation as a new form of imperialism. A key problem is to determine how the impact of conflicting national interests for economic self determination and political sovereignty affects the commercial policies of multinational firms in the country. In such circumstances, there is need for our lawyers and policy makers to tackle the question of the status of multinational companies in the country, their rights and responsibilities and the regulatory structures that should apply to them.

It has been said that after several years of heavy, direct foreign investment, Kenya's freedom of action has been progressively restricted to the point where it is doubtful whether it can be regained. If this is so, what can be done to improve the situation? Though political will is the first consideration in this regard, it is pertinent to look at the existing legal structure and examine whether adequate safeguards exist, and if not, how these could be strengthened.

The Foreign Investments Protection Act does touch on the obligations of investors but only so far as these relate to compliance with the Exchange Control Regulations.

Thus there is no specific Investment Act governing a code of ethics to be followed by the multinational companies, comprehensive regulations governing pollution or the location of industry to meet regional balance. Also there is no independent law governing transfer of technology and the transfer of trade mark rights.

Kenya is a party to the International Union for the Protection of Industrial Property, that is, Paris Convention for the Protection of Property of March 1893, as revised at Brussels on December 14 1900; at Washington on June 2, 1911; at the Hague on November 6,1925; at London on June 2, 1934; at Lisbon on October 31, 1958 and at Stockholm on July 14, 1967.

As Kenya has no independent patent system, letters of patent are therefore not granted nor are provisional applications accepted. Only a guarantee of United Kingdom patent may be registered in Kenya. In respect to Kenya's association with the International Patent Law, Osita C. Eze comments thus:

"At the international level it has been

contended that the international convention as it exists is not suitable to the needs of the developing countries. It tends to protect private interests more rather than give meaningful concessions to the aspirations of the developing countries. The national treatment standard combined with provisions relating to priorities and the reluctance on the part of the industrialized countries to accept a more rigid and extensive control of the use and non-use and abuses of patents have not helped matters. In fact, the utility of a developing country joining an international convention on patents has been questioned." (27)

The other legal instrument of control is the Companies Act (CAP 486). Though a bulky piece of legistlation (based on the English Companies Act of 1948), the Act lacks, "sharp teeth" and needs drastic restructuring or reform. Under this piece of legislation, control over corporate power remains luke-warm at best and the words of Justice Brandeis in Louise K. Ligget Co. v. Lee are partinent as ever.

"Through size, corporations, once merely an efficient tool employed of private business, have become an institution - an institution which has brought such concentration of economic

power that so-called private corporations are sometimes able to dominate the state." (28)

Lamenting the far reaching dangers of corporate economic power vis-a vis economic and political affairs, Judge Brandeis noted that there was a widespread belief that the existing unemployment was the result, in large part of the gross inequality in the distribution of wealth and income which giant corporations have fostered, adding:

> "...by the control which the few have exerted through giant corporations, individual initiative and effort are being paralysed, creative power impared and human happiness lessened... only through participation by the many in the responsibilities and determinations of business can Americans secure the moral and intellectual development which is essential to the maintenance of Liberty." (29)

The company law in Kenya is characteristically geared to the profit motive and anything which is not umbilically connected with the benefit of the company is not to be pursued albeit its social, economic or political usefulness. However, with the growth of the idea that giant corporations are to a certain extent public institutions with responsibilities towards many social groups and the general public, demands for more

political control have emerged. But this is by no means catered for in the Companies Act. It is interesting to compare the country's (Kenya's) company legislation with that of West Germany. The emphasis away from the profit maximisation concept was expressed in the German Share Company Act of 1937.(13) Under Sec. 70 par. 1, the members of the executive board were personally responsible for managing the corporation "as required by the welfare of the enterprise and its personnel, the common good of the people (Volk), and the nation (Reich)." The Share Company Act of 1965 deleted the final phrase by providing only: "The executive board has sole responsibility for managing the corporation". Legal writers, however, generally recognise that this change did not eliminate the idea of defining objectives beyond enterprise profits maximization.

As things stand today, company formation and the choice of industry does not present much of a problem especially when such undertaking is in the hands of skilful lawyers and project appraisers. Indeed, quite a number of the management or technical agreements are drafted mainly by the foreign companies' lawyers and are more or less rubber-stamped locally. It is probably this unsatisfactory state of affairs

which prompted the country's Minister for Commerce and Industry to note that lack of skilled manpower to negotiate investment/with the financial and /s industrial experts of developed countries results in a serious handicap.(31) The result is that the Kenyan firms become the victims of monumental fraud. They are sold dummy machines; they pay royalties for obsolete technology; management fees far outstrip profits; foreign investors dump sub-standard plants in the country without backing their machinery with any capital. Expressing concern over the trend the Minister stated that Kenya must start looking at the phenomenon critically and distinguish genuine investors from "mere machinery salesmen" whose motive was only to sell useless equipment without taking any corresponding risk of equity in projects:-

> "We must begin to evaluate the usefulness of certain practices and conventions in the process of foreign investment. We must reexamine the basis on which royalty fees are paid for technology which is globally available or obsolete. We must question the practices of payment of managerial fees which in certain instances have exceeded the profits of the company". (32)

The recent case of Ken-Ren fertilizer plant strengthens the view that effective instruments of control and supervision over giant corporations do not exist.

Ken-Ren Chemicals and Fertilizers Ltd. was formed in 197[illegible] to build a fertilizer manufacturing complex at Mombasa. But before long, the shs.428 million set aside for the project had been exhausted mainly though purchase orders and contracts never authorised by the company's board of directors. As a result the project never successfully got off the ground. Besides the complete drying up of the initial funds, the company got enmeshed in colossal debts incurred by the management without the knowledge of the directors.

The N-Ren Corporation, a relatively small American firm entered into partnership with the Kenya Government in 1975 and formed Ken-Ren Chemicals and Fertilizers Ltd./35 per cent for the N-Ren Corporation. /with The American firm, with apparent inside information about quotations by manufacturers who had responded to the government invitation for a tender in 1974, came up with quotations which distorted the actual cost of the project and appeared cheaper and further undertook to complete the factory in a shorter time than others.

The greatest blunder during the short-lived marriage of convenience was when the management prepared and caused to be signed contract supplement No. 2 which for all practical purposes transferred all N-Ren financial obligations to Ken-Ren. That meant that Ken-Ren was to meet all the bills for the project earlier undertaken by N.Ren International as the main contractor for the project.

N-Ren also pledged to secure fertilizers in the interim at prices lower than those obtaining on the world market in quantities and quality required since it was not in the fertilizer cartels. N-Ren further undertook to arrange easy purchase terms for the government. But the company proved an imposter for it never honoured its obligations.

In the subscription agreement, it was stipulated that N-Ren be appointed the contractor for constructing the fertilizer plant. In the agreement, it was provided that the associate company in Kenya would have six of the nine directors on the company's Board of Directors. And as is usual in most of the joint-ventures in the country, an expertriate, who was an appointee of the foreign concern, was to be managing director of Ken-Ren Chemicals and Fertilizers Ltd. The expatriate got involved in a number of mal-

practices which resulted in colossal losses of money. Ken-Ren managing agents indulged in a series of errors of omission and commission. As management agents, they carried out business on behalf of Ken-Ren without much consultation with the board of directors comprising six Kenya Government appointees.(33) Although a foreign firm once established, must provide a fair amount of information to the Central Bank and the Government authorities, no serious check on its activities nor detailed control of its foreign transactions seems normally to take place. In 1976, TAW International Leasing Corporation, a black American leasing company in Nairobi charged that a United States government agency and three multinational companies, all TAW creditors, had forced it to violate foreign exchange regulation in Kenya.(34) The three multinational companies mentioned in this charge were the First National Bank of Chicago in Nairobi, the Chase Manhattan Bank and General Motors Corporation and the U.S. government agency involved was Overseas Private Investment Corporation (OPIC). In a press release, TAW said that the creditors had forced them to make payments to them in violation of Kenya exchange control regulations. "Over one million shillings were paid to those giant multinational corporations through the United States Embassy in Nairobi", (the release said). To counteract such practices, a Foreign

Investment Committee under the Finance Ministry, or a Companies Supervisor under the A.G.'s Chambers could be appointed with a view to not only valuing tangible assets being brought into the country as well as technology in its various forms, but also establishing a special audit system.

In the key sector of the Kenya economy, decisions concerning what is to be produced, where it is to be sold, from whom supplies are to be purchased and what funds are to be transferred in the form of interest, dividends, loans, shares, purchases, charges for management, research or advertising services and so on are made entirely with consideration of global strategy of foreign corporations. This is not often compatible with Kenya's interests and one can safely say "that multinational subsidiaries in Kenya are not autonomous planners, shaping their own economic plan space but rather part of the economic place of the firm's head offices." This is not withstanding the noticeable localisation of directorate which is the case in some of the subsidiaries. Thus the "Africanisation" or "Kenyanisation" exercise should be re-examined in this light. Management contracts, which are quite common should need also to be re-examined to make sure that "Kenyanization" measures are not being thwarted.

The Trade Licencing Act should also be re-examined with a view to establishing whether service operating of multinational corporations which are not sophisticated can be brought under the ambit of the said Act.

Under national and international laws, Kenya has a right to nationalize but this has been done only sparingly. And even when nationalization takes place, adequate effective and prompt compensation is assured.

But it would seem that Kenya's position might change with the rest of the "Third World"(33) in respect of the new approach to the legal regime governing foreign investments and the safeguards thereof. In accordance with UN Resolutions 3281 (XXIX) of December 12th, 1974, compensation as a remedy was qualified. The Resolution in question dealt with the Charter of Economic Rights and Duties of States. Article 2 of the Charter speaks of "appropriate Compensation" taking into account the expropriating States' "relevant laws regulations and all circumstances that the State considers pertinent." In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of states and in accordance with the principle of

free ch[illegible]. It is noteworthy that Kenya was one of the many "Third World" countries which voted the resolution affirmatively notwithstanding strong opposition from the highly industrialised nations.

The Charter of Economic Rights and Duties of State also emphasized the right of a State to regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies.

However, it remains to be seen whether we can count much on effective leverage on the international scene. Dr. Rodney's remarks here are apt:

> "From the beginning , Europe assumed the power to make decisions within the international trading system. An excellent illustration of that is the fact that the so-called international law which governed the conduct of nations on the high seas was nothing else but European Law. Africans did not participate in its making, and in many instances African people were simply the victims, for the law recognised them only as transportable merchandise. If the

[illegible] an slave was thrown overboard at sea, the only legal problem that arose was whether the owner of the slave-ship could claim compensation from the insurers'."(36)

The common form of control in Kenya is the practice of taking equity participation with foreign firms. To some people this forms a concept of nationalisation, but the important thing here is the chain of command, with regard to day-to-day management and decision making. It is evident that mere participation of the State in stimulating or undertaking major industrial and marketing functions, or even the nationalisation of foreign enterprises, does not necessarily alter the economic structure.(37) For example, it is normal for managerial control of enterprises wholly owned by the state (of which the State holds the majority participation) to remain in the hands of international corporations. Minority participation and management agreements ensure the foreign corporations a regular flow of payments in the form of royalties, patents, licensing agreements, and technical assistance fees, etc. which to some extent replace the export of profits in affecting the balance of payments negatively.

3. Scope of Analysis and Hypotheses

The foregoing points touch on various fields of Law: Company Law, International Economic Law, Revenue Law and Public International Law. In short, the relevant aspects of the legal environment of the host country include taxation, freedom to repatriate earnings and capital, the degree of financial disclosures required, the extent to which equity participation by residents of the host country is required, the form of business organisations permitted, and the extent and terms to which nationals of the host country should be employed by the company.

Though exhaustive treatment will be given to the existing legal structure vis-a-vis the multinational corporation and suggested reforms thereof, it is important to note that the horizons of analysis will be broader and will try to eschew the fundamental weakness of approach in many of the studies on the activities of multinational corporations by which liberal scholars are merely concerned with the reformist counterstrategies by the "host countries". Such approach looks at the international economic system from a narrow viewpoint and as such "it denies the possibility of independent African aims. It is an

intellectually neo-colonial approach, however, anti-capitalist or paternalistically 'pro African' it may be. It is the opposite of liberation."(38) Thus the aim in this study is not to seek knowledge for the sake of knowledge but to understand the underlying forces in order to change them. The study will therefore go beyond the post-independence form of "interventionism" in which the role of the State is clearly to try to anesthetize capitalism for the benefit of the indigeneous comprador class. Logically follows the various hypotheses which are discussed hereinder:

1. Present regulatory and monitoring devices for multinational corporations to the extent that they exist at all, are dismally inadequate. The mode of various methods of control - screening and restricting foreign investments, devising national policies to promote local industry through tax mechanism or government subsidization and ownership, seeking a greater diversification in the sources of foreign investment capital and in training partners, and joining the forces fighting for the prospects of international supervision and regulation of MNCs (Multinational Corporations) - only underscores Kenya's cautious middle course which is no match for the sophisticated strategies employed by these corporations in protecting their assets and decreasing their vulnerability.

2. If, as has been stated above, the existing legal controls over multinationals are not effective, there would naturally be a presumption that a more radical legal regime would rectify the position. Unfortunately, this is not so. This is because law under Kenya's budding capitalist system is not able to plan or direct its development: it has to be elastic, but ominously resists change in the most basic aspects of property relationships. In the circumstances, the present and future legal controls will at best be palliatives, so long as Kenya continues to internationalise home-country values and aspirations. With such high wholesale importation of foreign values - political,legal and cultural- it is not possible to disengage from the unequal or unbalanced international economic relations whose bedrock constitutes alien standards and perspectives.

3. Corollary to (2) above, it is evident that the behaviour of the Kenya multinational corporation is inextricably tied up with the nature of international monopoly capitalism. As such then, there is not much to be gained with respect to the oft stated need of introducing or even faintly policing multinationals. Of course, there has been the report of the UN Commission on Transnational Corporations(1974) whose recommendations, _inter alia,_ include the need for

formulating a code of conduct to be observed by transnational corporations and the need for economic self-determination as a legal concept respectively. Observance of such new concepts by Western Powers is not possible so long as the major Western Powers continue to be tenacious of their interests as a first consideration. Of course, if poor countries like Kenya combine their knowledge and join together for bargaining leverage (as OPEC has done), multinationals may soon find it necessary to get on the band-wagon for international controls as a way of protecting their own interests. With such scenario, the demands of the "Third World" countries like Kenya will no doubt be whittled.

4. The evolution of Kenya's industrial structure which to a very significant degree, has come about as a result of multinational enterprise, is incompatible with the Kenyan perspective. With newly independent country in search of economic independence, it is a sad fact that the large part of affiliates and branches of multinationals in the country has been established either by the acquisition of local firms thus stifling the growth of domestic enterpreneurial talents or by the establishment of monopolies and oligopolies thus limiting economic opportunities of local enterprises.

Needless to say, the purpose of multinationals activities is far from charitable, or to use the common saying, a multinational corporation is not the Red Cross Society. As long as MNCs see their role in terms of global output or profit maximisation with little interest in the long run, domestic impact of their activities, the MNC host state conflict will continue to be prevalent. Leaving aside the loud cry, but justifiable all the same, that multinational corporations represent the extension of the imperialist power of the major advanced capitalist countries, it should be noted that multinationals - by and large are vehicles of "anti-development"; their modus operandi does not represent the efficient way of fostering economic growth and social welfare, and that development is highly exaggerated.

5. To have a meaningful action with regard to the MNC duties and responsibilities, it becomes necessary to have a fundamental change in the body politic in both social and economic terms. Kenyan society is being built upon capitalist economic institutions. The right of property is basic element of the constitutional legal order. Property thus is among the things which the state is committed to protect and in such circumstances nationalisation and more effective state control over the means of production become anathema.

It logically follows that the growth to multinationals must be stopped; the surplus value which feeds this growth must be directed to national enterprises instead. If this cannot be done under capitalism, as Canada's experience strongly suggests that it cannot, a further answer follows: national independence and socialism can.

6. Finally, it sometimes pays to state the obvious. There exists a relationship between law and socio-economic structure. In particular, there is a relation between the forms, content and values of our law and our still essentially capitalist structure; if that structure changes, law will change with it.

Corollary to what has just been stated, the differences between legal theories or approaches lie not in statutes or cases, but in different attitudes toward what the state represents, how it originated, and what is required to change it. It is therefore, critical to legal analysis that there be a political theory which accurately describes the economic basis of law. Thus as has been stressed all along, the study will not ignore the perspective which insists on defining the state and law as organised force of a social or economic class. Historically, this class contradiction can be illustrated. As historians

would confirm, "The Law" in 18th century England was concerned with the establishment of a stable state whereby trade intercourse and the ownership of land could be regulated in an orderly manner. Uncritical liberal scholars are apt to get enmeshed in the procedural niceties of the period and to assume that fairness, impartiality and good conscience obtained. But this fictitious impression does not meet the strain of scientific analysis. For the common man, the unpropertied and labouring "God's bit of wood"(39), "The Law" was brutal. Its manifestations were manifold: the lash of the whip, the threat of transportation or "in the awful spectacle of the public hanging and the bodies of convicts swinging in chains."(40)

In his attack on the ban on bilbery-picking, Marx used his pen in his characteristic poignant manner:

> "the children of the poor....pick these fruits to earn a trifling sum for their parents; an activity which has been permitted by the owners <u>since time immemorial</u> and has given rise to a <u>customary right</u> of the children....(But these berries) have already become articles of commerce and are despatched to Holland by the barrel.... things have actually gone so far that a customary right of the poor has been turned into a

monopoly of the rich... [illegible] not think, it calculates. [illegible] figures. Motive is an incentive for [illegible] the basis of law..."(41)

In the above light, the present [illegible] structure is looked at as a mechanism which ari[illegible] out of a class contradiction in order to preserve the interests of one class in opposition to the interests of others.(42)

In summary, the study will describe in specific terms the kind of approaches the government has taken toward foreign private investment. The purpose is to provide some idea of the range of policies which prevail and the instruments used to implement them. The study would be incomplete if such impact of control were undertaken in complete omission of the specific position of the Kenya economy within the global one.

Another important aspect of the study is the emphasis on the context in which the various legal rules and regulations operate. Law cannot be divorced from the prevalent, economic and political conditions.

"This is perhaps stating the obvious yet many studies fail to consider the operations of the multinational corporations in a political

economic context.

It makes little sense to evaluate the role of direct investment without considering its relationship to local economic classes, however, 'unformed', and to the state. The areas of conflict as well as the nature of the conflict between local and foreign capital will have an important bearing on the trajectory of the economy and the role of the state - particularly with regard to its relative autonomy is of particular relevance."(43.)

4. The Legal Perspective

"...In the developing countries like those of East Africa, and at a time when some of them are undergoing significant structural changes, we feel that there is a need for re-examining our views on law and on the role of lawyers. A view which restricts itself to the technical and formal aspects of law at the expense of concern with fundamental problems affecting our development cannot be justified."(44)

In this study, law is seen as a product of given socio-economic formation and as such an important instrument for developing and shaping the social

system of the time. Nevertheless the law can only perform the functions of shaping and developing society if, as a whole it accords with the socio-economic system. Law was created to secure the rule of one class over other classes. The earliest written sources of law testify that this law established slavery and privileges in the interest of the ruling class and provided severe punishment for the slaves, who were the property without any civil rights. Since society disintegrated into classes, the economically dominant class has guaranteed its rule by using the state to create a legal system which serves its interests. Thus law is made to shape, to strengthen, and secure the social conditions necessary for the existence of the ruling class as a whole. Here we turn to Lenin and his much maligned theory on the relationship between the state and the governed. "The origin of Soviet power", stated Lenin (April 1917) "is not in a law previously considered and passed by Parliament, but in the direct initiative of the masses from below, everywhere." Lenin's theory of the state and of the role of the soviets is set out in The State and Revolution(45) written in the months immediately preceding the October Revolution. Lenin followed Marx and Engels in his definition of the state as "a special organization of force, the organisation of violence for

the suppression of [illegible] class." [illegible] [illegible]ments of /comprised [illegible], the bureaucracy such coercive machinery which Lenin [illegible] must be "crushed, smashed to bits, wi[illegible] [illegible] face of the earth". He specifically excepted "the apparatus closely connected with the banks and syndicates, an apparatus which performs a vast amount of work of an accounting and statistical nature," which must be "wrested from the control of the capitalist", not broken up. Lenin foresaw a great future for nationalized banks. In the meantime, according to Lenin, the coercive machinery was to be replaced by "a <u>more</u> democratic but still a state machinery in the shape of armed masses of workers, which becomes transformed into universal participation of the people in the militia... <u>All</u> citizens are transformed into salaried employees of the State". Basically, Lenin's stand was that the task of the working class in its revolution was to overthrow the bourgeois state and substitute for it a state which, on behalf of the overwhelming mass of the population should use force against those whose rule was based on the exploitation of man by man. Is this always an immutable law, or for those who believe in the theology of redemption, the Law of Moses?

To answer this important question it is necessary to employ some powerful missiles of analysis.

Denis Lloyd in his book, The Idea of Law,[46] states that "Law was nothing but a coercive system devised to maintain the privilege of property owning class" or that alternatively law was "distilled out of the economic order which gave rise to it, and was an institutionalized form of the prevailing ideology whereby the dominant section of society coerced the masses into obedience". Such observation can take some people unawares and jump into cheap vulgarization of Marxian analytical thought. "This is so because it is nothing else but insult to the immense analytical genius of Marx to assume that he was incapable of explaining those many laws which have neither this coercive intent nor this effect."[47]

In The German Ideology,[48] Marx and Engels did indicate that they were aware that the law has little to do directly with inter-class relationship and "the main dominant class, and so indirectly, to consolidate class position."

What should be realised is that the mere removal of the architects of the coercive machinery does not necessarily change the structure of the society; what is important is to have a structural development change. And this is important, for in

Lenin's theory what should first happen in a place like Tanzania for example would be the use of force as a medium of delivery of socialism. But here, indeed, the "coercive" structure is aiming at serving the goals of socialism. It may be gradual socialism - cautious of not catching the cold of Marxism - Leninism,[49] but the point is that in a situation like Tanzania where you have a one-party system, the situation like that which took place in Chile (re: the overthrow of Alende), is automatically ruled out. That is why it is necessary not to fall prey to blind dogmatism. Indeed, Karl Marx himself warned against this danger in 1843:

> "We do not face the world in doctrinaire fashion declaring 'Here is truth, kneel here'.... We do not tell the world, 'Cease your struggles, they are stupid; we want to give you the truth watchword of the struggle'. We merely show the world why it actually struggles, and consciousness is something that the world must acquire even if it does not want."[50]

It is imperative to note that it is accurate Marxist position to state that a legal form cannot hold back development if a change in the real economic conditions has taken place or is taking place. Also it should be noted Marx did recognize the fact that

legal institutions in the control of the economically powerful can unquestionably facilitate and expedite real economic change. In Capital Vol.2, (51) Marx shows the example of how a century and a half of legislation designed to prevent enclosures - e.g. the Act of 1533 restricting the number of sheep for one owner to 2,000 - proved fruitless. When the bourgeois gained control of the political institutions, however, the policy was done away with, and the forms of feudal land tenure were abolished: "The aims were now to extend large scale agriculture, to increase the supply of masterless 'free' proletarians to increase the dependence of the new proletarians' on the market for goods also, and to increase 'efficiency' on the farm and so provide a surplus for the manufacturers."

In his famous Open Letter to Leszek Kolakowski, E.P. Thompson(52) notes that in the immediate post-war years the British Labour Movement attempted to carry out socialist measures within a capitalist matrix. The mines and railways were nationalised, a free Health Service was introduced; educational provision was expanded in ways which were intended to provide greater happiness to the greatest number. Thompson expounds:

> "In classical social-democratic theory, these measures, taken together, could be seen as an

> 'instalment' of socialism a step upwards in a steady gradient leading from a capitalist to a socialist society... I reject this view, but I also reject the view presented by certain Marxist doctrinaires which would see these reforms as excreted as part of the Machiavelian defence - mechanisim of the capitalist organism itself".(53)

But the Labour measures of 1945 did not give the desired socialist results. Why? According to Thompson, not all reforms, without cataclysmic revolution, are doomed to failure.

> "Those reforms, if sustained and enlarged by an aggressive socialist strategy, might well have effected such a cancellation of the logic of capitalism that the system would have been brought to the point of crisis - a crisis of not despair and disintegration but a crisis on which the necessity for a peaceful revolutionary transition to an alternative socialist logic became daily more evident and more possible... What was defeated was not each 'reform' ...but the very meaning of reform as an alternative logic to that of private enterprise, profit, and the uncontrolled self-reproduction of money. The socialist meaning of each reform

were surrendered... because each took its place within an alien totality: capitalism."[54]

To summarise, Marxism does not say that proletarians should do away with legal institutions.[55] In addition, it becomes evident that workers can be a force to be reckoned with if they form a united front in pressing for concessions but within a socialist framework. Legality and constitutionality "do not in themselves, at least in non-revolutionary circumstances, mean an abandonment of revolutionary purposes or need not necessarily do so. Afterall, there are in all capitalist countries with bourgeois democratic regimes parties and groupings which claim Marxist credentials and which advocate revolutionary policies, yet which operate within the framework of bourgeois legality."[56]

At this juncture, however, it is necessary to lodge a caveat: situations like that of Chile during the time of Salvador Allende need a special word. Socialism has no cause to pursue the utopia of a society without power; rather,"it must understand the power that it wins and defends a realization of this justice of this time and in this social situation."[57] Allende's victory at the polls did not bring about the requisite political power; the victory simply meant the occupation by the Left of

one element of the state system, the presidential - executive one - an extremely important element, perhaps the most important, but not obviously the only one."[53] With the army and the parliamentary opposition forces, not to mention the appendages of big business, and of course the CIA against Allende, the Marxist leaders' partial occupation of power was doomed to failure. It is probably in the particular case of Chile that Lenin's ideas in <u>The State and Revolution</u> need to be re-examined rigorously. R. Miliband's observation sums up the situation:

> "I have argued...that in one sense in which it appears to be used in <u>The State and Revolution</u>... i.e. in the sense of the establishment of an extreme form of council (or soviet) democracy on the very morrow of the revolution as a substitute for the smashed bourgeois state, the notion constitutes an impossible projection which can be of no immediate relevance to any revolutionary regime, and which certainly was of no immediate relevance to Leninist practice on the morrow of the Bolshevik revolution; and it is rather hard to blame Allende and his colleagues for not doing something which they never intended

in the first place, and to blame them in the name of Lenin, who certainly did not keep the promise, and could not have kept the promise, spelt out in the State and Revolution."[59]

In the Kenyan situation, the way in which the law is shaped and implemented depends on the framework of the socio-economic system - on the concrete historical conditions, the character of state power the situation in class struggle, the international situation, *et cetera*.

Arising from the foregoing points, there will - in this study - be an endeavour to make various suggestions toward reform, but with the cautionary note that recommendations thereof will be inadequate if they are meant to streamline an unsatisfactory economic strategy. Thus the need to recommend, where necessary, an alternative economic system for enabling the growth of a meaningful industrial strategy. The need for such an alternative economic systems /from the reality that what Kenya is actually /stem promising is underdevelopment, a phenomenon well defined by Professor Dale Johnson in the book The Chilean Road to Socialism[60]

"Underdevelopment means having an economic

system that perpetuates poverty and its attendant human misery and living with social structures based on gross inequalities in social - well being, privileges, and power. Dependence is an international structure that conditions underdevelopment."

5. A Comment

Preference for socialism is boldly projected in the study being undertaken. No apology is made in this regard. And further still, it becomes evident that there is no shyness in espousing Marxist analysis.

To adopt a Marxist stance in a field of study in amorphous branches of knowledge like Arts is heretical enough, but to carry the Marxist torch of inquiry in the field of Law is barbaric enough in the eyes of the 'safe' scholars, the traditionalists- in short, this is tantamount to descrating the altars of conservative Gods with their "correct formulations". If such an approach is critisized as being anti-man's process, civilization and understanding, then the waters of lament should be allowed to flow for such criticism is no more than "a veritable trophy to be hung at the cloudy alter of the established gods."(61) To adopt the above approach can easily be dismissed as

a tendency to be different, radical or exciting, but this is by no means the position. Materialistic dialetics not only sees the world in constant motion, change and development, but also contributes to the proper understanding of society[62] and thus serves as a fulcrum in the overthrowing of the capitalist society and the birth of a liberated man.

Marxism as a political doctrine has above all been about the making of a socialist revolution.

Fortunately there has been, in recent years, a tolerance for Marxist approach to various branches of knowledge. However, such tolerance can be based on various factors: a view that Marxism is a religion like any other or from sheer non-concern, or worse still by those who cling <u>transiently</u> to anything which sounds "exciting". In the last group are those who pick up "radical" materials just like one picks up a tube of toothpaste or sausages from a supermarket whose product-life span is shortlived. Then there are those who can be called <u>Marxist neutralizers</u>, a rather motley grouping - members of the New Left, Revisionists,"realistic analysts" and paid Marxist peddlers. It is, for example, quite telling that a magazine like <u>Encounter</u> with

some noises on Leftist politics is actually subsidised by Ford Foundation, a layer in the capitalist rock that continues to make Marx writhe in the grave. And of course there are well-grounded Marxists who are aware that to undersand the transformative significance of Marxist theory is not a matter of learning quotations by heart or by converting Marxism into a collection of dogmas, but of understanding it as a guide to action, to the solution of important practical tasks. And as Taban lo Liyong says, political tricks are so few, after a while, one has exhausted them up. "You can't go on feeding man of words for ever and ever."[63] In a Marxist framework, the food is not words but positive action:to master Marxism - Leninism means to be deeply imbued with its militant, revolutionary spirit, to know how to apply it in actual historical conditions, in practice.

The foregoing approach definitely marks a very wide departure from the traditional legal formalism so common with "one-ounce" lawyers who glister in their bliss of mystification of law. This concern with formalism at times borders on the ridiculous as can for example be observed from the cumbersome and mazy criminal procedure in the 18th century England. In the admirably written book, <u>Albion's</u>

<u>Fatal Tree, Crime and Society</u>. The authors pointed out:

> "Many prosecution founded on excellent evidence and conducted at considerable expense failed on minor errors of form in the indictment, the written charge. If a name or date was incorrect, or if the accused was described as a farmer, rather than the approved term 'yeoman' , the prosecution could fail. The courts held that such defects were conclusive...
>
> The functilious attention to forms, the dispassionate and legalistic exchanges between counsel and the judge, argued that those administering and using the laws submitted to its rules. The law thereby became something more than the creature of a ruling class - it became a power with its own claims, higher than those of prosecutor, lawyers and even the great scarlet-robed judge himself. To them, too, of course, the law was the Law." .(64)

Accoding to Max Weber, the legal scholar or jurist's preoccupation is to observe and evaluate the role of judges, advocates, criminals or citizens as regards the ideal norms of the legal system.

As regards the impact of the economy of law, the Weberian postulate is that in general economic interests do not determine the direction of legal rationalization. Thus, the lawyer is "removed from any interest in the real world and finds both his intellectual satisfaction and his power position in the immanent legal coherence of the system of legal propositions."(65)

Such a preposition attempts to draw a demarcation between sociological and legal points of view, a line of thinking which is quite undialectical, as expressed by one scholar:

"...In an important sense Weber's emphasis on formal rationality trivializes the function of law in society. As is apparent by his own historical analysis it is difficult to show any clear relation between formal law and modern economy. Very different legal forms provide the framework for capitalist development. Prepositions of my content whatsoever can be part of a legal system. Law has no substance, it becomes mere form. Lawyers become the narrow representatives of law for the sake of law. For the law has no content, it is merely that which commends anent and is enforced.

Law is made inherently conservative by Weber's treatment of it, for any change in the real conditions of social life which involves a change in the meaning of legal concepts has to be viewed as an intrusion of substantive conditions and thus a necessary decline of formal legal nationality."(66)

The Weberian approach is gradually losing supporters especially from the liberal fold. For example, the authors of the book, Law, Order and Power, Professors Chambliss and Seidman censure the traditional approach of teaching law in the Anglo-Saxon countries by which the prescriptions of the constitution, the common law, and statutes, are descriptions of the real world.

"The legislature is....conceived of as an arena within which groups reflecting the power configurations of society itself can peacefully resolve their conflicts. The police are seen as carrying out the law which the legislature enacts, the courts as deciding which side of the dispute is telling the truth and then fairly impartially applying the law and meting out the sanction required by the law itself."(67)

The result is that the teaching of law becomes a

pollination of myth and mystification at best.

The foregoing manifestations of lacunae in the approach to the understanding and analysis of law has led some Law faculties in the Western world to adopt syllabi which are miles away from the emphasis on doctrinal curricula, rule memorization and the abstract teaching of law from treaties.(69) That this trend is significantly gaining support is a fact and what is needed is to know which tools are necessary and effective in examining the role of law in a social and economic context.

CHAPTER II

THE MULTINATIONAL CORPORATION IN PERSPECTIVE

1. Definition of a Multinational

The term multinational is one which has not yet been precisely defined.

The common approach is to view the multinational corporation as a business organization whose managerial headquarters are located in one country (referred to as "the home country") while the organization carries out operations in a number of other countries as well, that is, "the host countries".[69] Sol Picciotto, referring to international firms regards them as "giant corporate entities with activities and assets in every corner of the globe."[70] He adds:

> "The value of their (international firms) sales or turnover often exceeds the national product of many countries and the decision taken within the firm, to extend or discontinue production here or there, to develop this product rather than that one or to speed up or slow down the rate of exploitation of raw materials, seem to have more impact than does national economic planning."[71]

The headquarters is of course where the international firm is based. This is the nucleus of

managerial control and does not necessarily mean where the greatest volume of business operations is concentrated. The Bata Shoe Organization, for example, is based in Toronto, CAnada, where no production is in fact carried out. Thus the headquarters at Ottawa oversee the company's operations of its 102 subsidiaries in 89 outside countries. Some points of consideration crop up: are subsidiaries and associates appropriately termed as multinational? Is the important thing the level of equity or the degree of managerial control?

According to conventional company law principles, a company is deemed to be subsidary of another, if, but only if - (a) that other

(i) is a member of it and controls the composition of its board of directors or

(ii) holds more than half in nominal value of its equity share capital; or

(b) the first-mentioned company is a subsidiary of any company which is that other's subsidary.[72]

The association status arises when there is minority equity share participation and correspondingly minority directorate. Thus when Metal Box Ltd's[73] shareholding in Metal Box Nigeria Ltd. was reduced from 60% to 40%, the Nigerian company was shown in the accounts as an associate rather than a

subsidiary.(74) Such a distinction may be fine but cannot be regarded as a reliable criterion in determining whether a company's operations are multinational in nature or not. When the writer interviewed some senior executives of General Motors (Kenya) Ltd., the latter were wary to term this associate of General Motors (with 51% shareholding held by the Industrial and Commercial Development Corporation and the rest by the Detroit-based multinational corporation) as a Kenyan company. However, a closer analysis clearly indicates the great control - financial, administrative, etc. - exercised over the Nairobi associate by the octopus in Detroit. Thus, what matters is the degree of managerial nexus between the foreign headquarters and the host - country appendage. This is the approach adopted in this study.

To all the students of the multinational phenomena , one thing which is of striking significance is the mere size of the multinational enterprise. Comments Anthony Sampson:

> "For decades the Companies (with a capital C) seemed possessed of a special mystique, both to the producing and consuming countries. Their supranational enterprise was beyond the ability of national governments

Their incomes were greater than those of most countries where they operated, their fleets of tankers had more tonnage than any navy, they owned and administered whole cities in the desert... They were the first of the global giants."[75]

The oil companies had seemed often like "private governments to which the Western nations had deliberately abdicated their diplomacy, and sometimes appeared as if they were Atlas himself, leaving the world on their shoulders." [76]

The $ 54.9 billion - per - year turnover of the largest multinational corporation - General Motors - is by far larger than the GNPs of the majority of member states of the United Nations.[77] Union Carbide is another corporate giant with more than US$ 7 billion sales: "The highly diversified company embraces more than 350 US plants, churning out thousands of products ranging from petrochemicals and industrial gases to such well-known consumer items as Eveready batteries, Glad bags and Prestone antifreeze."[78] It is evident that such colossal economic power is a factor to be reckoned with when one talks of the counterstrategies of the host countries in the "Third World" vis a vis foreign investment.

From a lawyer's point of view, "the multinational enterprise breaks down into a cluster of separate corporate entities, organised under the laws of different countries." (79)

Legally, the multinational corporation is governed by several national jurisdictions since the parent and each affiliate is incorporated by some government. Each company within the global enterprise has rights accorded to it by its government, but there is no single legal regime covering the enterprise in its entirety: "The multinational enterprise ties several separate national entities together into a somewhat confusing legal package. Yet, each government has rights of compulsion and power of protection. Thus, when the owner of a national corporation is a corporation in another national jurisdiction, the corpus of the person exists in one country, under its laws, while the mens resides in another under a different set of laws. And who can say where the soul of the entity may be? Questions of loyalty, as well as those of ability to control, become acute. In a legal sense the multinational enterprise is an anomaly."(80)

Overall, the legal structure and activities of multinational corporations have generated interest and attention only in recent years. The international

company is generally taken as a conception of public international law and not as a child of the domestic law regime.[81] According to this approach, the international company is, from definitional viewpoint, a different product since unlike the multinational corporation it is only created by an international convention between governments as opposed to the former which is incorporated under different national laws. This distinction is, however, blurred, and in some writings, the terms the "international firm", the "transnational corporation" and the "multinational corporation" are in fact used interchangeably.[82]

From a purely legalistic viewpoint, the multinational corporation is seen as embracing three prerequisites, namely: (1) a motley incorporation of companies of different nationality, (2) a connection in terms of shareholdings, contract, or managerial control, and (3) the existence of the multinational corporation as part of an economic scheme or unit in international economic law. However, much as these definitional requirements are necessary, they do not take us very far. Indeed, a vàlid bugbear of lawyers seems to be the questionable complacency to be content with definitions which, more often than not, are bogged down in colourful but myopic

euphemisms. Thus, it is refreshing to come across a solidly comprehensive definition of the multinational corporation by Norman Girvan:

> "When we speak of 'the multinational corporations' we mean far more than that category of business organisations whose main distinguishing feature is that they all happen to operate in more than one country. We mean a large and rapidly expanding sector of the world economy, characterized by a revolutionary new system of production and accumulation. The main features of this new system are diversified internationalized production under centralised control; massive size and huge financial resources of the basic institutional unit; technological dynamism and vanguardism; and high and continuously growing concentration of economic power. In a very real sense this new system now dominates the world economy, whether 'developed' 'underdeveloped' or 'socialist'. Both quantitatively and qualitatively it is continually enlarging and intensifying its sphere of operation and control; attempting to absorb, subordinate or liquidate all other systems of production and accumulation. As a result, the

expansion of this system is generating powerful tensions and contradictions - some of traditional and familiar type, and others which appear to be altogether new. We will refer to this system as transnationalized capitalism, the contemporary phase of international capitalism which has emerged since World War II."(83)

The approach taken in this study encompasses the theme in the above definition. Thus one of the postulates in the study is the assumption that the multinational corporation exhibits the most advanced form of organization of capital at the present stage of imperialism. Such organizational ability is, however, not a result of chance but characterizes the various factors, which at every stage, made possible the penetration and expansion of capitalist mode of production. These factors will become apparent later when examining the historical development of the multinational phenomenon.

More than 10,000 enterprises are said to control over 50,000 affiliates outside their home countries: "These affiliates represent a book value of more than US$165 billion. Approximately 80 per cent of all multinational enterprises, foreign affiliates, and their international direct investments

originate in five countries: the United States, followed by the United Kingdom, France, the Federal Republic of Germany, and Switzerland. By including Japan and Canada, one can account for almost 90 per cent of the international activities of multinational enterprises."(84)

With such economic colossus facing the poor nations, the immediate question is: What is the impact of these corporations on the development of such nations? How does the mushrooming of these economic Hydras affect the role of the poor nations in developing positively sovereign economic systems within their borders? How are they likely to "affect the vital problems facing the world today of polarisation of development and underdevelopment, rich and poor countries and people?"(85) And from lawyer's viewpoint, how useful as a tool of development is the legal process?

To answer such questions, taking Kenya as an example, it is important to look at the historical antecedents of this form of business organisation. As we are aware, or should be aware, the multinational corporation is an offspring of company law (inherited company law to be exact) which in turn is of course about capitalism. In his book, "<u>Company Law and</u>

Capitalism", Tom Hadden correctly notes that company law provides the formal legal structure necessary to the operation of the capitalist system. This observation in turn illustrates the reason (s) why Kenya is in the position she is today.

2. Historical Review

According to Karl Marx, the capitalist mode of production is bound to revolutionalize production continually as well as revolutionalizing production relations continually in harmony to the prerequisites of the continuous development of the productive forces. Thus, the history of capitalism becomes that of "the process of adjustment of production relations to the requirements of the progress of productive forces."(86)

As far back as the 17th century, European companies (Dutch, English, French) were well entrenched both commercially and strategically in their trading centres in Asia(China, Japan, Southeast Asia), Africa and the Middle East. In these areas, and later, North America, in the late nineteenth and early twentieth centuries there was an upsurge in industrial growth and significant concentration of production in large enterprises. This phase, as is the case in

Marxist analysis, was characterised by the formation of cartels and monopolies.[87]

Capitalism then assumed a role which only Marx had foreseen; in the words of Ernest Mandel, a well-known Marxist thinker, the capitalist mode of production took on a missionary role. It began to extend throughout the world by means of capital exports thus making it possible for capitalist ventures to be established in countries where monopolies had not yet established themselves firmly. Mandel points out:

> "The consequence of monopoly in certain branches and of the spread of monopoly capitalism in certain countries is that the capitalist mode of production has been reproduced in branches still free from monopoly control and in countries which had not yet become capitalist. This is how colonialism in all its varieties managed, towards the beginning of the twentieth century to spread like a powder train in the course of a few decades, starting from the small part of the world to which the capitalist mode of production was limited, and eventually embracing the whole world. Every country on the map was thus transformed

into a sphere of influence and field of investment for capital."(88)

The incorporation of the Kenyan economy into the international capitalist system under the umbrella of British commercial interests, yokêd the country to the interests of the metropolis. Kenya being a colony meant that the British imperialist strategy was geared to creating a local market for manufacturers from the "Mother Country" and having the colony as a source of raw materials. This was exactly what was predicted by Lenin in Imperialism, The Highest State of Capitalism(89) to the extent that the next stage of imperialism would be where the "have" nations could and would dominate the "have not" nations simply by the export of capital itself.

Therefore, the main preoccupation of the early capitalist ventures in Kenya was in the sectors of agricultural production, ancillary services and the processing of primary products. Much of the manufacturing carried at that time was carried out by both the metropolitan bourgeoisie and the local settler class with the Asian community concentrating in the area of trade. Due to disproportionate political strength both in Kenya and among allies in Britain, European settlers pressured the colonial regime into implementing policies which restricted African enterprises and boosted European enterprise.(90)

The situation that the British imperialists were bent on a policy of simple primary production in their colonies which were also to serve as markets for British manufactured goods meant that the adequacy of local capital was not in their interests. Thus up to 1945 there was a tendency by the British colonial administration to "state-manage" Kenya's economy. Certain considerations underpinned this departure from the laissez faire philosophy of the "Mother Country". To begin with, the colonial administration was not all that convinced that the private enterprise sector could initiate and carry out a meaningful development strategy in the use of the colony's resources. This lukewarm attitude could very possibly be attributable to the unsuccessful role played by the Imperial British East Africa Company. Formed in 1888 with its operations centered in Mombasa the chartered agent could not carry out viable commercial enterprises due to poor communications and inadequate investment base.

Another consideration is well highlighted in E.A. Brett's Colonialism and Underdevelopment in East Africa:Policies of Economic Change 1919 - 1939:

> "... The British were as committed to capitalism in Africa as they were at home, but they recognised that its relationship to the

> state must take into account sharp differences in circumstances. Most important especially in East Africa was the poverty of both material and human resources in the area. There was no obvious accumulation of local capital or extensive markets to be taken over...
>
> ... Far from private enterprise opening up the country, it was the government which had to 'pave the way' by extensive public works and administrative services not only for European settlement, but also for all modern economic activity.
>
> ... In these circumstances private interests wishing to obtain the advantages resulting from these efforts on their behalf did not attempt to enforce the commitment to *laissez faire* which characterized their activities at home.[91]

Thirdly, the two World Wars no doubt threw the colony into a serious economic crisis, a factor which clearly made it difficult for settlers to put in any meaningful investment. Indeed, it fell on the colonial administration to come to the aid of the settlers who would have become broke if their farms had not been financed by the former.

The foregoing factors help to explain the colonial rather indifferent attitude, and sometimes arrogance, towards organized private enterprise in most of this period. Indifference in that there is little evidence apart from developing infrastructure, of any positive encouragement for organised business enterprise.

One writer has illustrated the effect on company formation in Kenya arising out of the British colonial government's disenchantment with significant accumulation of local capital.[92] The first period of company formation, from 1907 to 1922, was characterised by a low level of investments which were mainly in the sectors of agricultural production, land and property. After 1922, there were manifestations of expanding capitalist development "with an increase in the number and viability of firms as well as the scope of investment."[93] Even after the introduction of the tariff structure which served in protecting local processing and agricultural industries - there was no marked degree of manufacturing or secondary industry.

It was only after the Second World War that we find emergence of a more benevolent attitude. This is explained, <u>inter alia</u> by the change in the economic order particularly with the rise of

North America and Japan as major producers. The following extract from the speech of the Secretary of State while opening the conference of African Governors marks a significant shift in economic and hence the colonial company policy:

> "As I have said before we were primarily concerned with utilities and agriculture, trying to get the necessary equipment and background on which the economic life of the territories could go on. Now we must help to carry things a stage further by encouraging enterprise both public and to some extent private enterprise in opening out increasingly the economic life and improving the economic stability of various territories. On that basis we decided that it was necessary to give, every possible encouragement to new capital to come into the country. One more thing should be added because it represents part of the economic policy being worked out. We are conscious that if people are to be invited to sink more capital into the development of enterprise into the colonies a genuine effort must be made on our part to help them in the world market in the marketing of their goods and also in trying to secure them a fair return, a just price for the product

that they seek to bring us."(94)

The new economic policy which sought to attract new investments and also to use territories as markets for goods manufactured at "Home" was accompanied by a relaxation of the attitude towards private enterprise. Thus, we see the colonial administration adopting a line of encouragement resulting in incentives in the form of tax concessions.

In this "enlightened" stance, the colonial government accepted the Report of Taxation Inquiry Committee which inter alia recommended that incomes of companies should be given a preferential tax treatment. The Economic and Commercial Adviser accentuated this in his address in Legco:

> "... It was our object in making recommendations to indicate in which way the fixed weapon, or the fixed medium, could be made used of to build up that economic potential. In a new country not only must the fiscal policy be related to the economic capacity of the country to pay but its greatest necessity is to fructify the land with capital."(95)

Commenting on the Report of the Royal Commission on Land and Population in East Africa, the

Governor of Kenya stressed that it was the policy of the colonial administration to ensure that healthy industry continued to be encouraged in every possible way, the emphasis being "encouraging suitable private enterprise, whether the necessary capital comes from the United Kingdom or suitable foreign sources, and not on State financial development outside basic services much as railways, water and roads."(96) Since there was a limit to the British capital which was available for export overseas, the colonial Government considered that the greatest possible advantage should be taken of suitable foreign investment and technical help.

Of course a factor which supported the establishment of the multinational corporation (notwithstanding the colonial policy of regarding Kenya as an economic satellite for manufactured exports and an El Dorado for natural raw materials) was the banking network. The big names, some of which still survive, in one form or another were: Barclays Bank (D.C.O.), the National Bank of India and the Standard Bank of South Africa. The expatriate banks during the early days did not distinguish between territories of their operation and the metropolitan area where their head offices were situated.

These branch banks in the overseas countries operated in the same manner and on the same principles as branches of their head offices located in the various regions of the metropolitan country itself. As these banking institutions were serving mainly the "home interests", they were quite instrumental in oiling the colonial industrial engine. This feature is hammered on by Lenin, thus:

> "The concentration, the monopoly arising therefrom; the merging or coalescence of banking with industry: this is the history of finance capital and what gives the term 'finance capital' its context."(97)

In the case of Kenya, as was the case of the other colonies, direct investment was a way of over-taking control over another social unit by means of capital export. This takes the form of establishing a wholly-owned subsidiary firm, the large multinational corporation being the investor. This was possible as a result of wholesale introduction of British company law into the country. The economic bedrock of company law was, and is, freedom to set up and operate commercial enterprises on terms/allowed /which capital to be raised by independent investors for the running of a commercial venture by entrepreneurs and

managers. The net result was/is that the investors or shareholders should be free "to withdraw their capital from a concern, without damaging that concern, either for consumption or for reinvestment in a more profitable enterprise."(97) Thus, the multinational corporation which is a direct product of the capitalist system of law is basically concerned with "the benefit of the shareholders as a general body". As every student of company law has learned almost by heart, "the law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company."(98)

Kenya's independence in 1963 did not mean disengagement from the political, economic and social edifice established by the colonialists and the basic structure still remains "externally oriented, in part through the continued influence and control of strategic sectors of the economy by multinational corporations."(99) Of course there is the talk of African Socialism which lays down in broad terms the Government's policy in the field of economy. But it is evident that fine rhetoric which speaks of "socialism" in the sky of conceptualities can never take the place of hard deeds

in replacing the yesteryear colonialism. The White paper on African Socialism and Its Application to Planning in Kenya(100) talks of "establishing Africans in a firm position in the monetary sector by ensuring that a large share of the planned new expansion in African owned and managed." Yet, external economic dependence continues to be the pattern of development although of a changed nature:"... Throughout the confused talk about African Socialism for Kenya there is the basically false assumption that there can be a harmony of interests between private capital, including private foreign capital, and Government as the representative of the public interest in Kenya.(101)

As historians recall, the colonial pattern of foreign capital investments was geared towards labour intensive export-oriented primary producing areas with the attendant abundance of cheap, unskilled labour. The colonial economic system has, however, undergone great changes, especially after the second World War. There has been a pronounced shift from primary production to processing industries, from export-orientation to import substitution, from labour intensive, primitive techniques to scientific capital intensive more up-to-date ones.

Another notable feature is the rather diminishing

role of Great Britain as a leader in the economic domination over Kenya. The United States of America seems set to take over the lead and Japan has joined the ranks of creating the "Invisible Empires." Thus companies like Union Carbide, Del Monte, Mitsui, etc.,have extended their tentacles to the country. True, there have been some forms of control over the power of the multinational corporations but these have not been effective. The neo-colonial link characterized by a combination of formal state sovereignity with de facto dependence and exploitation by foreign monopolies continues.

3. Evaluation of the Multinational Corporation

Multinational corporations are not in Kenya for the country's health. As Lornho's accountant has said:"When it comes down to it, there is only one thing that matters, and that's the cash we can expect to receive in London."(102) During the period of the launching of Rothmans of Pall Mall in Kenya in 1966, the then Vice-President of Kenya who was about to resign from the second/Government/top post to direct the multinational corporation's activities in the country was asked whether he did not

foresee any conflict in his staunch opposition of apartheid and his new role as a cog in the giant's wheel of growth which partly thrived on South African interests. His answer: "I'm talking to you not as a politician but as Chairman of the company. Here all I am concerned with is the interest of the company."[103]

Multinational corporations have been described as "efficient instruments whose role should be primarily geared to ... the problem of producing more goods, more foodstuffs, more products and services, and thereby raising the overall living standards of the whole population of the host country."[104] How true is this?

In the first place, direct foreign investment involves much more than the simple transfer of capital or the establishment of a local factory in a "Third World" nation. (The words of the late Ronald Ngala are apt here: "...Capital should not be just like river running from London, coming to Nairobi, back to London. That kind of capital flowing from London to Nairobi and back to London is no use to our people."[105])

Multinational corporations carry with them technologies of production, tastes and styles of living, managerial services, diverse business practices,

including co-operative arrangements, marketing restrictions, advertising and the phenomena of transfer pricing. Unlike certain types of foreign aid, the purpose of multinational corporation activities is far from charitable. In many instances, they have little to do with the development aspirations of the countries in which they operate.

The advocates of private foreign investment tend to be free-market, private enterprise, laissez-faire colonialists who firmly believe in the efficacy and beneficience of the free market mechanism where this is usually defined as "hands off" policy by host Governments. However, the actual operations of multinational corporations tend to be monopolistic and oligopolistic in practice. Price setting is achieved more as a result of international bargaining and collusion than a natural outgrowth of free market supply and demand. Professor Benham in the book Economic Aid to Underdeveloped Countries correctly notes that it is pleasant to feel that you are helping your neighbours, and at the same time increasing your own profits.

And the late Kwame Nkrumah, in his book Neo-Colonialism -The Last State of Imperialism states that at its imperialistic stage, finance capital's

primary need is to find spheres of overseas investment which will return profits at a greater rate than can be obtained at home. Nkrumah further observes:

> "The many consortia which are being established in the majority of the new states revolve largely about the same financial and industrial groups that have rooted themselves firmly since the inception of colonial rule. Such changes as there are correspond with the changes of influence that have occurred within the groups themselves. The dominating influence is held by the ubiquitous American formations of Morgan and Rockefeller, with their British and European associates following behind. Dying colonialism is reviving in the international coalitions of neo-colonialism. These coalitions of competing organisms reflect the global character that financial monopoly has attained under the dominance of the most powerful imperialism, that of America. They are also a sign of the struggle for the survival of the older imperialisms against the fierce questing of the more powerful aggressiveness of American imperialism, whose vaster productive forces is driving it outwards more and more."(106)

The role of Firestone Tire Rubber Company in Liberia is one illustration of the strangulation effects by a multinational on the national sovereignty of a country. Firestone was invited into Liberia in the 1920's at a time when the fledging "slave free country" was nearing the shores of pauperization. Hitherto, Liberia had depended on loans from Europe to bolster her sagging economic base but the dependence had wrought disastrous ramifications which were highlighted by the lynching of the first President to arrange a European loan.

Liberia thought that a loan offered to it by Firestone might loosen its dependence on Europe. Accordingly the American firm was offered far reaching concessions:

> "The Company was granted the right to introduce extensive rubber plantations, which, even in 1970 Firestone claimed were the largest in the world. However, the loan involved a virtual reorganisation of the Liberian government's control over finance. It acquired an American financial adviser, who was to be nominated by the U.S. President, and a number of American subordinate advisers and auditors who had extensive powers. The company controlled the only

> local bank, and the government was not permitted to raise any debts, either external or internal without the permission of these Americans. The company also held all the most important distributorship of United States and European consumer goods and could even influence the price of rice, the staple item in the Liberian diet. Labour relations were fairly tense. Wages were lower than those in the Gold Coast and Nigeria and after one dispute in which a number of rubber trees were burned, Firestone set up its own security system." (107)

Quite an anomalous situation! This could only fuel disagreements, suspicion and bitterness from the host country. It was, therefore, not surprising that when the loan was finally repaid in 1952, the country - which even today religiously follows a capitalist path albeit the beguiling political tag of humanistic capitalism - erected a monument whose dedication fittingly read:

> "This monument erected by the people of Liberia is dedicated to the great relief brought to the country by the Tubman administration in the retirement of the 1926 loan with its humiliating and strangulating effects

on the economy of the nation."[108]

The Firestone Tire & Rubber Company operated in Liberia for more than 40 years just growing and exporting rubber and it was only in 1970 that the multinational corporation agreed to establish a fully integrated tyre manufacturing plant in the country. Despite the tarnished history, the company has been growing bigger and bigger and is now the world's second largest producer of tyres next to Goodyear. Its operations have been introduced into Kenya where the company has established its 60th factory overseas, notwithstanding poor quality standards of the company's products.[109]

Any observer of Chile knows that not only ITT but other multinationals conspired with the CIA and elements in the State Department to bring down the government of Allende, with repurcussions not only throughout Latin America, but also in Europe. Similarly, one does not need a Leninist theory of imperialism to see the manner in which the oil multinationals and foreign powers brought down Mossadeq when he tried to nationalise the oil majors, with a delayed political impact in the rise of OPEC from which the world is still reeling. There are also some arguments (for example a recent article by John Kenneth Galbraith

"In Praise of Multinationals"[110]) that multinationals have promoted "a more rapid spread of technology, a better international division of labour, greater productivity, greater aggregate employment" and that this is "the old case for international trade." But Bertil Ohlin, recently gained the Nobel Prize for a book which mainly pointed out that direct foreign production tends to substitute for trade.

It is in the "Third World" that the activities of multinational companies come into critical focus and where conflict of interest is most likely to arise. At best they can make a valuable contribution to the development of a country's economy; at worst they display an attitude which puts their interests above those which are best for the host country - hence the statements from men like H.Walter, the chairman of a multinational food company, writing in the Columbia Business Journal on the subject-of marketing in developing countries.

> "How often we see in developing countries that the poorer the economic outlook the more important the small luxury of a flavoured soft-drink or smoke... to the dismay of many would-be benefectors the poorer the malnourished are, the more likely they are to spend a disproportionate amount of whatever they

have on some luxury rather than on what they need... Observe, study, learn. We try to do it at IFF. It seems to pay off for us. Perhaps it will for you too."(111)

As for transfer of technological benefits, a UN study between 1960 and 1970 found that the proportion of foreign technology contracts which contained prohibiting or limiting clauses on exports was 99% in Peru, 97% in Mexico, 93% in Chile and 83% in Bolivia. (It has been estimated that the "Third World" holds only 1 per cent of the world stock of patents). As for other contributions to international trade a 1973 UN Report on the "Flow of Financial Resources, Private Foreign Investment in Selected Developing Countries" stated that:"We may be justified in concluding that they (Global corporations) do not offer any marked benefits to the host countries."

There are other abuses brought about by the protected MNCs: the 1978 US Supreme Court decision upholding the rights of the government of India, Iran and the Philipines to sue six pharmaceutical companies for alleged price fixing- the 1975 ruling when United Brands was fined £400,000 by the Europen Commission for commercial malpractice.

4. The Multinational Corporation and the Challenge of Capitalism

The authors of Lonrho - Portrait of a Multinational note that Lornho's ambitions now stretch beyond the borders of Black Africa. Rowland has said that the "future lies with international companies, with consortia set up by different nations getting together and tackling today's needs all over the world."(112)

The authors of the above quoted book very correctly point out that the real challenge to Lornho's future lies in the possibility of an African and Arab challenge to capitalism itself and to its major agencies in the multinational companies. "The devotion of these to the priorities of private profit have come under increasing attack even by conservative Arab regimes, which have sought to dispossess the oil multinationals of their traditional role in dominating supply and marketing."(113) The authors continue:

> "In an era when there is a mounting hostility, within the very homelands of capitalism, to the role of the multinational as an exercise of power without accountability, the role of the

> multinational is unlikely to escape scathing criticism in Africa. And the criticism must be the more scathing to the degree that the multinationals are inevitably associated with Western economic dominance. Ultimately, however, the question must and will be asked whether the sort of system represented by the multinationals is necessarily the most just and productive for Africa. The issue is not whether Lornho is the unacceptable face of capitalism, but whether capitalism is going to have an acceptable face in Africa at all."(114)

Quite a number of countries in the "Third World" are quite liberal even though the appeal to foreign capital does present certain dangers for the host country's economic and political independence. The paradox of private international investment lies in the contradiction between the investors' interests which are purely commercial, and the host States' requirements for its economic and social development. The words of Justice Harlan in the Sabbatino case still gives cause for concern:

> "...Expropriations take place for a variety of reasons, political and ideological as well

as economic. When one considers the variety of measures possessed by this country to make secure foreign investment, the permisive or coercive effect of judicial invalidation of acts of expropriation dwindles in comparison. The newly independent states are in need of continuing foreign investment: the creation of a climate unfavourable to such investment by wholesale confiscations may well work to their long-run economic disadvantage. Foreign aid given to many of these countries provides a powerful lever in the hands of the political branches to ensure fair treatment of United States nationals."(115)

Thus poor nations are faced with undue pressure on one hand and poverty at home.

Partly because protectionism in developed countries is difficult to get rid of, partly because more aid is hard to oome by, less developed countries have looked for partial solutions in the field of expansion of manufactured exports. This can, for example, be seen in the OAU Document (Document CM/261) drawn up before the convening of the second UNCTAD in New Delhi in May 1967. The Export Committee on Trade and Development of the Organisation

of African Unity and the Working Party on Inter-Africa Trade of the UN Economic Commission for Africa decided to call joint meetings to discuss Africa's objectives and strategy at New Delhi. Among the outcome of these meetings were various recommendations on the "Expansion and Diversification of Exports of Manufactures and semi-manufactures of developing countries." Early 1970 was designated as the date on which a general system of preference was to enter into effect. The general system of preferences was to include processed and semi-processed agricultural and primary products so as to be closely related to the present and foreseeable production capacities of African countries. In addition, the general system of preferences was, except on proven grounds of over-riding national economic interest, to provide for duty-free entry. Moreover, no retaliatory discriminatory measures should be taken by any developed country against any developing country on account of preference granted by the latter to developed countries as a result of contractual obligations undertaken before the entry into force of the general system of preferences.

The main difficulties in expanding exports of manufactures have been described as restrictions imposed by the advanced countries, and the questionable

policies in the developing countries themselves. The developed nations have removed some of the restrictions- although not of great relevance to industrial strategy in the less developing countries; on the other, the poor nations seem to be clamouring for preferences without having a solid and sustained industrial strategy in the first place.

The simple fact is that unless the poor countries establish meaningful industries as opposed to industries run by multinational corporations and other nebulous forms of industries like assembling, there is really little point in insisting on preferences in respect of manufactures and semi-manufactures. It is regrettable that some UNCTAd members whilst seeing the right path of self-reliant industrial strategy have nevertheless opted for new-colonial form of industrial plants.

.Addressing members of the Association of Commercial and Economic Diplomats in 1977, the Kenya's Minister for Commerce and Industry stated:

> "Multinational corporations are unique instruments for transferring technological know-how, management abilities and capital to countries wanting rapid economic development."(116)

Noting that the relationship between the Kenya

Government and the multinational corporation was something "akin to marriage where it is incumbent on both sides to work hard everyday in order for the union to suceed", the Minister urged multinationals to adjust their policies to suit the interests of national governments before any services corporation could develop.

Citing some of the factors of the "unacceptable face of capitalism" brought about by big businesses, the Minister observed that multinationals often employed arbitrary pricing policies which sometimes deprived the host country of valuable foreign exchange as well as tax revenue. Such techniques were often used to evade local currency regulations.

"Third World" countries like Kenya are, in the context of international capitalism, experiencing the kind of dependent development we have been discussing. Such countries may show very rapid rates of increase of Gross National Product (GNP), at the very same time that the material wellbeing of the mass of the people remains stagnant or even declines. With reference to Kenya, the present GNP is US$2,900 million[117], quite an impressive figure by the standards of the poor nations. However, this is in no way a good indicator with regard to the wealthy

of an ordinary peasant who has to toil on the shamba for about 4 to 5 years to earn one month's pay of an average executive of a multinational corporation. Thus the country would seem to be pursuing economic growth rather than development and to be importing foreign models rather than evolving indegenous ways of doing things with a dozing hope that in the long run the adopted development will lead to greater independence because she will have developed the skills and infrastructure to take over by themselves.

The position in Kenya has been that a significant part of the local bourgeoisie is in effect sympathetic to the multinational corporations and there has been no significant effort to indigenise the country's economy. The words of Richard Sandbrook are handy here:

> "Although the political class bases its privileged position in the first instance upon its control of the political apparatus, it has also linked its future to that of foreign capitalist interests. This class provides the investment climate within which the 'external estate' of international firms seeks to create further wealth and 'modernize' the economy.
> It is not only Marxists who suggest that the

> metropolis may have more control over the Kenyan economy than in the colonial past, owing to the intertwining of the interests of the indigenous political class and big (i.e. foreign controlled) business." (118)

Poor nations never have been nations. Independence might have resulted in a shift of economic dependence from France or Britain to the USA but it has not changed the fact that the poor nations are at the bottom end of a world-wide imperialist structure. In a such a situation, Kenya's challenge is to disengage itself from the web of international monopoly capitalism by evolving a coherent internal strategy of self-reliance, a process which is not yet in sight. This is borne out by words by Mr. Mwai Kibaki, Minister of Finance, when speaking at a party hosted to mark the inaugration of Barclays Bank of Kenya Ltd. Noting that Kenya was no longer experimenting with development ideologies, the Minister (who is also the country's Vice-President) noted:

> "We have found our way in our experience of the last 15 years. We know where we are going and we know who is going there with us." (119)

The above statement summarises quite unerringly the tranquil and complacement relationship existing between the Kenya Government and the multinational

Corporations.

CHAPTER III

THE NATURE OF INVESTMENT INCENTIVES OFFERED BY THE KENYA GOVERNMENT: AN APPRAISAL

1. Legal Guarantees in General

To what extent can legal commitments, on the part of sovereign governments, be harmonized with their powers and responsibilities as national legislaters?

First, let us take the position of investors. These need to be assured that there is little or no possibility that an unfavourable legal situation will be created at a later date. These investors gain some assurance when a favourable legal situation has existed for a sufficiently long time, or when the country's economic and political structure is so stable that there is little probability of any radical change in the immediate future. In addition, foreign investors wish to be assured that they will avail themselves, both at present and in the future, a definite legal treatment, specified in the relevant legal instruments, and that consequently they need not fear any major changes in local legal or political conditions that would be unfavourable to their interests.

Legal guarantees to foreign investors are

issued by states to either a single state, several states, a category of private persons or a single private person.

Guarantees are sometimes granted within the framework of international instruments in which case they form a part of the international legal regime; in other cases, they (guarantees) may originate in provisions of municipal law and instruments issued in accordance with them.

States may grant protection to foreign investors by concluding international agreements regarding foreign investment. Capital - exporting and capital - importing states may conclude bilateral agreements, or all states may conclude a single multilateral convention governing the treatment of foreign investment. On the other hand - and as is usual - each state may guarantee the security of investments of foreigners in the state or of investments by the state's nationals abroad, by means of general promises or of specific instruments addressed to each particular investor.

The proposition to adopt an international code as regards the protection of foreign investments has been mooted since the "free trade philosophy" got

accentuated from the early 1920s. After the Second World War, the winds of optimism(fanned by the increased consciousness of international economic problems and the search for an amicable comity of nations) were such that an idealistic movement took form towards the achievement of such a code. But the movements' hope proved forlon in the end, and for good reasons.

In the first place, there was the Charter of the International Trade Organization (ITO) signed at Havana, Cuba in March 1948. The relevant provisions had been incorporated in the Charter at the demand of powerful American business groups but the lot of the poor nations was given some attention in the final deliberations.

The Charter expressed the need and the salutariness of international investment, private as well as public, and the creation of a machinery for protecting the capital supplied thereof. Capital-importing countries undertook in the Charter to avoid"unreasonable or unjustifiable action" detrimental to the foreign investors' interests, to provide reasonable opportunities acceptable to them and adequate security for existing and future ivestments, to give due regard to the desirability of avoiding discriminations as between foreign investments and to enter into consultation or negotiations with other governments with the object

of concluding bilateral or multilateral agreements relating to such matters." At the other end of the spectrum, the Charter expressly espoused the right of capital-receiving countries to interfere with foreign investments through screening restrictions on the ownership of enterprises and any other reasonable requirements. Such a provision was obviously incompatible to the interests of the American (US) big business and this opposition no doubt sapped the support for the Charter and indeed resulted in the non-ratification by the Washington Administration and other signatory states.

Another multilateral international instrument dealing in part with the protection of private international investment was the Economic Agreement of Bogota, signed at the Ninth International Conference of American States on May 2, 1948. The relevant provisions - that is articles 22-27 - which form Chapter IV of the Agreement, are similar to those enshrined in the Havana Charter, though the former are more comprehensive and forceful. There is re-assertion of the beneficialness of foreign investment and invocation of general guarantee of "equitable treatment", especially non-discrimination, transfer of technology in its various forms is accomodated, and so is the need to lighten the tax burden, when excessive. The Charter also forbade

the imposition of "unjustifiable restrictions" on the transfer of earning and capital outside the capital-receiving state. Nationalization was allowed, but that this should be non-discriminatory and in accordance with local legislation, and that once carried out, there should be payment of "fair compensation in a prompt, adequate and effective manner." The Charter's provisions became terminalogically anaemic through the constant use of indefinite words such as "appropriate", "unjustifiable", "just" or "equitable". What's more, several states attached at the time of signature express reservations on the scope and effects of the relevant articles, especially the article dealing with expropriation. The Bogota Agreement, like the ITO Charter proved to be another still-born baby and has never become legally effective.

The likelihood of a general consensus embracing an effective investment code is fettered by various considerations. A code's provisions, if they are to afford some protection to foreign investors, would have to limit the sovereignity of all states participating in it.[120] In addition, it is palpably clear most of the proposed international investment codes are unilateral in a number of ways. Such codes usually show unabashed pull towards the protection of the investors' interests to the disregard of the host states' interests.

Such an approach cannot be justified whatever allowances are made, as for example the scarcity of capital. The misleading view is that it is the foreign investor rather than the host state that is in need of protection.

The realization of the difficulties besetting the creation of an investment.code is one of the main reasons giving rise to the trend of major capital - exporting states' predilection for bilateral agreements on the protection of private foreign investment. The trend was is of course a relatively new phenomenon. Granted that in past provisions concerning the protection of foreign merchants and investors had been concluded by the capital - exporting countries, nevertheless the post-Second War treaties were on the trader and merchant basis rather than on the industrial investor level. After the war, treaty provisions dealing with investment and investors gained significant importance and practice. The United States first inaugurated a series of treaties dealing chiefly with investment problems.. The United Kingdom did not follow the American example until recently- for several years it continued to conclude occasional agreements dealing in a rather general manner with foreign investments, in its treaties with underdeveloped countries. Since 1957, the Federal

Germany is the benficiary and thus has more advantageous position *vis-a-vis* the Treaty. So the sweet phrase, "nationals or companies of either contracting party" may be alright from the point of legal finesse but definitely exhibits unmitigated nescience of the ABC of economics which is partly attributable to the absurd traditional approach that law can develop independently of the manifold incursions of political and economic domains. As regards the repatriation of capital and profits in the event of liquidation, the foregoing observation holds water since Kenya has not invested any capital worth that name in Germany. In the same vein, the Treaty in its exhibition of "equality to contract" states that both countries undertake to promote as far as possible the investment of capital by their nationals or companies and "admit such investments in accordance with legislation." Naturally, the Treaty also affords the facilitation of travel and residence of would be investors.

Some of the other observations made in connection with investment codes are also applicable, *mutatis mutandis*, to bilateral treaties (e.g. the one already referred to between Kenya and Germany). A Treaty's language is usually general and amenable to more than one interpretation. The protection afforded to

investors is also limited by the fact that the treaty is going to apply to all investments regardless of type or size. A capital-importing state may be prepared to offer more extensive protection to certain individual investments or certain kinds of investment, but rarely will it be willing to expand it to any and all investments.

2. Legal Protection Under Municipal Law

In view of the difficulties and limitations of international arrangements, multilateral or bilateral, the need for legal guarantees to foreign investor is chiefly through municipal state action. Since it is the capital-importing states that are in need of foreign capital, it is usually they that offer legal guarantees to prospective investors.

(a) Foreign Investments Protection Act

In Kenya, for example, the major instrument for foreign investment guarantees is the Foreign Investments Protection Act.[122] Under the Act, the Minister for Finance may in his discretion, issue a Certificate of Approved Enterprise to foreign nationals who invest foreign assets or re-invest their profits in Kenya, if the Minister is satisfied that the investment will be of

"economic benefit to the country." Now "economic benefit" is a loose term whose interpretation can differ from place to place depending on the economic system being adopted. However, in the case of Kenya, a writer has put the proposition that the phrase has been interpreted to mean that a project will:

(a) lead either to an earning or saving of foreign exchange, or

(b) result in a gain or technical knowledge to the country, or

(c) result in an increase in the economic wealth and social stability of the country by raising the national income or promoting the diversification of the economy.(123)

Section 8 of the Foreign Investments Protection Act reads:

"No approved enterprise or any property belonging thereto shall be compulsorily taken possession of, and no interest in or right over such enterprise or property shall be compulsorily acquired, except in accordance with the provisions concerning compulsory taking of possession and acquisition and the payment of full and prompt payment of the compensation contained in Section 75 of the

Constitution of Kenya (i.e. Act No. 5 of 1969)".
On the eve of independence, there were fears from the owners of private enterprises that there would be political instability under Black rule and that the security of private property would consequently be jeopardised. This was so notwithstanding assurances by the ruling party KANU (Kenya African National Union) that the Administration on the morrow of independence would willingly accommodate foreign investments and offer the necessary protection thereof.(124) The Government in introducing the Foreign Investments Protection Bill underlined that there were four ways in which they hoped to accelerate industrialisation in the country. One of them involved Government investment in the industrial sector either singly or in a joint venture with a private investor. The second was the encouragement of investment for industrialization by local citizens as individuals or in company. The third was the promotion of the co-operative movement in the field of commerce and industry and the fourth one was the encouragement of foreign investment. It was mainly the latter method of accelerating industrial development that was the hub of the Foreign Investments Protection Bill. Thus the Bill sought to strengthen the Government's policy statements on investment by giving these a legal aura.

Such sentiments were describod by one Member of Parliament thus:

> "...If...we want to develop a democratic socialism in this country - a socialist must be democratic - then first of all we need to secure that property shall be respected. This is one of the things which this Bill is dealing with. Secondly, we need to assure foreign investors that when they invest here this investment is not going to be grabbed."(125)

In the spirit of *laissez-faire*, then the Foreign Investments Protection Bill constituted in effect "a bill of rights for foreign investors, guaranteeing freedom of repatriation of profits (in proposition to the foreign share of equity) interest and repayments on foreign loan capitals, and abjuring expropriation without good cause."(126) The Certificate of Approved Enterprise, which is the foreign investor's guarantee of compensation in the event of nationalization is granted without much difficulty. Applications for repatriation of dividends are usually approved by the Exchange Control Department of the Central Bank without much difficulty.

(b) Constitutional Protection

The case of Kenya is quite interesting in that

foreign investment is guaranteed in the Constitution. Expropriation of property is undertaken only when the following conditions are satisfied, that is to say:

(1) the taking of possession or acquisition is necessary in the interests of defence, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit; and

(2) he necessity therefore is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and

(3) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.(1

In the case of New Munyu Sisal Estates Ltd. v. A-ly, the plaintiff claimed compensation "in terms of... the Constitution of Kenya for land and certain movables which the plaintiff alleged had been wrongfully and compulsorily taken of" by agents of the Government. The Government admitted liability acknowledging that "the Government was by virtue of the Constitution and

Common law obliged to pay compensation to the plaintiff" and accordingly paid into court a sum in "full satisfaction of the plaintiff's claim."(128)

The constitutional safeguards offered can be explained easily. In the first place, the Constitution of Kenya, though arrived at after lengthy negotiations, cannot be said to be authentically Kenyan. The "Mother Country" with its "kith and kin" living in Kenya was keen to see that the sanctity of private property was spelt out in no uncertain terms. But behind this facade was the surveyed capitalist path to be followed. This situation clearly vindicates the thread of analysis in this study, namely: the principle of class interest cannot form the basis of state, for classes represent private interests and thus the state becomes the instrument of private property contrary to the overall well-being and interests of the entire nation. A radical Member of Parliament was aware of this during the Parliamentary debates on the Foreign Investments Protection Bill when he stated in effect that the Bill smacked of a colonial imprint:

> "...the so-called guarantee in the Constitution was imposed on us by the imperialist government because it was only interested in its capital in this country; it was not interested in the benefits which our people get from those investors but only to see that its capital was

safeguarded."[129]

(c) Concession Agreements

State guarantees to Foreign investors may also be specified in character designed to serve the needs of particular investments. Of interest is the concession agreement which involves the conclusion between a State and a private person and providing for the grant by the State to the individual of certain rights or powers which normally would belong to and be exercised by the State. Typical examples of concession agreements are those relating to mineral and other natural resources or to the operation of enterprises of public utility.

Prospecting and mining for minerals in Kenya are controlled by the Mining Act and its subsidiary legislation.[130] Titles which may be granted under the Mining Act are as follows:

(a) Protection Area - This is a temporary exclusive right to prospect which may be secured on any land open to prospecting by the holder of a valid Prospecting Right.

(b) Exclusive Prospecting Licence - This offers protection while one is prospecting.

(c) <u>Special Licences</u> - As the name implies, these are of a special nature and such licences may be granted only in respect of land which has been closed to prospecting and mining by the Government and which is re-opened specifically for the purpose of the licence(s).

Although the British companies, British Petroleum and Shell have failed to get oil, they have retained an important offshore concession. In terms of Third World oil-politik they had, after all, done their prospecting duty in a country where they enjoyed a large slice of distributive business, not to mention a stake in the Mombasa refinery.

Total Exploration (a subsidiary of <u>Compagnie Francaise de Petroles)</u> in which the French Government has 30% stake has formed a partnership with the Kenya Government to cover a 40,000 sq. mile area off the coast beyond the 200 metre watermark.

Chevron have a vast middle section on land, flanked by a Burmah - Adobe - City Services concession, and another operated by a Whitestone and Louisiana Land and exploration partnership, while on the other side of the Chevron stake there is a consortium of Canadian companies and the American Louisiana Land, and Louisiana Land are in one an adjacent block with Whitestone

Industrial, a Texan outfit. Oceanic have a concession on the Tanzania border. B.P. Shell's offshore licence takes in their old hunting ground north of Mombasa to the Somali border, with Total and Wainoco of Canada operating offshore to the south. All in all, some nine groups are in the field.

(d) The Legal Effects of State Guarantees

What are the legal effects of State's promises and state practice in foreign investment protection?

At this juncture, we shall look at the case law starting off with the International Court of Justice decision in Barcelona Traction Case.(131)

In this case, the Belgian Government filed with the International Court of Justice an Application against the Spanish Government claiming reparation for the damage allegedly sustained by Belgian nationals, shareholders in the Barcelona Traction company on account of acts said to be contrary to international law committed in respect of the company by organs of the Spanish State. On 15th March 1963, the Spanish Government raised four preliminary objections to the Belgian application. Briefly the Court considered that the adoption of the theory of diplomatic protection of shareholders could create an

atmosphere of confusion and insecurity in international economic relations. However, noting that Belgium lacked jus standi, the Court nevertheless pointed out that the national state of the company is perfectly free to decide how far it is appropriate for it to protect the company. The World Court noted that the law on foreign investments did not look solidified at first sight but that the law in this case had been formed in a period characterized by an intense conflict of systems and interests. It is essentially bilateral relations which have been concerned, relations in which the rights of both the State exercising diplomatic protection and the State in respect of which protection is sought have had to be safeguarded. Whether in the form of multilateral or bilateral treaties between States, or in that of agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments. The court continues:

> "...within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal person on whose behalf it is acting consider that their rights are not adequately protected, they

have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress. The municipal legislator may lay upon the State an obligation to protect its citizens abroad, and may also confer and clothe the right with corresponding sanctions.

... It is quite true that it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company."

The first important legal effect of the promises to foreign investors which are made through instruments of public international law relates to the possibility and extent of diplomatic intervention on the part of the State of which the investors involved are nationals. There is in this connection an important difference between the effects of promises regarding expropriation

and those of promises on other matters, such as exchange restrictions or taxation, due to the differences in the customary rules pertaining to these two categories of matters.

In the case of expropriation, there already exists in public international law a rule which condemns such action under certain conditions, even though the precise content of the rule and related conditions are not very clear. (It should, however, be noted that a state has a right to expropriate so long as this is done under the accepted principles in international law. These will be mentioned later.) The importance of the treaty promises lies in their making the applicable rule clearer and establishing its validity, within the limits of conventional international law.

The diplomatic intervention of the state of the investors' nationality is now legally admissible (re: Barcelona Traction case already discussed). If the diplomatic methods of intervention prove not to be effective in any particular instance, there now exists a possibility of bringing the matter before an international judicial body, chiefly the International Court of Justice or possibly an arbitration tribunal.

As regards treaty promises, local courts would afford little protection to the foreign investors in the case of legislative action in violation of such promises. It is today accepted in treaty law that a later statute prevails over an earlier treaty. This rule, however, is often applied with caution. Courts generally recognise a presumption in favour of the continuing validity of the treaty and may require direct and clear statutory language in order to admit the treaty's invalidation.

Within their limitations, guarantees to foreign investors can play a very useful role in promoting international investment in the underdeveloped countries. The main significance is of a non-legal character, although legal claims cannot be ruled out. It lies in their providing an indication that a favourable attitude toward foreign investment prevails in the particular capital importing state. The grant or offer of guarantees shows that the state concerned is conscious of its own need for private investment and of the foreign investor's desire for security. Such an attitude is in itself reassuring to the investors.

(e) Fiscal, Financial and Trade Incentives

Fiscal and trade incentives are part of the

investment magnet. Many poor countries like Kenya have elected to foster the growth of local industry behind the protection of high tariffs and other import restrictions. For example, Firestone Kenya Ltd. is protected by the restriction of the importation of tyres into the country. Government backing for the industry has in the past been most explicit. Under the agreement signed between the Government and the firm in 1969 the Government has carried out its obligations and undertaking. These have included the publication of a Legal Notice under the Merchandise Act intended to prohibit the importation of any tyre, tube or raw materials required for the manufacture of tyres unless the country of origin was clearly stated; an import order under the Imports, Exports and Essential Supplies Act intended to control stockpiling; and a remission order under the Customs Tariff Act [133] intended to permit duty free entry into Kenya of the construction materials, equipment, machinery and spare parts required for the construction and equipping of the factory and also of raw materials o to be used directly in the manufacturing operation.

With respect to certain industries, the Government can also waive import duties as well as sales tax. The

Customs Tariff Act deals with customs duty which is tax on the value of imported goods expressed as a percentage of their value. The tax is imposed on the importer but in reality the duty is actually paid by the consumer in form of a higher price. Customs duty is customarily used as a revenue raiser but as a country industrialises, the duty gradually recedes as a revenue earner and becomes primarily as a form of protection of local goods from foreign goods by raising the price of the imported goods. Kenya is in the mid-way position in this respect. For manufacturers needing protection from influx of foreign imports, approach can be, and is usually made, to the Minister for Finance for protection before investment funds can be committed in the production of items competing with imported goods. There is also the Suspended Duty which can be imposed in accordance with the Second Schedule of the Customs Tariff Act as a form of protection for people who are presently constructing a factory. The duty becomes effective when the Minister for Finance publishes it in the official Gazette. Such Suspended Duty affords assurance that protection will be granted when the factory in question is completed. However, no duty is imposed on foreign goods unless the factory starts operation. Exemption from duty on imported goods, especially with

regard to ancilliary items, can be obtained by requesting the Minister for Finance to exclude such item from the First Schedule of the Customs Tariff Act. Another way of incentive is for the importer to ask the Minister of Finance to ask Parliament to add the list of duty-free items to the Third Schedule of the Act.

For example, in February 1971, the then Minister for Finance and Planning, Mr. Mwai Kibaki, announced that the Government had abolished import tax on all materials imported by East Africa Industries Ltd.[134] as the company had decided to utilize all the available local material in producing their products. The lifting of the import tax was meant to enable the company to fill the balance of the required material from overseas.[135]

With regard to Leyland Kenya ltd., the company is well protected in its area of operation. Under the agreement with the Government, only two other companies are licensed to assemble commercial vehicles. The agreement also prohibits the importation of second hand units for resale and vehicles comparable to those being assembled will only be imported in completed form if the company is unable to assemble

them. Presently the company is assembling British Leyland heavy and medium commercial vehicles, Land Rovers and Range Rovers (the company is also allowed to assemble Volkswagen and light commercial vehicles under contract from CMC Kenya Ltd. who hold the franchise).

Another form of incentive is the flexibility afforded to the multinational corporations in raising finance locally. During the colonial period the bulk of advances by the colonial banks went to European firms, European settlers and the European community in general. Although the establishment of local banks consequent to the attainment of independence no doubt brought about a change of attitude with regard to lending priorities, credit is still afforded to the major foreign firms.(136) In May 1977, the Central Bank of Kenya relaxed local borrowing facilities for foreign-controlled companies involved in agricultural production and manufacturing as well as in tourism. Such firms will now be able to borrow up to 100 per cent of investment including equity and foreign loan capital and unimpared reserves. A bank statement(137) said the concession was being made for the purpose of increased production and employment in those sectors. Such borrowing, however, would still be subject to exchange control

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notice No. 19 contained in exchange control circular No.16/1974 issued on December 9, 1974. Authorized banks were previously allowed to grant overdraft and other credit facilities to firms engaged in agricultural production, manufacturing, export business and tourism. The export business firms seem to have been left out of the new arrangement which now allows at 100 per cent borrowing facilities previously maintained at between 20 and 60 per cent. According to notice No.19 no credit facilities may be extended to non-resident controlled companies without consent of exchange control. Previously the notice allowed no more than 20 per cent of investment, including share and loan capital and unimpared reserves to non-resident firms. For Kenya registered firms where between 40 and 50 per cent of the equity was in the beneficial ownership of Kenyan nationals, a total not exceeding 40 per cent of total paid-up capital, unimpared reserves and foreign loan capital was allowed. Kenya registered companies where over 50 per cent of the equity was owned by Kenya nationals, borrowing facilities not exceeding 60 per cent of total paid-up capital, unimpared reserves and loan capital were allowed. Kenya registered companies in which the proportion of equity held directly or indirectly in the beneficial ownership of non-residents does not exceed 15 per cent are not regarded as non-resident controlled for exchange control

purposes.

With regard to the promotion of trade, the Government has established an Exports Credit Guarantee Corporation, an Exports Inspection System, a Kenya Institute of Exports and a Division and Packaging Unit. Of importance here is the Exports Credit Guarantee Corporation whose function is to insure exporters against non-payment risks resulting from dishonouring of bills of exchange. The Corporation will be able to discount the bills which are normally of a duration of 90 days.

Kenya is also a participant in several international agreements that affect foreign direct investment. Notable in this respect are the articles of agreement of the International Monetary Fund (IMF) and the International Center for the Settlement of Investment Disputes(ICISD)[138]. The Articles of Agreement of the International Monetary Fund(IMF), which were approved at Bretton Woods Conference became legally effective on December 27, 1945. In view of the bitter experience in the 1930s of restricted and distorted world trade brought about by the disorder in the International exchanges, the IMF Agreement has, as one of its aims, the establishment of a free stable multilateral and non-discriminatory system for international payments.

Article VIII embodies this principle and imposes upon its members in effect the following obligations regarding the abolition of exchange restrictions, namely, avoidance of discriminatory currency practices, and convertibility of foreign-held balances.

In terms of Article VIII, members of the fund should not impose restrictions upon payments for current international transactions. This means that a resident in a member country may at any time exchange the currency of his own country for such foreign currency as is necessary for external payments. This regulation may be interpreted as an obligation to maintain the convertibility of a resident current account. By payments of current transactions as per aforegoing is meant those payments which are not, in fact, transfers of capital. Examples of such transactions are: all payments due in connection with foreign trade, other current business, including services and short term banking and credit facilities. Also included are payments due to interest on loan and as net income from the investments and moderate remittances for family living expenses.

The Articles of Agreement of IMF have produced some major effects. They have established a code of

legal obligations binding member countries in matters which usually no limitation on the exercise of their sovereign rule could be submitted. The code is important in that the Articles of the Fund were the first major attempt to regulate international monetary relations by legal obligations, and they were, therefore, the first great contribution to the creation of international monetary law as a sector of public international law. In Kenya, legislation came into effect on December 10, 1963 establishing an Act of Parliament[139] providing for the acceptance by the country of the Agreements for the International Monetary Fund and the International Bank for Reconstruction and Development. The provisions of the Fund Agreement (and the Bank Agreement) set out in the Schedule to the Bretton Woods Agreements Act have the force of law in Kenya.

To some extent the attack upon direct controls in the international economy has been weakened by the failure of the Havana Charter and the International Trade Organization (ITO). In the original conception, the two agencies were to be responsible for the international supervision of trade; the IMF seeking the abolition of monetary controls over international payments, while the ITO dealt with import quotas and

commercial policy. The two organizations therefore have been interdependent and their work would have been closely co-ordinated. Some of the work intended for ITO has been carried on by the General Agreement on Trade and Tariffs (GATT) which in its various seminars has achieved numerous tariff reductions and, in other cases, undertakings not the raise duties above their present level. Also some of the provisions of the Havana Charter have been incorporated in the GATT notably that under which member nations agree to resort to only quantitative controls for both balance of payments adjustment. The agreement is, however, hampered in its scope in that it has no power to make member nations dismantle controls or amend duties which are legislatively sanctioned in their own countries.

The IMF was shaped in the latter years of World War II by capitalists who feared that the international capital market would not rejuvenate. The problem was how to circumscribe the measures of governments bent on resorting to trade restrictions or competitive devaluation to bridge trade deficits. The IMF's response to the changed financial situation has been to arm itself with powers to control and police the manipulation of exchange rates. Member agreement was

achieved at the Jamaica meeting of January 1976. The Second Amendment of IMF Charter sets out the new authority in Article IV. The detailed new code of conduct for the application of the Article was confirmed by the Interim Committee in May 1977.

The new Article IV begins with a carefully balanced statement of the general "obligations of members" stressing both the "orderly underlying conditions that are necessary for financial and economic stability" and the obligations of IMF members "to collaborate with the fund and other members assure orderly exchange arrangements and to promote stable system of exchange rates." The new Article also provides that the IMF shall exercise "firm surveillance over the exchange rate policies of members, and shall adopt specific principles for the guidance of all members in respect to those policies." To these ends, the Fund would be supplied with appropriate information by member countries, and members would be obliged to consult with the fund on their exchange rate policies when so requested by the fund. The fund, by an 85% majority, may determine that "international economic conditions permit the introduction of a widespread system of exchange arrangements based on stable but adjustable par values."

Although the International Monetary Fund is established as a specialised agency of the United Nations reporting to the Economic and Social Council of the UN, this organisation has proved to be a marionette of the United States as opposed to being an organisation run by its members for the benefit of the members. The palpable ungracious influence of the American Treasury upon its policies and utterances and its questionable policy to supply currencies only on conditions devised by the US Government clearly cut a figure of a poodle of the U.S. for capitalists' interests.

Kenya is, as already stated in this study, a signatory to the International Union for the Protection of Industrial Property by which ipso facto the country leans on a liberal patent policy. Given the existence of patent protection, the promotion of brand names and the lack of effective regulation over these privileges, foreign investors are no doubt attracted by such a favourable situation.(140) The patent monopoly given to foreign investors seems not geared to encouraging invention locally but rather to stimulate foreign investment and licensing of foreign technology together with the relevant know-how. To the extent that such exclusive rights have been used to strangle local production of similar items and to maintain

restrictive business practices by local affiliates, it is quite justifiable to question the value of the patent monopoly so granted.

Another favourable factor to the foreign companies is the establishment of the Stock Exchange whereby share prices are quoted publicly and that in this way overseas investors can have an idea of the degree of the capitalists' confidence in particular companies and in the national economy. Stock Exchange as an institution is essentially a capitalist product in that it serves as a barometer of speculation and abhors progressive change which would curtail or abolish the privileges and benefits accruing from private property. Even modestly liberal researchers have almost expressed similar sentiments by pointing out the dangers of a Stock Exchange, namely: manipulation of values, the artificial fluctuations of prices and the ethics of trading in shares.(141)

(f) Stable Labour Relations

In Marxist analysis, one of the consequences of commodity production is that labour becomes an obligation from without and "ceases to be an activity tied to the rhythms of nature and according with man's own physiological rhythms."(142) In addition,

in the capitalist system, the degree of labour productivity is such that the living costs of the worker are always less than the quantity of newly created value. Mandel comments:

> "This means that a worker who labours for ten hours does not need the equivalent of ten hours of labour in order to support himself in accordance with the average needs of the times. His equivalent wage is always only a fraction of holiday's labour; everything beyond this fraction is surplus- value, free labour supplied by the worker and appropriated by the capitalist without an equivalent offset. If this difference did not exist, of course, then no employer would hire any worker, since such a purchase of labour- power would bring no profit to the buyer."(143)

In the Kenyan situation, the foregoing obtains and to continue reaping the surplus-value, labour conditions have been made conducive in this respect to the profit making of the capitalists. The stable labour relations brought about by the labour legislation have seen to that. The Government policy in Kenya has been to circumscribe the scope of

remedies with regard to the working conditions. The legislation governing the economic role of trade unions includes the Trade Disputes Act, 1964 setting up the Industrial Court, the Trade Disputes Act, 1965 and the amendments to this Act in 1971.[144]

The Industrial Court was established by the Trade Disputes Act of 1964 for the purpose of the settlement of trade disputes and matters related thereto. On the 8th June, 1965 the Trade Disputes Act 1965 superseded the Trade Disputes Act 1964 and sought restrictive provisions to prevent unions from calling "unnecessary" strikes and causing labour unrest. One of the Act's provisions extended the list of essential services by five and provided that the Minister for Labour could refer a trade dispute in any essential service to arbitration by the Industrial Court. The Act also included strict procedures to be followed in reporting and resolving trade disputes. In addition, the Labour Minister was empowered to declare strikes or lock-outs illegal. He may declare an actual or threatened strike unlawful where the parties have not yet exhausted their voluntary disputes - settlement machinery,[145] or where there is an agreement or award regulating the matters under

dispute[146], or where the action is sympathetic and not related to a dispute within the employees' own industry.[147]

The Government strengthened the strike restrictions still further. A further rule was thus introduced in 1969 after a large number of unions organised work stoppages. After the Government had intimated of sanctioning legislation to ban strikes altogether, an informal agreement was entered into between the Unions' body COTU and the Government to the effect that unions would only call strikes with the latter's endorsement. The agreement was treated by the Government as a formal commitment violation of which would be considered an offence. COTU on its part has been quite wary to authorise or approve such violation in fear of Government reprisals - the country's trade union leaders have traditionally been as afraid of a successful controntation with the government as an unsuccessful one; in the immortal words of J.H.Thomas, right-wing leader of the Railwaymen at the time of the General Strike in Britain:"I have never disguised that in a challenge to the Constitution, God help us unless the Government won."[148]

The Trade Disputes (Amendment) Act passed in July

1971, established still further restrictions on the right to strike. One of the amendments expanded the definition of "strike" to include "go-slows", while another reduced the definition of what were acceptable trade disputes. Strike action thus ceased to be a meaningful weapon for obtaining redress for Unions' claims for higher wages, better working conditions, etc. In addition, the political leadership has, at times, taken measures which would seem to indicate that workers have no right to strike. For example, in 1974, President Kenyatta banned strikes in the country warning that severe disciplinary action would be taken against anyone "who incites, organises or takes part in any strike".(149) The new President has followed in similar footsteps and has directed that no strikes should be tolerated.(150)

(g) <u>Investors' Pressure Institutions</u>

It should be noted that the foreign sector has its own institutions for protecting its interests. One of these is the Federation of Kenya Employers. The Federation was first established in March 1956 under the name of the Association of Commercial and Industrial Employers. During 1959 the sphere of influence was widened to cover both agricultural and

plantation industries and also in January of that year the first meeting of the Federation in its present form was held. By 1969, there were 1473 members.(152) Naturally, the Federation's function is that of championing the interests of employers through organised pressure form. The drafting of the various Trade Dispute Acts and signing of the Tripartite Agreement of 1970-1 bears a great imprint of the organisation. With respect to the Federation's views on the 1971 Trade Disputes (Amendment) Bill, Colin Leys comments:

> "What was clear was that the Federation of Kenya Employers' forcefully expressed views, echoed by civil servants both local and expatriate had added a new and perhaps lasting element to the economic strategy of neo-colonialism in Kenya: the menace of unemployment was to be dealt with by a long-term downward pressure on wages generally."(153)

Another foreign sector institution ensuring the protection of foreign capital in Kenya is the Kenya Association of Manufacturers. The Association was formed in 1959 as the association for the Promotion of Industries in East Africa and in 1963 it became the Association of East African Industries. It became the Kenya Association of Manufacturers in 1969. The

Association's primary task is to protect and enhance the interests of manufacturing firms. By 1971, some 150 overseas companies, two-thirds of them British, subscribed to the Association.(154)

(h) Partnership with the Government and Localisation

Minority participation into the operations of multinational firms can also be regarded as a kind of "insurance" by the Government for continued uninterrupted activities. Foreign collaboration is increasingly becoming a common form of foreign investment in Kenya. Such collaboration usually involves financial participation and those involving only technology transfer. Although the Government's main wish is to lessen the embarrassment of dependency and to eventually acquire the greatly needed technological advance, from the point of view of multinational corporations, minority Government ownership of shares is a sign of government approval and support. In matters like negotiations with trade unions, such an arrangement affords the multinational corporation rigid sustainment and the foreign firm can "in effect wave the national flag and accuse the trade union of letting down the Government".(155) Also, minority shareholding by the

Kenyan Government and by African Kenyan citizens is seen by the foreign firm as"a form of vaccinnation against future nationalization."(156) It is in search of protection under the shade/Government /of umbrella that a foreign firm like the Magadi Soda Company(157) have been waiting anxiously for Government acquisition of part of the shareholding equity.

In 1978, Kenya's Natural Resources Minister announced that the Government would acquire a 51 per cent of shares of Magadi Soda and assured the owners of the company that the taking of majority shares by the Government did not mean that they would be driven out of the country.(158) The company's chief executive readily pointed out that the company had for a long time been holding talks with the Treasury to have the Government as a partner, adding:

> "But during the talks there has never been a suggestion that the Government would take over the company. The talks have been friendly and my company has been expecting to hear from the Treasury."(159)

The Minister for Natural Resources did not say when the Government would acquire the shares but the writer understands that the matter is still being considered by the Treasury.

Local incorporation also seems to give a stamp of acceptance and identification. The case of Barclays Bank (Kenya) Ltd. is of importance here. The main aim of the Barclays Bank Kenya Ltd. Bill was to change the name from "international" to "Kenya". The legislation was passed by Parliament on July 26, 1978 and gazetted on September 25, 1978. The Barclays Bank International (incorporated in the U.K.) will continue to hold the majority interest in Barclays Bank Kenya Ltd. According to the chairman of the Barclays Group - the new structure and local incorporation meant more than just a name:"It is, in fact clear evidence of our desires to be yet more closely identified with the future of Kenya and to make possible participation in the banking business."[160] With the tarnished role of the Barclays Group (especially its close links with South Africa), such incorporation is a shining badge of acceptance by the Kenya Government; and not only that, there are also some tax benefits.

(i) Indirect Incentives

The significance of "home-country influence" cannot be underrated. The following quotation in respect to the Canadian experience is quite telling:

"The fact that the parent Government has power to sway economic developments in the host

countries becomes the basis of a fear of economic and political domination. The Canadian Task Force concluded that an elaborate legal and administrative apparatus had been created by the American Government to implement their legislation abroad in regard to the American goods, technology and the action of subsidiaries that this network was capable to being turned to any objective in foreign policy to meet any future stringency, such as a further deterioration of the American balance of payments position. This poses for Canada a basic political problem, namely, that for an uncertain future the 'elbow room' or decision-making power of the Canadian Government has been reduced in regard to economic relations involving American subsidiaries. The essence of the extraterritorial issue is not the economic courts - and in the interacting network of Canada - United States relations, there may even be economic benefits from Canadian compliance - but rather the potential loss of control over important segment of Canadian economic life."(161)

The enactment of the first Hickenlooper Amendment(162) was the major congressional initiative to make the United

States expropriation policy legislative prerogative. The remedy to be applied was a direct economic sanction - foreign aid. Since this piece of legislation, a series of measures for diplomatic protection of U.S. foreign investments have been undertaken and all have been directed at protecting the equity interest of U.S. shareholders in their controlled foreign affiliates. The legislative sanctions which have been invoked over the years have ranged from denying the benefit of U.S. bilateral economic resources(U.S. Congress 1967) to denying sugar sales (U.S. Congress 1948) in the United States and the vetoing of loans in the international financial institutions - the World Bank and Inter-American Development Bank - where the United States could exercise considerable power based on the weighting of its capital contribution. Between June 1971 and January 1973 the United States voted no, or failed to support World Bank and International Development Agency loans to Guyana, Bolivia Iraq and Peru. In each of these instances, the reason cited for the U.S. position was expropriation of property of U.S. nationals without compensation.

"Home Country" incentives also include tax concessions as well as insurance against noncommercial

risks faced by foreign direct investment in particular countries. In the case of the United States of America, there is the programme of investment insurance and guarantees. The idea behind such a scheme was to insure foreign direct investment against some of the non-commercial risks of investing in the countries covered: the threat of war, expropriation and currency inconvertibility. Since 1971, the programme has been run by the Overseas Private Investment Corporation (OPIC), an independent government corporation.[163] Over ten "home countries" insure and guarantee some foreign direct investment by their firms in the poor countries.[164]

In the field of tax mechanism, the United States has negotiated over 20 bilateral tax agreements involving withholding taxes on dividends and profits remitted to the US. In accordance with these agreements, the withholding taxes (in addition to the "host country" taxes on profits) may be as low as 5 per cent versus 30 per cent where no bilateral agreement exists. If a U.S. based multinational has a subsidiary in a country with no bilateral agreement, the sure way to go about this - to any capitalist - is to reincorporate the subsidiary in a country that has such an agreement.

The apparent less stringent environmental laws in Kenya make the country a popular investment jewel for the outside investors. For example, in 1970, Japan announced a policy of exporting low-productivity, polluting industries as part of a revised industrial strategy.

In Kenya, there have been two cases whereby laxity was quite evident as regarded environmental considerations. The first involved the Kerio Valley where Fluorspar Company of Kenya started flourspar mining in the early 1970s. The company then was a joint venture between the Government and the International Mineral Chemicals Ltd. of New York, which was represented in Kenya by Continental Ore (Kenya) Ltd.[165] Around 1975, people living in the Kerio Valley complained bitterly that their lives and those of their domestic animals were in grave danger due to an unusual chemical pollution of rivers Kimwarer and Mong which are the principal tributaries of Kerio Valley. The chemical pollution said to originate from the factories of Fluorspar company included among other things a chemical called mimosa, soda ash, tannic acid, seporan and lime.[166] The other environmental factor was ecological which involved displacing about 500 people from the site of the company's factories to another settlement.

Such approach to modernisation seems mechanical in that the interest here would seem to be placed in the exploitation of the physical environment by modern technology without caring much about the indigenous human factor, that is, the existing modes of adaption and environmental conceptualization.(167)

Another example of laxity vis-a-vis environmental considerations was the case of Copal Ltd. whose establishment by the shores of Lake Nakuru was done in flagrant violation of even the existing albeit inadequate pollution regulations. Investigations undertaken by a committee of conservationists established that neither the provincial planning officer of Rift Valley Province nor the water quality and pollution control section of the Ministry of Water Development were consulted before the Nakuru Municipal Council and other appropriate authorities issued the requisite authority for the establishment of the factory at Nakuru. Copal was easily given approval for the manufacture of agricultural and other chemical products notwithstanding the fact that there was a likelihood of highly poisonous chemical waste released by the factory which would naturally adversely affect the ecology of Lake Nakuru where the world-famous flamingos abound. It was only after a great outcry both from the local Press and the World

Wildlife Fund that the factory was not completed.(168)
Since the Minister of Lands and Settlement, was a shareholder in the company when its establishment was being undertaken it would seem that his influence was paramount when the matter came up for decision by the Capital Issues Committee. This shows that direct access to local prominent men is a favourable condition to foreign investors. "There is evidence that such sharing will continue to grow with larger percentages going to well-placed Kenyan Africans who can ensure the 'smooth working' of an MNC subsidiary by giving it access to top decision makers."(169)

(j) Other Incentives

Other forms of incentives for foreign investment in the country include the flexible work permit system whereby foreign firms are allowed to engage the services of expatriates. For more protection, foreign firms have also found it expedient to appoint "political notables to management positions and directorships in foreign subsidiaries."(170)

In several cases, the governments of poor nations have issued formal statements of policy indicating their general attitude toward foreign investment and laying down

the particular policies to be pursued by administrative or legislative action. Statements of policy while theoretically easily revocable and less dependable than special statutes, may in some cases be of more real value to the investors, when for instance, they represent the definite views of an established government.

Thus after the death of Kenya's First President the new Head of State re-emphasized the sanctity of private property. In a major statement after the death of Kenyatta, Mr. Moi, the new President, reaffirmed that "the economic policies which have been so successful and which are based on individual enterprise by Kenyans and Government participation in all vital sectors, will be continued."(171) The President reiterated that in this respect the Government would continue to provide for the protection of foreign investment and give other investment incentives: "We shall continue to welcome and protect foreign investment as long as that investment is in accordance with our development plans and provided that foreign investors respect the dignity of the people of Kenya and their traditions."(172)

Summed up, the Government's various legal and quasi-legal guarantees to foreign investors coupled

with the country's political and economic stability together with the neo-colonial dependence on the Western world and the accommodation of the economic system thereof have, and will continue, to attract foreign investment to Kenya.

CHAPTER IV

THE VARIOUS TYPES OF INVESTMENT CONTROLS AND COUNTERSTRATEGIES BY THE KENYA GOVERNMENT

The growing hold of multinational corporations on the economic, social and political well-being of the countries in which they operate, has given rise to deep anxieties, particularly in areas of employment, competition, tax avoidance, manipulation of capital movements and various ethical shortcomings. The giant corporations have reached such size and geographical proportions as to cast doubts on the effectiveness of the traditional measures usually pursued by governments to deal with them. Such apprehension has been expressed in the following words by Kenya's Governor of the Central Bank:

> "My experience with multinationals has not been a happy one. Although they confer some benefits to the host country, and indeed their know-how is most useful, their interests and allegiance are with their parent company and country of origin. Owing to their privileged position in the technological and financial fields, multinationals make a handsome return on their investments in the developing countries, which is then re-exported in the form of dividends, interest and profit..."(173)

Those who argue against the activities of multinational corporations are often motivated more by a sense of the importance of national control over domestic economic activities and the minimisation of dominance/dependence relationships between powerful multinational firms and "Third World" governments. They see these giant corporations not as needed agents of economic change but more as vehicles of "anti-development". Multinational corporations, they argue, reinforce dualistic economic structures and exacerbate domestic inequalities with wrong products and inappropriate technologies. Thus the approach is not abolishing the multinational corporations but rather minimizing the adverse effects, more like anaesthetising a patient. That is the course Kenya has been pursuing.[174]

Before the introduction of the Foreign Investments Protection Bill, what existed was an open door kind of industrial economy with very few industries actually requiring a licence from the Government to set up their industries. The East African Industrial Licensing Ordinance of 1953 replaced the Industrial Licensing Ordinance (Cap.276), the operation of which had revealed that a more detailed and comprehensive enactment was necessary. The list for which a licence was required was

enlarged from cotton and wollen wear to include steel drums and caustic soda.(175) Up to the introduction of the Bill (Foreign Investments Protection Bill) foreign investments were divided into foreign investments ~~outside~~ inside the sterling area and those from outside the sterling area. Investments from the sterling area did not have to be issued with the Approved Status Certificate, but investments from outside the sterling area had first to have the requisite Certificate before they could invest in the country. With the passage of the Bill, the differentiation was ended. The Foreign Investments Protection Act thus put all foreign investments in the same category instead of showing favouritism which had hitherto been shown to investments from sterling areas. Though the Foreign Investments Protection Act is "an immuniser" against nationalization, there is still the possibility of expropriation under certain circumstances.

1. <u>Nationalization and Joint Ventures</u>

The exercise of expropriation in Kenya has been carried out only sparingly. The acquisition of 48% of National Grindlays Bank and the consequent acquisition of the rest of the equity portfolio was done reluctantly (with actually the initial request for joint venture

coming from the multinational bank). The nationalization of the Kenya Broadcasting Corporation is the only clear-cut example of nationalization since independence. Such bold measure prompted one Member of Parliament to declare in the Kenya House of Representatives:

> "Sir, this day must be hailed as the first day when the Government has started moving in the direction in which the people are expecting it to move. The nationalisation of various assets in this country is the very thing which the African expected after Uhuru and the continuation of K.B.C. in the hands of imperialist agents was a very embarrassing and most unwelcome situation, but today I must congratulate the Minister for Information and Broadcasting on the bold step he has taken to ensure that the Voice of Kenya will be in the hands of Kenyans."(176)

K.B.C. was created in 1961 by the colonial administration. It became a statutory body and was charged with the task of forming an independent broadcasting service to disseminate information to the country and also to broadcast on educational matters,

provide entertainment and to advise government on matters relating to broadcasting. After the formation of K.B.C. and the establishment of television, there was formed a company known as the Television Network Ltd. The company comprised external interests like the Television International Enterprises, the International Enterprises Ltd. of England, the Scottish Television Ltd., the National Broadcasting Inc. of America, and Northern Broadcasting Company of Toronto Ltd.

A formal agreement was concluded betweeen K.B.C. and the consortium. Under this agreement the consortium agreed to provide the necessary capital as follows: the external organizations agreed to raise bank overdraft to the tune of £117,000 as well as manufacturers' credit worth £115,000. They also undertook to provide equipment and programme material and to assist in the training and selection of personnel. In return, the consortium were to be paid, as follows: £5,000 per annum payable in London, initially, for the period ending June, 30th, 1963 and thereafter to be payable at such rate as would be agreed with the Corporation. Secondly, they were to receive 7½% of all net revenue accruing from advertising on radio or television which they had

initiated and completed. Thirdly, they were to be paid 15% of the Corporation's net advertising revenue from the television, in other words 15% on the above 7½% already mentioned. Fourthly, they were also to receive 15% of the net advertising revenue accruing to the Corporation each year in excess of £100,000 from radio. Fifthly, they were also to be paid a commission of 6% of the net advertising revenue received by the Corporation each year in excess of upto £100,000. This was quite a favourable contract vis-a-vis the foreign interests and justifiably elicited the following comment from the then Minister of Information and Broadcasting, Mr.Achieng-Oneko:

> "...the gist of all this... is that the Corporation as originally conceived was to develop into a sort of goldmine at the expense of the taxpayers".(177)

The Corporation soon got stuck in financial quagmire; the contractors did not fulfil their obligations. The agreement between the consortium and the corporation was unsatisfactory, "because for one thing, it failed to produce the necessary working capital for the television as was expected by the Government and it also lacked, or did not contain

a break clause which would have strengthened the hands of the corporation to terminate the agreement."(178)

The Minister noted that for political reasons the nation could not afford to have its broadcasting medium controlled by an independent organisation especially where such an organisation has interlocked interests with outside people:

"...The Government also considered it was a mistake to have a structure like Kenya's broadcasting organisation(as) it became more or less a commercial enterprise for foreign financial interests. This has tended to give the Kenya Broadcasting Corporation a character which is not fully in keeping with the nationalist spirit of Kenya; a character which has been out of step with Kenya's policy of non-alignment. The official broadcasting service of Kenya must reflect the mood and the feeling of the people...(179)

Although the nationalization measure was bold enough (the Bill was approved without amendment), the Government made it clear that legitimate compensation would be paid to the consortium and that this was "a very generous gesture by the Government which shows that Government is composed of intelligent

leaders who respect the constitution of the country".(180)

Is there a likely departure from the "Bible acceptance" of the canons of full, adequate and effective compensation?

The new outlook to international duties and obligations toward investors was given expression in October 1972 at the Twelfth Session of the United Nations Conference on Trade and Development (UNCTAD) Board when the Chilean Government reported that U.S.-owned Kennecott Copper Company had requested a French Court to temporarily prohibit the Chilean government's trading company's goods destined for buyers in France. The Chilean government's position was that Kennecott's petition to a foreign court and the court's grant of the provisional order was repugnant to the principles of international law, especially the principles of non-intervention of a state in the affairs of another and the principle of self-determination.

Eight Latin American countries supported the Chilean stand which was enshrined in a resolution to the Trade and Development Board urging that "expropriations and subsequent nationalization of natural resources are acts of undeniable sovereignty

within the exclusive competence and subject to the sole decision of the state in which the resources are situated, in conformity with its National Constitution, laws and regulations" (UNCTAD,1972). After a lengthy debate, the Trade and Development Board passed a resolution which encompassed the spirit of the Latin American Declaration "without prejudice" to the United Nations General Assembly Resolution 1803 (XVII) which, to the contrary, embraced an international legal standard for expropriation.

The foregoing points were given foetal form in the Economic Charter of Rights and Duties of States. The language of the Charter is bold enough: Article 2(c) of the 1974 Charter provides the following:

> "2. Each State has the right...(c) to nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case

where the question of compensation gives
rise to a controversy, it shall be
settled under the domestic law of the
nationalising State and by its tribunals,
unless it is freely and mutually agreed by
all states concerned that other peaceful
means be sought on the bais of the [illegible]vereign
equality of states and in accordance [illegible]h the
principle of free choice of means."

Kenya is a signatory of the Economic Charter of Rights and Duties of States, but it remains to be seen whether self-economic determination will be accepted as an international legal norm in which case attitude towards nationalization would be a far departure from the present situation obtaining in the country. But this is an unlikely situation and consequently, Government participation in the operations of multinational corporations is generally taken as a form of control, and indeed is seen as a more acceptable course of action as opposed to nationalization measures. But of importance here is the determination of the actual degree of influence over the policy/planning strategies of the multinational corporation. Take the Chilean position as an example. In June 1965 Dow Chemical received a letter from <u>Corporation de Fomento</u> (CORFO), the industrial

development agency of the Chilean Government inquiring whether Dow would be interested in participating in a joint venture with Chile for the production of two plastics - low density polythene and polyviny chloride. The company's attitude was not optimistic:

> "Our response was that we were interested in the joint venture if we could have a controlling interest so that we could protect efficient management of the business. ... We did not sugarcoat the fact that we wanted to make a profit."(181)

In Kenya, Government's participation has in, in certain instances, actually been sought by foreign companies, either as a way of raising capital(182) or as a way of acknowledging the realities of the day, that is, the need for the country's exercise of control over the national economic well-being. It was the latter reason which prompted National & Grindlays Bank to accept partial state control by the Kenyan Government:

> "...the agreements that Lord Aldington has negotiated for National & Grindlays Bank in

Uganda and Kenya appear eminently sensible in the context of recent developments within the bank in African political and economic thinking."[183]

The agreements were similar in their fundamental respects. They each allowed for the bank's main branch operations to pass under 60 per cent state control with the Governments participation in a 40 per cent minority capacity in National and Grindlays international merchant banking business.[184]

The Ugandan agreement was pursued in response to President Obote's Nakivubo Pronouncements of May 1, 1970 which called for 60 per cent state control of a wide range of foreign-owned enterprises. The Kenyan agreement on the other hand, was reached under no such pressure; on the contrary, it was on the initiative of the overseas bank. Although the other banks in Uganda thought of the May 1 Pronouncements as a "breach of faith... a saddening state of affairs",[185] National and Grindlays Bank, however, took a different view, a factor imbibed in the bank's experience as a government banker in Uganda and Kenya and realization of "the legitimate

aspirations of a developing country."(186) In the Kenyan case, the Government has now acquired the remaining 40 per cent equity in Kenya Commercial Bank Ltd. thus making the bank a locally owned bank.

There was also the abortive move in 1971 to create the Union Bank of Kenya as a merger between the Kenya Government, Barclays Bank International and Standard Bank. The bank was to have an initial authorized capital of £5,000,000 divided into 5,000,000 shares of £1 each. The Government was to own 50 per cent of the shares, with the two merger banks sharing the balance between them. The total cost to the Government of the purchase of these shares was to be £2,500,000. Both banks had agreed to make a sterling loan to the Government at 7½ per cent interest rate to finance 90 per cent the purchase price. Although the proposed directors of the bank were actually announced in Parliament,(188) the idea never got off the ground mainly as a result of suspicions of a number of Members of Parliament as to the real economic motive behind the move.

But observations from other quarters would seem to indicate that the merger was not viewed by foreign investors as a pointer in the right direction.

In a lecture entitled "New Banking Dimensions for Kenya "given by Karl A. Zielgler, the then Manager of the First National Bank of Chicago, to the Kenya Insitute of Management some five years ago, the death of the merger was viewed as good news:

"...one of the major talking points in the financial community within Kenya was the possible merger of two large British banks into assuming a minority position with the Government holding a majority interest in a new bank to be called the Union Bank of Kenya. In many respects the financial authorities in Kenya made a decision of great long term significance at that time by permitting these banking houses /maintain their ownership structure./to Furthermore, Government permitted other international banking houses to set up operations within this city.

"I would submit that this decision and the policy of continuing encouragement of new foreign investment will auger well for what many people have referred to as the dream of Nairobi becoming a 'Beirut' of the region and Kenya becoming a capital haven or 'Switzerland' on the African continent".

The Industrial and Commercial Development

Corporation(ICDC) has developed into a widely diversified commercial and industrial conglomerate encouraging the investment of foreign capital in the promotion of enterprises on a joint venture basis. The corporatio-'s shareholding in such enterprises increased from Shs.133.3 million in 1975 to shs.192.3 million in 1976.(189) To mention only a few companies ,ICDC has shares in Union Carbide(K), Firestone E.A. (1969) Ltd. General Motors Kenya Ltd., Metal Box Kenya Ltd., and Pan African Paper Mills (E.A.) Ltd.

The extent of Government control is not necessarily proportionate to the level of shareholding in a multinational corporation. Even where the multinational shareholding is in the minority, the position of the multinational can remain quite strong if supported by control through management contracts or technological expertise and patents. For example, in the case of the 51 per cent Zambian participation in the mining companies, the arrangement is quite limp in terms of control:

> "...Although the Government has a majority on the boards of directors of the two mining companies, all decisions of importance regarding the running of the companies, including the disposal of

profit and investment must be approved separately by the 'B' directors representing the minority shareholders and management contractors."(190)

And as we know, even companies which have gone a long way in Africanising senior posts are quite reluctant to "relinquish control entirely to Africans. The Financial Director would tend to remain expatriate 'to protect the investment'". (191)

And even nationalization per se without structural economic changes does not amount to very much, especially when external control is retained "through the back door", that is, maintenance of management contracts, top management by the members of the "arrived" (that is, the petty bourgeouisie) and pervasive trade links with the outside countries. Comments Issa G. Shivji in,"Tanzania The Silent Class Struggle":

"However, nationalization while being a necessary first step towards socialisation of the ownership of means of production is not in itself socialisation. In other words, by

nationalising, a country does not break from the imperialist economy and therefore does not cease to be a neo-colony."(192)

In the face of reluctance to nationalisation (with the noted pitfalls even when expropriation does actually take place), the Government has been more keen on controlling the multinational corporations through equity collaboration. The idea behind such foreign collaboration is partnership. Such partnership might be based on actual cash injection by both parties or it may involve the supply of technology to a firm where the Government has an interest and where the foreign investor's capital is represented by the input of technology. Whichever method is employed, the hold of the multinational corporation remains strong as the top decision makers of the locally incorporated firm are more often than not expatriate. And by virtue of the restrictive provisions in technology collaboration agreements, the multinational corporation does exercise control on the major policy decisions of the host country partner with regard to technological requirements, material input requirements, quantum and quality of output and their market prices.

Various methods have been used in some countries to lessen the impact of control by the multinational

corporation when such investor is in collaboration with a poor country. In Yugoslavia, for example,[193] when the joint venture incurs losses, these must now be covered by the domestic and foreign partners. The foreign partner may contribute new capital, otherwise the amount of its capital participation registered in the Nominal Account will be reduced by its share of the loss. Also, as regards profit sharing, the Joint Venture Agreement must establish the maximum amount of profit available for distribution to the foreign partner. This limit is calculated by reference to the previous performance of the domestic partner, the profit performance of that sector of the Yugoslav economy and the world economy as well as the importance of that particular investment to the development policy of Yugoslavia. And under Article 11, paragraph 3 of Yugoslavia's Investment Law, the Federal Executive Council is empowered to regulate the minimum capital contribution of the foreign partner both in amount and proportion. The provision is aimed at putting an end to token investments by foreign suppliers in joint ventures which are really disguised sales or contribution of some sort of intangible industrial property as the foreign investors' share of the capital.

The above points would be quite relevant in Kenya's situation where no established machinery seems to exist as pertains the regulation of profit distribution and share capital contribution.

2. Exchange Control Measures

The other area where instruments of control exist is the exchange control system. The most crucial of the moves to evolve a banking system was the setting up of the Central Bank in 1966. Among the bank's objects is "to assist in the development and maintenance of a sound monetary, credit and banking system in Kenya conducive to the orderly and balanced economic development of the country and the external stability of the currency...". It is within the scope of the powers of the Central Bank to administer the Exchange Control regulation.

Exchange Control in Kenya was initiated under the Colonial Administration as part of the British exchange system implemented at the beginning of World War II and continued by the Government of Kenya after Independence. In 1967 all previous legislation was summarized in the Revised Exchange Control Act[194] which gives the power to exercise almost complete control over all transactions in domestic currency by non-residents.

For the implementation of the Exchange Control Act the Government issued a set of Exchange Control Administrative Notices and Instructions(EN) which define the policy decided by the Minister of Finance in co-operation with the Central Bank. The latest printed version of these Notices and Instructions is the fifth edition of 1972. Subsequent changes are announced through Exchange Control Circulars (EC) issued by the Exchange Control Department of the Central Bank to whom the Minister for Finance and Economic Planning has delegated the administration of exchange control. The Bank in turn delegates most of the routine decisions to "Authorised Dealers" (Commercial Banks) and "Authorised Depositories" (Commercial Banks and Members of the Nairobi Stock Exchange).

In order to enforce the provisions of the Exchange Control Act this piece of legislation provides legal sanctions in form of fines and imprisonment for offenders. Over the years some cases dealing with exchange control evasion have been published in the local press with the clear aim to discourage black market dealings.

The exchange control regulations are necessary

in order (1) to stop a depletion of foreign exchange reserves and (2) to ward off the danger of lack of means to pay for our international indebtness. The exchange control system of Kenya relies mainly on foreign exchange restrictions determined in quantitative terms through discretionary action by the authorities. Hence the system is meant to limit or curtail demand for foreign exchange for visible and invisible payments and capital outflows. Thus exchange control measures have been viewed as an instrument to foster economic development by controlling exports as well as payments and transfers in the current account and to prohibit capital outflows.

In an interview in 1974, Kenya's Minister for Finance discussed at length of the various measures being undertaken by the Government in curbing capital outflows.[195] The important payments outside the economy are: the dividends from company profits where the shareholders may be foreign; payments of interests on loans borrowed abroad; payments of rents to a few non-residents who still own some property in the country, and payments for goods and services being imported. As regards

every one of the mentioned items, the Government has taken action. It has taxed rents which are remitted abroad quite considerably and the Treasury are now taking 30 per cent or more out of them before they are remitted-in other words 30 per cent over and above the normal company level of taxation which is 45 per cent. In the case of profits or dividends, the Government is charging, in addition to company tax, a withholding tax of 15 per cent. With regard to charges like management fees, there is a 20 per cent withholding tax in addition to company tax.

The major problem which the Government has recently dealt with is the payment of dividends abroad. Hitherto, dividends have been freely remitted to their owners abroad. But the Government approach, though significant to a point, is not very strongly articulated. The words of the country's Finance Minister give credence to this view:

> "As a short-term measure (and I insist it is just a short-term measure) we have directed that a foreign company in Kenya should first liquidate the bulk of its debts to Kenyans whether Kenyans are banks, insurance companies,

hire purchase companies or individuals before remitting profits abroad. This is a necessary measure because of the difficult times in which we are. It is justified because our first priority is to maintain the employment level in Kenya and the level of general economic activity before we remit any money to another country abroad.

It is a measure which has been taken by other countries. It is not unique, the way some people are trying to present it. We have emphasised that it does'nt in any way affect our commitment to honour repatriation of profits by foreign investors."(196)

In his speech delivered to the National Assembly on June 2, 1974, when presenting the Budget for the Fiscal Year 1974/75 (1st July to 30th June)(197) the Minister for Finance placed greater restraint on profits. He increased the rate of tax on company profits from 40 per cent to 45 per cent and the rate of tax on the profits of foreign branches were raised from 47½ per cent to 52½ per cent. In addition, the Minister raised the rate of tax on dividends paid to non-residents from 12½ per cent to

15 per cent advising: "This tax can of course be avoided so long as profits are retained in the business and dividends are not paid."

The Report on Employment, Incomes and Equality organised by the International Labour Office observes that foreign companies in the country repatriate with complete freedom under the law, though they require Central Bank permission to do so: "They have, however, been under some pressure to retain and reinvest a large proportion of profits than in the past: the exchange control authorities and the Capital Issues Committee have followed a policy of restricting the local borrowing rights of companies that have a particularly high rate of repatriation. This has led foreign companies to hold back a higher proportion of profits earned on their capital in Kenya, and accounts for their relatively high retention ratios (retained profits to total profits) in Keya."(198)

The general policy is that the activities of foreign controlled companies should be financed by funds brought into Kenya, so that the limited/sources /re available within the country, shall be preserved for internal use. Of course, a particular foreign

controlled company could be of/nature that /such special concession is granted by the Central Bank of Kenya. It may be that some activities are of sufficient importance to the economy to justify reference to the authorities through the Exchange Control. Such reference might be appropriate for the various specified fields (agriculture, manufacturing and tourism) but it is unlikely that the necessary permission would be obtained for the finance of activities of a special commercial nature. For example, in 1974 lengthy correspondence was exchanged between the Central Bank of Kenya and Kenya Shell Ltd. regarding the availability of local financial resources. In the view of the Bank, the company's operations came within the scope of Exchange Control Notice No. 16 of 9th December , 1974, which advised the companies affected to make "other arrangements" for the financing of their business. The Bank was of the opinion that the required finances should be sought outside of the country but Kenya Shell asserted that any measures to restrict credit at "unrealistic levels could only result in widespread harm to the national economy".[199] Finally, it was agreed to have the company's overdraft facility of K£1,515,000 reduced at a phased programme to

K£1,300,000 after which the position was to be revised.

In a confidential letter with the caption "Credit for Companies under Non-Resident Control",(200) addressed to Managers of Specified Financial Institutions, the Governor of the Central Bank noted that certain financial institutions had devised means whereby the activities of companies under non-resident control could be financed without a direct loan of money. He noted:

> "Licensed financial institutions are aware that any lending to any body corporate which is by any means controlled (whether directly or indirectly) by persons resident outside the scheduled territories, except with the permission of the Exchange Control, is contrary to section 32 (4) (A) of the Exchange Control Act (Cap.113).
>
> "Licensed financial institutions are therefore hereby requested to refrain from entering into any commitment for the finance of the activities of a foreign company, or a Kenya registered company which is by any means controlled by persons resident outside the scheduled territories. This request

applies to the provision of equipment to such a company on lease; to the refinancing of leasing activities by such companies; to the purchase of goods in the name of a financial institution for resale to such companies; to any form of property development whereby the funds of a financial institution are used for construction on the land of or for the use of such companies whereby the resources of a financial institution are made available. The finance of such companies is not considered to be a suitable use for money raised in Kenya on deposit."

In another circular letter of the same date by the Governor of the Central Bank addressed to the Chief Executive of the Commercial banks, the Governor made it clear that "in general" it is not desired to encourage foreign companies to make a habit of financing their activities in the country by local borrowing. "Indeed their presence is welcome more by reason of the capital they bring."(201)

The control over local borrowing has not been completely successful because although the level of local borrowing is restricted to the foreign company's equity contribution, "it appears this limitation applies to private local borrowing only,

and does not include loans from public institutions like the Industrial and Commercial Development Corporation, which in some years have been greater than the foreign equity brought in by the enterprises."(202)

The institution dealing with requests for banking facilities over £50,000 and charged with the responsibility for reviewing management, technical and service fee payments from subsidiaries to headquarters abroad is the Capital Issues Committee which has representatives from the Central Bank and the ministries of Commerce and Industry, and Finance. The Committee is, however, handicapped in that its duty to preserve the country's foreign currency is not very much of a match to the foreign firms' accounting procedures. Langdon points out:

> "The principal criterion it uses is the foreign exchange cost of projects - though in its analysis of share issues and overdraft requests it is also concerned to find contributions toward 'economic development' before approving applications. Such development, however is conceptualized in rather broad and uncritical terms, so that virtually any significant

expansion planned by a subsidiary will win the committee's favour. Nor does the committee do its own detailed cost-benefit calculations on projects - often it relies primarily on the companies' own statistical analyses."(203)

What's more, it has always been quite difficult to discover cases of transfer pricing as such practices are carried out very delicately (in terms of accounting procedures) by the affected companies. One way in which transfer pricing can be curbed is one recommended by the Manufacturing Division of UNCTAD which has been toying with ways and means to plug the various loopholes. Here the argument is that there should be a vigorous anti-monopoly legislation on the international trade plane and that the affected countries should devise more air-tight protection measures against monopolistic franchises and the use of almost one-sided management contracts. Under such a legal framework, it is argued, repatriation of excessive profits would be curbed, if not stopped altogether. But how true is this? In this area, the mechanics or devices of accountants in thwarting counterstragies against transfer pricing are as baffling as the scene before Oliver Twist in Mr. Fang's magisterial office. In the case of

under-invoicing and over-invoicing exports and imports respectively, there is not very dependable way of ascertaining whether the good quality goods quoted are the ones actually delivered and not inferior ones. This is in the case of imports. As regards exports, there is also the situation whereby quotations are given of purportedly lower-grade goods when in fact the goods actually exported are of a high grade thus leading to smaller values being realized. This again is hard to detect. In addition, goods on the documents furnished to the Central Bank may be different from the actual quantities exported or imported. Thus, capital flight through the manipulation of quantity, quality and price continues through lack of adequate machinery to detect such practices which are made more easier by the high incidence of intra-firm and related party trade(204) and the preoccupation by accountants of the multinational corporations on the new methods or loopholes as and when old ones are discovered and plugged. The answer of the problem would seem to lie in the concerned Government agencies knowing the problems, the methods used and finding the solutions to the problems. This is, however, not easy for the forces working against the country's interests will continue

to devise accounting systems and arrangments to make transfer pricing a lucrative way of filling their coffers with ill-gotten capital.

3. The Policy of Kenyanisation

The Kenyanisation or effective Africanisation policy in the private sector is regarded by the Government as a tool of control over the operations of the foreign firms. After independence, it was natural that the African Government would lay stress on the policy of Kenyanisation. The Trade Licencing Act of 1967[205], for example, excluded non-citizens from trading in rural areas and in certain parts of th main towns and from handling certain goods. Another legislative measure was the passing of the Immigration Act in 1967 and the formation of the Kenyanisation of Personnel Bureau.

The Bureau was formed at the end of 1967 to advise the Principal Immigration Officer on work permits, to assist employers in the Kenyanisation of jobs, to act at an employment service for skilled, managerial and professional workers and trainees and to revive the careers advice programme. The Bureau has two principal tasks: recommending the issue or refusal of work permits, numbering 28,677 at the end of 1970, and registering all form 4 students and skilled

or trained persons who wish to register with a view to placing them in jobs. From 1967 onwards, expatriates were allowed to work only in those areas where Kenyans with similar skills or qualifications were not readily available and in such cases, they were permitted to take up jobs only on the understanding that employers take effective training programmes to produce trained Kenyans within a specified period, which normally is the duration of the validity of work permit issued. The Bureau has evolved an effective "training follow-up" system which ensures that this requirement is strictly adhere to. Those job holders within the clerical or sales category must apply through their employers for the "renewal of an entry permit." Whereas before the holder of a dependant's pass could move from job to job, whether the dependant of resident certificate holder or of an expatriate, now a dependant must apply for an entry permit of class D. Class A is general employment category, the most important one, where a job is held only for a specified period. Other categories of passes are divided according to types of work (for example farmer, self-employed, profession, et cetera) or status of residence (for example retired person or widow with several years of residence). The job holder is granted an entry permit in the relevant class for the period requested by the employer (permits can be granted for up to five years) or for a shorter

period, at the discretion of the Principal Immigration Officer. The background and policy motives were well analysed by Tony Hall as follows:

> "It is generally accepted among thinking people, that the Immigration Act, which in steady phases will put all non-Kenyans together on a new residential and work status, and the Kenyanisation Bureau which is the main machinery to gather and co-ordinate the date necessary to bring citizens steadily into the economy, are both democratic in concept and urgently necessary - socially and economically - in the long run."(206)

Hitherto, most of the country's non-citizen working force could move from one job to another and private employers could hire them with virtually no reference to control by the Government. These were the non-Kenyans with residents' certificates. And many people in this category - that is, the permanent residents - had all the privileges of citizenship with fewer responsibilities than citizens. Quite clearly, so long as the Government had no say over the move of the majority of the country's non-Kenyan workforce, which occupied most of the high-level jobs, they could not get started on Africanisation or localisation of the

economy in any meaningful sense.

The Kenyanisation programme has been implemented in stages by "calling up" certain occupations and later successive industries. The employers in an industry that is "called-up" have to submit returns giving full details of their foreign employees. Each case is then scrutinised and a work permit is recommended only if a suitable Kenyan citizen is not available among those registered with the Kenyanisation of Personnel Bureau. By Legal Notice No. 87 dated March 14, 1969, Banks and Finance Houses were required to register all non-citizen employees within 90 days. This was followed by the insurance industry and thereafter the Oil industry and East African Power and Lighting Co. Ltd. were given notice and this procedure has since been followed so that by now the majority of industries have been 'called' up."

There were 7,316 registered expatriates with work permits in Kenya by April, 1977.[207] Of these 238 were secretaries while the majority were teachers, engineers, company secretaries and accountants.

There has been many misgivings about actual pace of Africanisation of personnel in the private sector. For example, in a speech read at the official opening of a

Mobil Oil Company seminar on management in 1978, the Permanent Secretary in the Ministry of Information and Broadcasting, Mr. D. Mbela, claimed that foreign workers spared no efforts to perpetuate their stay in the country. Some, he said, indulged in "practices and manoeuvres designed to make them indispensable, particularly to the African executives that have no liking for hard work:

> "These Africans are the bosses who shamelessly canvass for work permits on behalf of guest workers because their service includes doing work which should, under normal circumstances, be done by the bosses themselves...No wonder, then that after 15 years of independence, effective Kenyanisation continues to be an elusive dream."(208)

And rightly so. But, then it should be realised that Africanisation is not of much fundamental change anyway. The position is well put by Frantz Fanon:

> "Seen through its eyes, its (the national middle class) mission has nothing to do with transforming the nation; it consists, prosaically, of being the transmission line between the nation and a capitalism, rampant

though camouflaged, which today puts on the masque of neo-colonialism. The national bourgeoisie will be quite content with the role of the Western bourgeoisie's business agent, and it will play its part without any complexes in a most dignified manner."(209)

It could also be mentioned that the old Employment Act was amended in 1976(210) with a view to reflect within the Act the post-independence conditions. The Employment Act and Regulation of Wages (General) Order do provide for free housing or house allowance for all employees earning shillings 2,000 - and below. The laws also provide for free medical treatment for employees.

The appointment of African distributors for the manufacturers' products has been a part of the Kenya Government policy of Africanising the distribution system. In a circular to local manufacturers in 1973,(211) the Permanent Secretary to the Ministry of Commerce and Industry expressed concern that since the attainment of independence not much was done to Kenyanise the distributive trade:

"Although the Africanisation of the

distributive trade is one of the main elements of the Government's economic policy, the Government has deliberately avoided introducing coercive measures to force the pace of Africanisation in the distributive trade.

This line of action has been followed under the assumption that local manufacturers will consider it to be in their best interests to embark on the Africanisation for their distributive trade activities without undue delay."

The circular aimed at finding out the extent to which local manufacturers had complied with the policy of Africanising the distributive trade. The pace has not been on the tempo required and indeed as far back as 1967 the Minister for Commerce and Industry was complaining that the Presidential directive that the distributive trade be Africanised had met very little success. Addressing a luncheon of the Kenya Association of Manufacturers, Mr. Mwamunga warned the industrialists that "there would be no getting away from the directive:"

"My Ministry had been following the

execution of this directive but, so far very little seems to have been achieved."(212)

Firestone E.A. Ltd. have appointed African dealers in various towns of the country. East Africa Industries products are distributed by Kenya citizens traders who hold valid wholesale licences. The number of Africans distributing East Africa Industries products has grown from 200 in 1968 to 800 in 1977.(213)

And B.A.T. Kenya Ltd. has Kenyanised 100 per cent/the distribution system of its products. /of

4. Price Control Measures

Price control measures have also contributed as a form of protection for consumers against possible exploitation. The relevant piece of legislation is the Price Control Act(214) whose functioning is administered by the Price Controller under the Ministry of Finance.. The extent of coverage, however, is limited as can be seen in the following excerpt of an interview with the Minister for Finance:

> "Price control is important but it isn't an issue to be viewed separately from the rest of the economic system. In our economy we have agreed that we shall have a system which permits a great measure of economic

freedom of activity.

If we control some items in internal trade it will be those which we feel are essential for the daily consumption of the ordinary person in Kenya. It has never been at any time the policy of the Government to control prices of all items in the economy.(215)

In line with Kenya's allowed <u>laissez faire</u> outlook and approach, price control is not extended to include every item in the economy. The suggestion for such extension in terms of the application of the Price Control Act has been frowned upon by the country's Treasury as this is feared to result in a centralised system. Mr. Kibaki is quite vocal in this respect:

"Frankly I am doubtful whether such a centralised system can be managed efficiently by the state; and secondly whether it is in practice, the kind of system that would be compatible with political democracy; and thirdly, and most important, whether such a system would lead to more efficient organisation of production and distribution in our country. I don't think that it would.

"I do think (and I said so in my Budget speech

this year in June) that we should, as a country, identify 20 or so items which are essential for consumption by ordinary people, particulary in the field of foods, and then control only those and make sure that price control is effective. For the rest, I would rather say we left it to a freer market competition. But then, there are people who differ."(216)

There have been complaints that there have been delays in the administration of price controls under the Price Control(General) Order. Such delays have of course resulted in substantial losses of profits and this has made local manufacturers feel that the Government was deliberately preventing them from earning a minimum return on their investment. To avoid such a situation an amendment has been made so that a firm producing a commodity subject to the General Price Control Order can effect a price increase if a 30-day delay is experienced. If the firm can demonstrate that its direct costs, other than wages costs, have raisen to justify a price increase under the Order, it shall apply to the respective price increase to the Price Controller. If, however, the firm has not received

a reaction from the Price Controller within thirty days, it may go ahead and implement the increase on the assumption that approval has been given. The Price Controller will, however, continue to monitor all proposals for price increases and will reserve the right to require price reductions even after the 30-day period a has expired.

Closely related to the above is the Weights and Measures legislation which is administered by the Ministry of Commerce and Industry. The principal aim of the Weights and Measures Department is to ensure that uniformity of measurement in all trade transactions is maintained all the time, that fair trade transactions prevail to give protection to consumers, producers and manufacturers at all levels. The Department encourages the fairness by _inter alia_ (1) ensuring a high degree of accuracy in all weighing and measuring means used in trade transactions, and (2) enforcing the various legislation which aim at curbing malpractices in trade transaction.

5. The Control over Quality of Produced Goods

The establishment of the Bureau of Standards has also meant a requirement of production of high quality products. The Bureau was set up by an act of

Parliament, the Standards Act of 1973.(217) Establishment of the bureau was prompted by the government's concern over the quality of the locally manufactured goods as well as that of the imported ones. An editorial in the <u>East African Standard</u> some five years ago gives the unsatisfactory state of affairs:

> "...While the talk goes on, what do we have from many manufacturers of every day goods? We have shoddy workmanship.
>
> On average, about one match in six works at the Coast. In an average packet of pins a great proportion will have no point. Hinges are not counter sunk so that the screw is either sticking out from the hinge when fixed or is loose and taking little stress. Tyres do not come up to the standards of motor cars.
>
> How on earth shipbuilders or other workers manage with some of the wood screws available in the country at present is pure mystery. These are just a few examples of poor quality goods which are being produced..."(218)

The Bureau of Standards is charged with the responsibilities of promoting standardisation and formulation of specifications and codes of practice. It is also the responsibility of the Bureau to provide facilities for testing and calibration of instrument and also to provide facilities for examination and testing of manufactured goods to ensure their compliance to the existing standards. So far, the Bureau has compiled a list of 22 products for whose standards have been set. The items whose specifications have been completed include the forerunner of corrugated steel sheets, gas cylinders, various types of paper and board, sawn timber, unprocessed whole milk and safety match boxes.[219] A permit to use the Standardisation Mark is obtained from the Bureau. The presence of this mark is an assurance to the consumer that the product has been produced to comply with the requirements of the Kenya Standard under a system of supervision, control and testing operating during manufacture and including periodical inspection at manufacturer's works in accordance with the certification Marking Scheme.

The Bureau of Standards has recruited professional staff, including engineers, food technologists and statisticians. The Bureau's work is monitored

and approved by National Standards Council composed of prominent people of special disciplines both in private life and Government. Kenya Standards were already being implemented on a voluntary basis and would soon become compulsoty.

6. Need to Encourage Competition

The Kenya Government whilst generally helpless before monoplies has sometimes surprisingly shown some sharp teeth. For example, the Government has decided to licence another tyre company in the country after the inability of Firestone E.A. Ltd. to meet local demand for tyres. Speaking recently at a presentation of long service awards to employees of Avon Rubber Co.(K) Ltd., the Minister of Commerce and Industry, Mr. Mwamunga stressed that the Government would take measures to liberalize all sectors where monopolies exist: "By encouranging competition, we not only ensure consumers more choice, but we also encourage firms to produce more efficiently so that they can offer goods to consumers at cheaper prices." (220)

When attacked by local press for allowing a proliferation of imports into the country, the then Minister for Commerce and Industry, Dr. Kiano, made the

point that his Ministry was bound to protect the consumer and that "too much protection of local industries can mean the exploitation of wananchi (the common people) by the monopolists." According to the Minister, "quite often a little bit of competition is healthy in inducing manufacturers to lower their prices and giving the customers alternative choices of products they require."(221)

In 1974, there was a big debate as to whether or not the Kenya Bankers Association was a form of cartel or a trade association. In a Circular Letter of August 14, 1974, the Governor of Central Bank of Kenya asserted that trade associations ... whose intention is to discuss or consult on the imposition of prices, charges or rates attempt to create an environment favourable to themselves and injurious to the public interest. The Kenya Bankers Association was deemed by the Governor to be no exception to this observation and that "although it has of late made no décisions known to the public, its influence appears to manifest itself in lack of independent initiative, innovation or competition among Kenya banks." The Governor further observed:

"Elsewhere in the world, it is a condition of

granting a banking licence that meetings between bankers for the purpose of discussing charges or rates are regarded as conspiracy in law."(222)

The response from all the old established banks was that the Kenya Bankers Association was not operating in restraint of trade and that other bodies like the Law Society of Kenya existed as an association for discussing of the common various and peculiar problems of the particular field. "A cartel tends to imply power to increase charges but, of course, the Banks cannot do so without the permission of the Central Bank."(223) Some of the banks were at pains to point out that they did not subscribe to the Rate Guide/ Summary of Banking Arrangements, which to all intents and purposes is a cartel.

The cartel has had glowing splinters thrown at it. From July 1978, the level at which bank charges for services were to be fixed were to be left to market forces, with the only stipulation that the interest rates for loans and advances must be within a spread of 3 per cent above the Central Bank of Kenya discount rate which currently stands at 7 per cent.(224) In addition, the charges and rates were to be displayed

for bank customers to see and published in the Press. The charges to be published were to cover those commissions and interest rates applicable to ordinary personal accounts, such as cost of bank cheques, bankers orders, credit transfers, sales of travellers cheques, special clearance, interest charges, ledger fees and such like services.

7. Reduction of Investment Incentives

The reduction of incentives is one method of lessening the strength of the hold by the foreign firms on the country's economic activity. In the 1974 Budget, the Investment Allowance was put under some restriction in its applicability. The Allowance was hitherto weighted in favour of new industries being located in rural areas - away from the two big urban centres, Nairobi and Mombasa. The 9 per cent subsidy for new investments in buildings and machinery was only to be available in rural areas, under the new measures. During his Budget Speech, the Minister for Finance noted that he had been reconsidering the usefulness of the investment allowance provided under the Second Schedule to the Income Tax Act. At the current corporation tax rate, the allowance was obviously superflous. The Minister observed:

"In our present balance of payments situation, a continuing general subsidy to what is mainly imported capital in addition to all the other investment incentives, is difficult to justify. A general subsidy to capital when we are anxious to create more jobs - not to have jobs taken away from machines - is also difficult to justify."

Thus from January, 1975, the Investment Allowance ceased to be applicable to new investment in rural areas, that is, outside the municipalities of Nairobi and Mombasa. The Allowance ceased to be a general subsidy for capital and was to become a special subsidy for the dispersal of new investments away from the two main industrial centres in line with the country's declared policy of encouraging wider distribution of industries.

In the same Budget Speech, Sales Tax Exemption Certificates were also brought within the orbit of control. These Certificates had been abused by some manufacturers who bought raw materials free of tax and sold to wholesalers without further processing. But this loophole was plugged and from 1975

a manufacturer had to pay tax on the raw materials when they were purchased or imported but with the right to reclaim as a refund, the tax in respect of such raw materials when he paid tax on his manufactured products. And in the 1976 Budget, local manufacturers were not to get export compensation if they were at the same time claiming a remission of Customs duty on raw materials and components.

And in the 1975 Budget Speech, sales tax was inreased from 10 per cent to 20 per cent on a part of luxury items not usually consumed by wananchi (common people). Local manufacturers were urged to become more cost conscious in their imports through a 10 per cent duty imposed on raw materials. More labour intensive industry was encouraged by a similar 10 per cent duty on machinery imports for manufacturing. Items such as metal sheets, tubes and pipes - which were free of duty before - were taxed at 10 per cent.

One can also mention the Government stand on charities paid by companies and the tax implications thereof. The Government does not allow tax offsets for companies or individuals who contribute to charity. In a statement some seven years ago, the Permanent Secretary to the Treasury issued an official statement:

"The proposal (that the Government give tax

remission to companies which donate money to charity) was examined in considerable depth as far back as 1965 and the Government decided then that if it were to allow companies to charge contributions to charity against income tax, such a system would be open to widespread abuse."(225)

A crucial problem which faces the Kenya Government is how to influence industrial investment decisions to reflect the country's objectives of industrialisation. These objectives are to promote socially desirable projects that would utilize maximum local resources- human and material - foster greater link between agriculture and industry, and promote dispersion of industries into the rural areas. In order to achieve these objectives, as well as secure stimulated and sustained industrial growth in the country, the Ministry has established different specialised institutions and programmes. Important among these are the ICDC, the Kenya Industrial Estates, the Rural Industrial Development Programme, the Industrial Promotion Areas, and the Industrial Survey and Promotion Centre.(226)

The bargaining power of the Government is increasingly gaining ground as a result of having relatively young articulate men on such bodies like the Investment Section

of the Central Bank, the Capital Issues Committee and the New Projects Committee. However, the meticulous preparations of feasibility studies by the foreign companies coupled with their resources to draw up exceedingly generous management agreements as well as the companies' ability to make investment proposals at the highest level- all these, plus the lack of qualified personnel to deal with such matters as cost aspects of such things like transfer of technology, equity portfolios and so forth- make the position of the multinational corporation a factor to be reckoned with.

In view of the open, free enterprise economic system in Kenya, it is then becomes an up-hill task to initiate and implement water-tight control measures over the said system. The words of Professor Reginald Green are very relevant here:

> "Initially controls tend to be based not so much on modifications of capitalist indicative planning or on African-based models, as on colonial formulae and those of the metropolis in the 1930s and 1940s... Unfortunately the tendency of most control systems has been to multiply over time, creating cumbersome, overlapping, and self-contradicting mazes riddled with loopholes. Economic

development cannot be regulated, much less induced, primarily by means of complicated bureaucratic rule books, especially when the civil servants operating the rules are too few, too inexperienced, too little grounded in applied or technical economics and possessed of too few instruments to detect and sanction avoidance or evasion. At the worst the control systems create widespread opportunities for corruption which destroy both the morals and morale of the civil service and bring the government into contempt in the eyes of the business community and the majority of the population alike.(227)

CHAPTER V

METAL BOX KENYA LIMITED: A CASE STUDY

The purpose of this case study is to show that for Kenya, and the entire "Third World" for that matter, there is no hope of ending exploitation and under-development within the framework of the imperialist system. As ought to be known, the modern corporation began when manufacturers embarked on the system whereby they built their own sales and distribution networks and then their own extensive purchasing organisations. By fusing mass production with mass distribution, multinational corporations came to coordinate administratively the flow of a high volume of goods from the suppliers of the raw materials through the process of production and distribution to the buyers. In such an arrangement, a managerial hierarchy was created to oversee several operating units and to coordinate and monitor their activities. Metal Box Kenya Ltd. is a direct offspring of such a phenomenon.

Metal Box Kenya Ltd. is one of the 16 principal subsidiary companies of Metal Box Overseas Ltd. which in turn is owned by Metal Box Ltd. which is incorporated in Great Britain and is Europe's largest packaging manufacturer.(228) In 1970, The Times(229) ranked Metal Box fifty-fourth among British companies

by turnover and forty-eight by capital employed with 52,400 employees. Overseas operations at that time were quite significant in the company's published accounts: thirty five cent of sales, by value, were made overseas thirty nine per cent of the profit before tax was earned there and forty seven per cent of Metal Box employees worked there.(230) A good portion of the overseas trade was naturally carried out in the colonies of the "Mother Country" thus clearly buttressing the argument of the imperialist expansion intentions of the capitalist companies at "home". Through the various expansionist devices mentioned above was born Metal Box Ltd. which is in every way a unit of monopoly capital and ipso-facto obeys the following imperatives: maximum profits, the addition of assets by exercising as much control as possible over sources of raw materials and other supplies, distribution channels and the markets in which it sells. The thread of this capitalist trend runs through the case study.

1: HISTORICAL BACKGROUND

a. Beginnings in Europe

The individual business of Metal Box Kenya Ltd. is concerned with the following: the manufacture and

printing of containers and closures, both metal and plastic, other plastic products and security printing. The company has branches in Thika, Ruaraka and Nairobi and a subsidiary, Betacans Ltd., whose operations are based in Mombasa.

Canning began towards the close of the 18th century when, as history has recorded, a Parisian chef by the name Appert won a big money prize for preserving food for the French army. It was not until the French scientist Louis Pasteur had supplied the scientific basis for Appert's method that it proved commercially possible. The method was applied under a patent in England to various containers, including pottery-ware and tin-plate canisters. The industry began in the United States in 1820 and by the end of the century had become commercially mechanised.

Tins in the last 30 years or so of the 19th century were used for a good many products besides food, but it was as suppliers to the food and tobacco traders that the direct ancestors of Metal Box first came to prominence. In late Victorian England and for many years afterwards they were nearly all imported, being brought in on the rising tide of food supplies from Australia, Argentina and above all the United States. The British canning industry, against this kind of

competition, remained insignificant until after the First World War.[231]

The tin-box industry that grew roughly between 1870 and 1914 was a service trade for the manufacturers catering for growing market in consumer goods particularly food and tobacco. The top firms were much larger and more powerful than the tin-box makers themselves whose business success and survival depended on specialized skill in one of packaging. The various tin-box makers were greatly family concerns and it was only after the First World War that the economic necessity of a merger was reckoned with. The idea of merger took shape with the British Tin-Box Manufacturers Federation, perhaps partly as a war time collective effort imposed by the Ministry of Munitions between the pre-war competitors. It was nevertheless the directors of Hudson Scot, Atkins & Co. Ltd. of Hull, Barclay and Fry and Henry Grant and Co., London, who late in 1921 agreed to merge by exchange of shares with a holding company - Allied Tin Box Makers Ltd. In February 1922, to incorporate the printing done by Scot and Barclay & Fry, the name was changed to Metal Box and Printing Industries Ltd. But two of the founder fathers in the tin making industry were still reluctant to join the new business merger, and they were to sit on the fence for some time. These were Williamson and

Barlows. But their indecision was dislocated when the threat of American invasion in the tin making trade became real. By 1930, Robert Barlow had agreed to take the generalship of Metal Box and Printing Works Ltd.which became a public company under the Metal Box Company Ltd. Dr. Reader in his book on the company comments thus:

"When Barlow retired from active management in 1961, at the age of 69, he might have been said to have completed the process which he himself had begun in the thirties of getting rid of the old owning families from Metal Box. There have been few British business men so consistently successful on such a large scale as Robert Barlow. He saw the opportunity in the early thirties for the foundation of a British canning industry and he propelled Metal Box towards it with energy, foresight, ruthlessness and charm, which were all elements in his character. No one who knew Metal Box in Barlow's time can speak of it without speaking of Barlow, and if the history of the company reads rather like a biography of the man, then that is just for Metal Box was Robert Barlow's creation and it is his monument.[232]

During the thirties, under Barlow's direction, the

base of Metal Box's foreign policy was solidified. This was grounded on the alliance with Continental Can, an American Company[233] and a division of markets resulting in Metal Box preoccupation with continental Europe and British territories overseas. Overseas expansion halted by the war, started again, and by the early fifties companies were established in Malaya (later Malaysia); East Africa, Pakistan, the West Indies and Rhodesia. In 1960 a company was set up in Nigeria; in 1968, in Thailand - the only company in this group, apart from the South Africa Company's Mozambique subsidiary, which was in territory which never had been British.

Reader observes:"The Pakistan company was set up purely in response to political necessity. Elsewhere, the companies were aimed at some particular opportunity as, for instance pineapple canning in Malaya or the canning of meat in East Africa, and a consequence they tended to depend heavily on one user or group of users, particularly in territories where there was little in the way of local demand to support a varied out-put."[234]

In the 1970's we find that Metal Box had become a multinational business on a very considerable scale. Its origins, however, and the main base of its operations,

remained and still remain British, despite protestations to the contrary by the expatriate staff of the company's local subsidiary.

b. Penetration in East Africa

A limited amount of business had been done with East Africa as early as 1934. These were principally flattened cans supplied from the United Kingdom and reformed locally. Between 1946 and 1947, there were discussions with oil companies and Liebigs which resulted in plans to build a factory at Dar es Salaam for making 4-gallon debes and corned beef cans.

On July 23rd, 1948, the Metal Box Company of East Africa Limited was incorporated with an authorised capital of £100(which was gradually increased over to intervening years to £1,250,000 by March 7th, 1963 . At this time, that is, the time of incorporation, plans were finalised for the Dar es Salaam factory. Decision was also made to build a small unit at Thika for reforming flattened can ex U.K. for supply to Kenya Canners Ltd. In 1949 building at Thika was completed and work started at Dar es Salaam; operations commenced at both factories and authorised capital increased to £300,000.

Between 1951 and 1954 some general line work was done

at Thika and gradual expansion (with second hand machinery ex U.K.) carried out. In 1955, authorised capital was increased to £750,000 (Issued totalling £550,000). In 1956, high speed can line was installed at Thika for manufacture of food cans, largely for Kenya Canners Ltd. Three years later, press and lines were installed for manufacture of open top ends. At the same time, authorised capital was increased to £1,250,000, Issued capital being £1,000,000.

In 1960, the Metal Box Company of East Africa Ltd. acquired Plastics (Africa) Ltd. The following year, printing equipment was installed at Thika. Hitherto printed tinplate was being supplied by Dar es Salaam but increased demands in Kenya and Tanganyika caused severe overloading of equipment. A line for manufacture of rectangular cans was installed at Thika for the supply of corned beef cans to Kenya Meat Commission. Between 1962 and 1964, there was expansion of general line business and a line was installed for making collapsible tubes.

In 1966 the Metal Box Company of Tanzania Ltd. was formed as a separate company but a subsidiary of the Metal Box Company of East Africa Ltd. In the same year, additional printing equipment was installed at Thika.

Also the year witnessed the formation of Security Printers Ltd. as a subsidiary of the Metal Box Company of East Africa for printing cheques and other security documents. Until about 1967, there was no company which specialised in the production of bank cheques, prepared and printed under the security necessary to avoid possible abuse, although some were being printed by commercial printers. Then the international complex of the Metal Box bought out the two main sources of Bank cheques in Britain: W.W Sprague and Co. and Perkins Bacon Ltd. By 1969, the local printing company was supplying about 17,00,00 cheques used annually in Kenya and Uganda.

In 1968, Calpak (California Packers Ltd.- Delmonts) decided to extend operations based on growing their own pineapple on a 10,000 acre estate at Thika. With regard to the Tanzanian side of things, the National Development Corporation of Tanzania acquired a 50 per cent holding of the Metal Box Company of Tanzania Ltd. and the rest of the shareholding was held by The Metal Box Company Overseas Ltd, in Britain. Metal Box Company of East Africa Ltd. was appointed the managing Agent. In the same year, that is 1968, authorised capital of the Metal Box Company of East Africa Ltd. was reduced to £750,000 (Issued £750,000) arising directly from the sale of the Metal Box Company Ltd. of Tanzanian Ltd.

A special resolution was passed at the extraordinary general meeting held on May 5th, 1970 to change the company's name from the Metal Box Company of East Africa Ltd. to the Metal Box Company of Kenya Ltd., and the change was filed with the Registrar of Companies and became effective on May 5th, 1970.

During the accounting year ended March 31st, 1970, the Company took a controlling interest in Betacans Ltd. manufacturers of 4-gallon debes at Mombasa.

In 1971, the liquidation of the two subsidiary companies, Plastics (Africa) Ltd, and Security Printers Ltd, and the absorption of their business with that of the business of the Metal Box Company of Kenya took place. One of the reasons for such move was due to the Metal Box Company of Kenya Ltd. being a public company and particularly in the case of Security Printers Ltd., the trading profit was large and reflected the advantage accruing to it as company arising from site management together with printing services, which would be much more expensive if the company had operated on its own. This, in the opinion of the company, was not particularly important whilst it was not necessary to file the accounts but customers now had access to the accounts and

it was necessary to make considerable alterations to the company's operating costs to reflect a true level of profitability. In the case of Plastics (Africa) Ltd. the company was under capitalised and, due to its expansion of business, it was necessary to double the issued capital to achieve a reasonable proportion of share capital to capital employed. There was also a tax element inherent in the merge. The writer was advised that a group of companies operating in similar circumstances, with central administration services, has been assessed for taxation purposes by setting off central adminsitration costs against dividends arising from subsidiaries. In the current financial year an assessment on this basis could cost a further £9,800 in corporation tax.

In 1974, major expansion works were carried out at the Thika's Metal Box factory to meet the increased demand of containers in the country. The Nairobi factory covers 7½ acres and began production in September 1970. The building contains new general line, machinery, a toolroom and a maintenance department. The general line production caters for metal containers of all types including fancy decorative boxes, aerosols, metal closures and aluminium tubes.

The company also has an open-top factory making cans for processed food, beer, cider and soft drinks. The paper group makes cartons, cardboards and metal composite containers, laminations, cheques and labels. The plastics division, on the other hand, makes polythene film bags, sacks, bottles, moulded plastic containers, closures and packaging components. The Ruaraka side of business specialises in research and engineering development.[236]

2. SHAREHOLDING AND ORGANIZATIONAL STRUCTURE

As at March 31, 1979 the authorised share capital of Metal Box Kenya Ltd. comprised 11,000,000 ordinary shares of Kshs.5 each. At that date, 8,056,002 Ordinary shares of Kshs.5 each had been issued and fully paid. At the same date, a scrip issue of 1 for 2 shares held was capitalised from unappropriated profits amounting to 2,685,334 shares at Kshs.5 each.[235]

The interesting point as regards the existing shareholding structure is why it became necessary for Metal Box Overseas Ltd. to invite subscription shares by other parties and to cease to be 100 per cent holding company it had been for many years since establishing its operations in East Africa. One reason

which the expatriate staff of the local subsidiary would not like to discuss about, is the reality of the changing circumstances. After the attainment of independence, for a company which has substantial investments in racist South Africa, it was only to be expected that the multinational company would attempt to cloak its tainted capitalist image with acceptability by the African Government. One way out of this was to bow to the new economic nationalism bent on the new administration participating in the private sector for "national interest". This meant that the Metal Box would view favourably to requests by Government institutions for equity participation. But allied to this basic fact was the fear of competition from new investors: to avoid such invasion, it was good business sense to be associated with a Government body for protection as the argument would be that an undertaking in which there was some local participation needed protection. It was therefore not surprising that the request by ICDC to acquire some shares in Metal Box Kenya Ltd. was considered favourably.

Before ICDC formally requested Metal Box Overseas to be allowed to purchase shares in the company's subsidiary, the corporation has been looking into the possibility of establishing a local can making industry. In 1965,

the Executive Director of ICDC wrote to Messrs. Jurgen Roper of Hamburg[237] pointing out that a plastic bottle factory was not at that time thought to be a viable proposition and that neither was the suggested water turbine justified. However, ICDC requested the German company "as a matter of urgency" to give the best offer for a complete metal container manufacturing plant.[238] The German concern, however, advised ICDC that a production of only 500 pieces was "not economically sensible" and that it was preferable to have a plant with a capacity of 1,000 tins per day. However, ICDC did not persue the matter further and instead the conglomerate thought it better to buy shares in Metal Box. In June 1969, the corporation was offered 10,000 at par (that is Kshs.20 each). Later ICDC was offered 60,000 shares at shs.25 per share.

The writer was not able to establish the economic sense behind the above quotations for the purchase price of shares and no wonder the corporation felt that the price of Kshs.25 per share was on the high side.[239] The 10,000 shares, were, however, paid for in cash apparently on the persuasion of the accounting principle based on dividend cover as an indicator of the rate of investment return. There are

of course differences of opinion as to whether the level dividend cover is the right way of looking at investment benefit (for capitalists this so of course) but one would have thought that it is good economic sense to look at the par value of shares vis-a-vis asset cover especially in a situation where the factor of labour exploitation is significant and where the level of overall investment is relatively low.[240] This is so especially when we consider the fact that the corporation must always appraise business proposals with Kenya's interests as the first priority. All the same, ICDC found "dividend cover" approach acceptable.[241] The Corporation's Chief Accountant, in an internal memorandum to the Executive Director , commented:

> "The (dividend cover) ratios indicate a generous dividend policy coupled with a good potential (sic) of a share for capital growth. Although in 1967/68 no retentions were available, there were sufficient revenue reserves to enable the company to maintain a high dividend of 10 per cent on fully issued capital. Normal dividend should be covered twice but on average of 1½ is considered satisfactory."

The other reason for inviting outside parties in the

shareholding of the company was of course the need for money to meet expenditures of capital nature. Thus the money for the payment of the 60,000 shares offered to ICDC was borrowed from the East African Development Bank with the share certificates as security. When the bank extended a 6 million K shillings loan to the company, an undertaking was reached that a half of that loan carried an option of its conversion and that the bank would give ICDC part or the whole of its conversion right. At the Board meeting of Metal Box Kenya Ltd. on February 14, 1974, the meeting approved a resolution that 400,000 ordinary shares be alloted and issued as fully paid up shares to ICDC. The value of the shares was shs.3 million thus indicating a premium of kshs.2/50 per share since an ordinary share was worth shs.5 each.

The shares by the Development Finance Company of Kenya and the Industrial Development Bank were also issued by the company as a consideration of funds advanced by these two institutions. It is also important to note that these institutions are associated /the Kenya/with Government by way of equity participation and that this is still a further illustration of the company's drive

to have closer links with the leadership of the day.

As a manufacturing firm, the company was not affected by the Government regulations of 1975 to reduce borrowing below the level of 20 per cent of investment, including share and loan capital and unimpared reserves. Thus during this time, the Industrial Development Bank obtained shareholding in the company by way of equity participation amounting to Kshs.2 million at a price of shs.7/50 per ordinary share of Kshs.5 and a loan of Kshs. 3 million repayable in 10 equal half yearly instalments commencing on June 30, 1976. with interest at a rate of 10.5 per cent to go towards the expansion at Thika and Ruaraka branches. An additional term loan of Kshs.6 million has been granted to the company by the Industrial Development Bank to cover the expansion of printing facilities at Thika Branch and additional can making machinery at Nairobi. In 1974, the company also secured a loan of Kshs.3,460,000 from Development Finance Company(DFCK) repayable in 10 equal half-yearly instalments from September 30, 1977. During the same year, DFCK was asked to provide Kshs.1,540,000 in new equity capital.

The foregoing does not illustrate a trend towards surrender of control over the activities of the company

by the investors in the U.K. but rather clever devices to raise capital locally instead of bringing the same from overseas. Even the shares given to the Industrial Promotion Building Ltd., R.A. Panju, A.W. Investment and the Asian owner of shares in Kenya Commercial Bank Nominces Ltd. were in consideration for the purchase by the company of Betacans Ltd.

ICDC has gradually increased its shareholding and is intent on progressively raising the present level of about 14 per cent of the total share capital to 49 per cent. Also, since May, 1971, considerable attention has been given by Metal Box Kenya Ltd. to a public issue of the company's shares for an approximate 20-30 per cent of the total holding. It is expected that the issue of shares will be new issues and not by the sale of existing shares. Such increased capital would of course be welcome to the company because, from studying their financial statements, it becomes obvious that the cash generated thereof would be absorbed by a reduction in current account indebtedness arising from overseas purchases together with the major items of capital expenditure. Additional finance here would be the consideration for the increased shareholding by outside parties.

Presently, the big representation of "home company" on the local Board of Directors is apparent from the composition of the current directorate:

Chairman and Managing Director-(British)-Metal Box Interests

Three more British Directors - "

One Kenyan Director - "

Three Kenyan Directors - ICDC, IDB and DFCK Interests.

Such strong representation, the writer was advised, is necessary in order to "guarantee that the company is run to the satisfaction of the shareholders." And indeed this is so. Of the eight directors, four are on full-time working days at the offices of the local company while the fifth "Metal Box director" is in active employment by the holding company in the U.K. The three minority directors only attend the Board Meetings which discuss agendas initiated (by and large) and prepared by the top "Metal Box Men" in Kenya. And it would seem that the minority directors have much to chew: the ICDC representative, that is the Corporation's e Executive Director/presents or is expected to /re represent the Corporation in over 60 companies. He simply does not have the executive time for the various

Board meetings and more often than not he has to nominate fairly junior officers to represent him at such meetings. Such officers are no match for the well informed "Metal Box Directors". However, according to a senior official of the "Kenya company" the significance of the hold by Metal Box Overseas Ltd., and ultimately the parent company, over the subsidiary company in running its affairs should not be over-emphasised. Before any major decision is implemented, "behind the scenes" consultation with the minority directors are held and their views sought and valued. The bare fact, however, is that the parent company's significant shareholding is a major critical factor at the Annual General Meeting: "It is......commonplace that particular shares can always be sure of carrying the day, aye or no, as the holder pleases".[242] As for the very small shareholders (Industrial Promotion Building, R.A. Panju, A.W. Investments and Kenya Commercial Bank Nominees), the voting at the Annual General Meetings is by proxy and their influence could be said to be minimal.

As regards close supervision by the holding company on the activities of the subsidiary in Kenya, various systems of control are employed. To begin with, detailed monthly accounts are always sent to Reading

in the U.K. for "recommendation", and the actual approval is made by the resident Board of Directors. But this is an oversimplification of the matter: financial matters are referred to the U.K. office not for compilation and comment, but scrutiny and directive. Company Instruction No.18[243], for example, makes it clear that "recommendation" should not be viewed in its literal meaning. According to this document, the Board of Directors have the authority to grant capital or special expenditure up to £7,000 on any single item (other than on the purchase of real estate) and a total of £35,000 in any one month without special recommendation from the Board of Metal Box Overseas Ltd. All proposed expenditure on the purchase of real estate or any expenditure of a capital or special nature in excess of £7,000 on any other item <u>must receive</u> (italics mine) prior recommendation by the Board of Metal Box Overseas Ltd. It is not very fruitful to engage in verbal gymnastics, but recommendation in the context of Company Instruction No. 18 has more force and implication as simply opposed to mere comment or suggestion. In the event of the U.K. office turning down capital or special expenditure proposals, it was not made clear to the writer what course of action the local directors would take and it would seem that such a course of collision is highly circumvented. Indeed the subsidiary's Financial

Controller could not recall any such situation obtaining in the past. It would seem that "behind the scenes" consultations do take place between the local Managing Director and the Reading office. Such consultations, can, and do take place, when the local directors visit the U.K. or when the parent company directors or officials visit Kenya. As a further precaution, the local office makes sure that the expenditure proposals are minutely and comprehensively completed to warrant favourable consideration before the Board of the U.K. Company.

As a further indication of close liason with the "home country" headquarters, the planning programmes (on medium-term basis) "are very much as of the U.K. planning programmes" although the Financial Controller was quite eager to state that the said programmes were nevertheless Kenyan plans. In addition, the accounting system is "to a degree" similar to the Head Office one (that is, the U.K. office) for apparently "purposes of uniformity when preparing the overall Group accounts".

To sum up, the reasons for selling shares by the company have been motivated more by the need to raise funds locally for capital expenditures. Such issue of shares to local institutions could also be explained as a way of conceding "national aspirations" whatever that means to a multinational corporation. True, the company is

arranging to reduce its share capital holding to 60 per cent and the rest to be in"local hands", but the fact will still remain that the company in Reading, U.K. will continue to exert full influence and control over subsidiary. After all, the shareholding percentage majority must also be represented by an actual majority in number. Thus these words continue to carry with them the force of truth:

> "It is not intended to suggest that the national affiliates have no scope for independent action. In day-to-day operations, in marketing policies, in personnel matters and at the plan level, to a limited extent in research and development and possibly in investment decisions below a certain size a policy of decentralisation will normally be followed. But in such questions as expansion or contraction of investment, determination to produce or redesign a certain product, production or purchase of equipment and other inputs locally or abroad, exports by affiliates to the world market, and research and development activities, the control is generally centralized. (244)

Of concern is the palpable lack of significant impact of the local minority shareholders on the day to day running of the affairs of the company. Taking

ICDC as an example, the Executive Director of ICDC who is expected to represent the corporation on Board Meeting in more than 60 companies hardly attends these meetings personally and in the case of Metal Box Kenya Ltd. the times he has personally attended are very few indeed. This is poor attendance by any standards bearing in mind that it was in 1969 that ICDC became a shareholder and was represented on the Board of Directors. The first Board Meeting at which ICDC was expected to attend was on 22nd May 1970. However, the executive director was unable to attend or even send a representative. What has been happening is that the corporation has been represented at Board Meetings by officials of relatively lower rank and business experience whose contributions have been significant by their absence. The Notes for Board Meetings are prepared by the Managing Director (who is also the Board Chairman) with apparently very little or no prior consultation with the minority shareholders. Going through the Board Minutes, it becomes very clear that there is very little contribution by the minority shareholders except, for example, to suggest a vote of thanks for a retiring expatriate executive and endorsing wholly (and quite uncritically) such matters as pertain to the authority-structure <u>vis-a-vis</u> capital expenditure. As an

illustration of lack of closer scrutiny, it is surprising that one of the major minority shareholders, that is, the ICDC, do not even have in their possession a copy of the Consultancy Agreement, a sin of omission which is hard to forgive. To further strengthen the links between U.K. company and the subsidiary in Kenya, there are usually tours of duty into Kenya by technical staff as per the Consultancy Agreement as well as frequent visits by the overseas directors. Similarly, the chief executive of the subsidiary company frequently visits the U.K. for consultations. And to immerse the Senior African Officials into the multinational-matrix, courses or visits to the U.K. factories are arranged when deemed necessary. To all intents and purposes, then, the local company is run on the lines conducive to good working relationship with the U.K. company and on business framework tailored to the interests of the parent company.

3. THE CONSULTANCY AGREEMENT

The Agreement between the Metal Box Company Ltd. of U.K. (now Metal Box Ltd.) and the Metal Box Company of East Africa (now Metal Box Kenya Ltd.) dated July 24, 1967 (effective from April 1967) and to expire on

March 31, 1986 serves as a good example of an exercise in exploitation and the concomitant dependency.[245]

Before analysing the various provisions of the Agreement in question, it is vitally pertinent to articulate the concept behind consultancy, technical or licensing agreements in general and to evaluate critically the false complacency inherent in such arrangements. The basis of these agreements is of course, the law of contract and the cloudy notions of freedom to contract as well as equality in contracting. Justice Holmes begins his analysis of contract in his Common Law by declaring that "The doctrine of contract has been thoroughly remodelled to meet the needs of modern times (and) that there is less necessity here than elsewhere for historical research".[246] And another American legal scholar, Roscoe Pound, has stated the following:

> "We do not give effect to promises on the basis of the will of the promiser, although our courts of equity have shown some tendency to move in that direction."[247]

How true are the above assertions? Law of contract is of course basically the protector of the sanctity of private property and from the genesis of

legal philosophy this branch of law has usually favoured those who could employ clever lawyers with the skill of drawing up agreement documents with hidden traps and deliberate chasms. Included in this galaxy of men of property who could use the law to their advantage were oil barons in America and settlers and missionaries in Kenya. Dubious concessions and distributorship agreements were the norm of the day during the time of Rockefeller I whilst in Kenya the settlers and missionaries signed questionable. conveyances with the "natives" relating to the transfer of land. Such practices still continue up to the present day, and this is typified by the alarming outcrop of technical agreements. C.V. Vaitos, views this feature of commercial intercourse as follows:

> "In evaluating contracts of technology purchase by developing countries, one is immediately struck by the total vagueness by which technical assistance is being acquired contractually. The licensor is quite generally left with complete freedom to transfer whatever he decides while the purchaser has explicit and fixed conditions with respect to payments, terms of obligations, etc. The buyer quite often, does not know what to ask."(248)

The same vagueness obtains in case of the Agreement

between Metal Box Ltd. and its subsidiary in Kenya. The subsidiary had nothing to offer to the parent company save to bind itself to a host of conditions which were readily accepted since the directors of the former company were to all intents and purposes employees of the latter company. If a fitting word were to be applied, it is the word conspiracy. Here were two birds belonging to the same feather and what they were concerned with really was to empty whatever was in the nest.

The Agreement encompasses all the major features /which of technology, that is, technical assistance transmitted through personnel, machinery, manual with production specifications, licence of patent and trade marks as well as know-how embodied in intermediate products for supplying the services of consultancy and technical advice to the subsidiary the British company, has made sure that adequate provisions of remuneration are catered for. Firstly, the local company is responsible for covering all the travelling and accomodation expenses with respect to technical representatives who come to give advice or practical technical service. (Clause 3). In addition, Clause 5 of the Agreement /provides that the U.K. company has the

right to engage "managers and other technical and sales staff and foremen" as it considers "suitable and necessary." The Agreement does not indicate what terms of service are/used as regards emoluments,/to be whether the U.K. scales or special scales. But from experience, it is almost certain that these executives from Britain are well looked after financially. For example, taking just the directors of the holding company, that is, Metal Box Overseas Ltd., the following were the emoluments for services to various subsidiaries and associates as at March 31, 1978:

As Directors - Stg.£100,000

As Executives - Stg.£ 1,796,000

In 1978, there were 13 expatriate executives in the permanent service of the local company against 12 non-expatriate executives (including one European) and twenty African officers of medium grade.(249) The important thing to note is that the European category were and are in the high category of seniority and with this goes high salaries and a myriad of fringe benefits - free passage, entertainment allowance, house allowance, children's education scheme, etc. Indeed, the cost of keeping these people is so high that it has been decided to Africanise Europeans in some areas of operation as a realistic measure to cut down salary

costs. Whilst there has been some localisation programme, it is to be noted that Africans are still mainly in the non-technical field and naturally it is an expatriate who controls the company's purse. Betacans, whose operations are quite unsophisticated and whose size is by no means significant is under an African Manager and has no expatriate employee on its staff. As for Thika, a great concession has been made whereby an African manager has been appointed. By size of the factory, volume of production and staff strength, this is an appointment which carries a good amount of responsiblity. Ironically, however, this is the only factory with the highest number of expatriates.

One of the capitalist methods of running business - in the name of the organization of work and efficiency - is the separation between the work of design and execution with the view of reproducing the relations of domination which determines the relations of exploitation. Thus in the case of Metal Box Kenya Ltd. it is not surprising that details pertaining to production techniques, design research and development are still the monopoly of the non-African staff. The research and development department is headed by a European while the Works or Production Managers of the factories are Europeans. In

such a situation, when does it become appropriate for the African to take over? There is the saying: "Give a boy some fish to eat and he will assuage his hunger for a day, but teach a boy to catch a fish and he will never be hungry." So long as the African is not to master technology in the true sense, when will he be a party to the technological advance of his country? It is true that an Apprentice Training Centre was opened in Thika in 1966 and that by 1978 the company had 68 apprentices and that an African Technical/Management officer has been appointed at Ruaraka after some training in the U.K. But the apprentices are not taught sophisticated and creative engineering: theirs is to learn about simple maintenance mechanics and mundane tool maintenance. The African Technical/Management officer was trained in food technology but he is still considered "unprepared" to take over from the European head of his department.

Basically, the machinery used by the company is not very specialised and it is obvious that cheaper and similar-quality machinery could be obtained elsewhere and adapted, if possible, to a local design of containers. But this is not possible. For one, most of the design of containers is based on the British specifications and as such the company gets most of its manufacturing

machinery from the U.K. together with the necessary spares. As far as the adaptation of the machinery from the U.K., this is expressly prohibited by the Consultancy Agreement. Clause 13 of the Agreement reads, inter alia:

> "The Manufacturer shall not without the Consultants' express permission reproduce or imitate or cause to be reproduced or imitated any machinery manufactured by the Consultant or purchase any machinery or equipment from any person frim or corporation which shall be a reproduction or imitation of machinery manufactured by the Consultant..."

Now, the above restriction is inimical to a country's desire to industrialise significantly. Had Japanese and Russian firms signed licencing contracts with such restriction, the two countries would not have been where they are today. During the past half-century, Japan and Russia ardously followed a calculated approach whereby their industrial development was based on imported technology which was used successfully as a basis for their own technological development. "Both show that it is possible to import technology and yet not be swamped by it".(250)

In the case of Metal Box Kenya Ltd., chances of

invention and innovation are therefore dim and the company will continue to depend on the U.K. company for its technical progress. Expatriates will continue to come to give advice, advice whose basis the local people will not be conversant with. This situation of dependency was painted quite eloquently by a Sri Lanka Prime Minister as long as 1954:"A foreign expert is a man who comes to find out and leaves before he is found out."(251)

Apart from paying for the machinery imported from the U.K. and apart from paying all the foreign executive staff, the company is still bound to pay for the patent and trade mark licencing by way of royalties. It is not clear why such payment is necessary because something like a patent is clearly not technology but the legal permission to use technology. The Agreement assumes that there is a possibility of reciprocal arrangement, that is, the subsidiary can also license the parent for use of its patents in case of any invention relating to machinery and containers. This provision in the Agreement is put for a different reason, that is, to avoid possible infringement of the anti-trust laws. For example, the agreements between Continental Can of America and Metal Box in U.K. had to be revised in the 1940s and provided that the two companies would cooperare in the

field of exchange of technical knowledge thus shifting from the earlier stipulation that it was Continental Can which was to supply technical know-how, a factor which was actually the reality but which was averse to the anti-trust legislation in the U.S. From the practical viewpoint, therefore, it is Metal Box in U.K. which is the beneficiary of the patent arrangement in the Agreement.

Whilst legal and administrative procedures are being applied in developed countries to restrict monopoly practices, poor nations seem very ill-equipped to forge a coherent industrialisation policy. Patent licensing in no way safeguards the capacity to innovate and is indeed a stumbling block in this regard:

> "...legislation on technology importation in developing contries is mostly identified with industrial property legislation such as patent laws. No relevant economic analysis is being pursued as to whether patents really protect the interests of the 'non-industrialised' countries while legal systems are transplanted from developed nations whose needs and interests are totally different."(252)

Even in the United States, there have been misgivings on the basis of patent legislation. A study

by the U.S. Senate has commented:

> "...Provisions (of the modern patent system) it is evident, have altered the complexion of the patent grant from one designed primarily to stimulate domestic industry to one in which foreign patentee has an increased chance of producing where he chooses and retaining his patent monopoly."(253)

Earlier on under this heading it was noted that the bulk of the machinery bought by the company is from Britain. Under Clause 6 of the Agreement, it is stated that the parent company will sell to the subsidiary machinery of its own manufacture at prices in sterling not greater than the regular sales prices. This is fair enough. But in the case of machinery usually manufactured by the consultant for its own use or for the use of the subsidiaries and for which there is no ruling regular sales price, there will be an additional 10 per cent payment on top of the total cost thereof. The justification for this is hard to find even if it is assumed that the cost of export packing, insurance and freight from the Consultant's factories to the point of export is included in such a figure. Even then, an arbitrary figure of 10 per cent

of the total cost sounds unreasonable especially when quantities of the machinery supplied are found to change. What's more, it is not clear from Clause 6(2) whether in fact the cost of export packing, insurance and freight to the point of export is incorporated in the percentage stipulated. The Central Bank of Kenya are also not clear on this matter. In a letter to the Capital Issues Committee, an official of the Central Bank [254] has pointed out it is not clear "as to what services are covered by the 10%, which is in addition to the total cost of machinery purchased in the U.K. We feel this charge is unreasonable." One could also argue the matter further: What are the determinants of the total sale price of the parent company's machinery? The Agreement offers no clue in this respect and indeed makes the whole matter more mysterious by boldly stating: "The Certificate of the Auditors of the Consultant shall be conclusive evidence of the amount of such total cost...." This is a strange one-sided way of verifying the total cost and it is even mild to term the arrangement unfair.

It is baffling that the agreement between Continental Can of America and Metal Box Company of U.K. in fact provided the very reverse of the provision in

Clause 6 of the Agreement under discussion. The American canning company had given Metal Box an exclusive right to buy machinery at a 10 per cent discount.

All the subsidiaries of Metal Box Ltd. buy more or less the same types of machinery with basically the same raw materials. As such, a Central Buying Unit exists in London to purchase various items for the subsidiary companies:"We do not need to use it, but we do", commented the local Financial Controller. The reasons given for the above arrangment are:

(a) the Central Buying Unit "operates like a free market",

(b) the U.K. company can get "very good prices because they are buying for a bigger unit", and

(c) the standing of the parent company is such that favourable credit facilities on behalf of the subsidiaries are available. Clause 15 provides establishment of the Buying Agency referred to above. But another snare is conspicuous: the parent company is entitled to retain for its <u>own sole benefit</u> (italics mine "all discounts, commissions, rebates and other emoluments or deductions paid or allowed to it by the suppliers of any goods purchased through it as agents..." With these amounts going to the parent company one wonders how the goods bought through the company are said to be cheap. The matter is more complicated as the existence of a free market is very doubtful. As the

well known Marxist scholar, Samir Amin, has noted, the price structure is by no means the result of various competition:

> "The price structure is a global datum; it is not the result of the individual behaviour of firms, even under 'pure/perfect ' competition. /and Raw materials cannot result directly from consumer preferences, in accordance with current ideology, because the commodities are not final consumption goods... furthermore, the price structure of raw materials is by no means independent of the structure of the world system, i.e. of the unequal international division of labour."(255)

The particular giant in this monopolistic world structure is the British Steel Corporation from which the parent company buys the bulk of steel. Steel comes from iron ore which is a commodity whose market prices are dependent on the manipulations of, not the producers, but the buyers of the raw material like British Steel. No wonder they have been quite frequent prices hikes of tinplate which in turn has forced the local company to seek price increases for its products.

There was an increase of tinplate of 3 per cent in

October 1972, and another increase of 12 per.cent in April 1973. During the visit by the Chairman of Metal Box Kenya Ltd. to England in March 1973, attempts were made to negotiate with British Steel Corporation whether they would stabilize the price of tinplate for longer periods than they were doing at the time:

> "We have asked them (British Steel Corporation) to guarantee that in future, there will be no price increase for at least twelve months. They were receptive to this and we hope that after April they will be able to hold the price for another 12 months."(256)

The above course of action is just a half/which in no /-heart measure
way can control further unreasonable price increases of tinplate which are dependent on the vagaries of international monopoly capitalism. Further, it is to be observed that the mode of purchase of tinplate through the parent company is repugnant to good management of the foreign exchange earnings of this country. The British Steel Corporation purchases are financed by £ 1 million sterling overdraft facility with Barclays Bank Ltd. in London and payment is made through the Metal Box Kenya Ltd. Operational facility granted by the

the Central Bank of Kenya. This is in effect an Inter-Company Account through which the company buys everything. Such an arrangement is undoubtedly prone to transfer pricing and the Central Bank have expressed their disatisfaction with the arrangement. In the communication to the Capital Issues Committee (already referred to above),(257) the Central Bank have expressed their disatisfaction with the arrangement. The Bank have pointed out that the General Superintendence have detected some discount discrepancies within the pricing of the different specifications of tinplate supplied to Metal Box Kenya Ltd. by the parent company in U.K. In the course of their inspection, the General Superintendence Company discovered that the British Steel have no standard Export Price List and that an export price is merely determined by the forces of demand and supply at any one time.

It is a matter of concern that despite the various commissions and discounts arising out of the Buying agency arrangement the parent company still has an entitlement "after giving one month's notice in writing or by cable of its intention so to do) to charge to the Manufacturer commission (payable in sterling) on the f.o.b. of all goods so purchased through the agency of the Consultant at the rate of one per cent in the case of tinplate and two and one and hald per cent in all other goods."

The basis of this provision in Clause 15 is quite obscure to say the least and can only give vent to the view that this is yet another device to milk money from Kenya. The Central Bank have also established through the assistance of the General Superintendence Company that Metal Box Ltd. in U.K. enjoys another commission of 3½ per cent by a separate Credit Note on all tinplate purchases destined for Kenya. One can only say that this is a strange state of affairs and the sooner the Government takes some serious measure, the better.

One would have thought the various payments accruing to the U.K. company though the foregoing provisions were generous enough, to put it gently. But Clause 18 stipulates that every year an additional fee is to be paid and that this should be computed as the figure which shall be the greater of:

(a) Twenty five thousand pounds or

(b) A sum computed by reference to the aggregate net sales price of all containers sold by the manufacturer during the twelve months period as follows:

(i) 1½% on the first £1,000,000 of sales;

(ii) 1% on the next £1,000,000 of sales;

(iii) ½% on the next £3,000,000 of sales

(iv) ¼% on all sales in excess of £5,000,000

The above provision ensures what is called a water-tight situation. If the local company makes very low sales (or no sales at all), there is a guaranteed payment of £25,000. The higher the volume of sales, the higher the remittance to U.K.

During the financial year ending March 31, 1979, the company made net sales amounting to Kshs.232,757,000 which figure included amounts invoiced for products and services. With such volume of sales, the amount to be paid to U.K. is more than £25,000 and works to about £69,000 using the second method. In addition, the parent company also receives dividends yearly. Overall, the company's operations have been quite profitable as evidenced by the level of dividend payments for the last five years.(258) This is the trend wanted by the investor in U.K. for, after all, it is the object of capital to extract the surplus value of the country in which it is invested with the intention of repatriating this surplus value. The net income of Metal Box Kenya Ltd, as at March 31, 1979 was Kshs.9,185,000 out of this figure Kshs.5,438,000 was

paid out as dividends and the balance of the amount was retained profits. However, this amount was used to finance plant machinery and equipment and inevitably the great proportion of the amount went overseas towards the purchase of the same.

On August 6, 1971 Metal Box Kenya Ltd. entered into an agreement with the Dow Chemical Company of USA, a well known multinational corporation, wherein access to the latter's proprietory technical information concerning the manufacture of plastic file was granted to the company. The technology thus acquired was applied to the manufacture of pineapple mulch films for Kenya Canners Ltd., which forms a major part of the company's plastic film business. The original agreement expired on August 6, 1976. In the intervening period a new agreement was negotiated which was to last for 10 years. Apparently, more favourable terms were obtained in that the royalty payment to Dow is US cent 0.02 per kilogramme of mulch sold compared with US cent 0.025 per pound in the old agreement. The company has also been granted the exclusive right to manufacture mulch film according to Dow technology in Kenya, Tanzania and Uganda.

In late 1971, a capital expenditure request for

K£17,700 was approved for equipment for the production of "locked ring" couplers for P.V.C. pipe manufacture at Ruaraka. The purchase of this equipment from Polva - Nederland of N.V. of Holland was said by the company to "result in considerable savings because it will be cheaper to manufacture the couplers at Ruaraka rather than import them, and this will also reduce the stock held at Ruaraka". An agreement was negotiated between the company and the supplier, Polva-Nederland, whereby on initial fee of Dutch Florins LO.000.00 was to be paid to the supplier by the company and thereafter 1% of sales of pipe with a minimum of Dutch Florins 10,000.00 p.a., for a period of 10 years. In return, the company would be provided with the know-how and would also have monopoly in East Africa and rights to sell the "locked ring" couplers anywhere in the world. Exchange control approval was given by the Central Bank of Kenya.

The experience has been that the company repatriates profits, royalty fees and other service charges with complete ease under the existing exchange control regulations and that, further, borrowing facilities with favourable terms have been quite frequent.(259) No doubt, therefore, that the Central Bank is becoming more stringent and the renewal of

consultancy agreements, including that of Metal Box Kenya Ltd. is going to be difficult in future. The impression one gets from the educated young officers of the Central Bank is that the Government has been too generous in the past and that although transfer accounting procedures are difficult to detect, the companies likely to be /are involved in transfer /or pricing and other transfer accounting practices should be made aware that the Government has some basic ways of pinpointing the anomalies thereof. As it would seem that the prices of materials, especially tinplate from British Steel, are negotiable, there is no sure way of knowing what can be termed reasonable prices, and in the circumstances the possibility of over-invoicing the imported goods cannot ruled out. This becomes very likely especially when the payments are effected through an inter-company account and where the payment is in sterling from the Barclays Bank Account in the U.K. If the remittances overseas were effected through the separate "open" application approvals as per Exchange Control Regulation No. 10, the situation might be different. Fortunately, this seems to be the view taken by the Central Bank who have advised the Capital Issues Committee accordingly. As for service payments made by the company, these have been given quite generously. What happens in many of the developing countries is that a subsidiary company is not allowed to make additional payments for research and development,

technical services or management or to contribute to headquarters overheads. But in the case of Metal Box Kenya Ltd. it does make all these accountancy headings simultaneously. It is quite debatable whether these types of payment are all a return to the parent company for a real service or may comprise an element of transfer. No wonder then that as at 31.12.78 the amount owed to Metal Box Overseas Ltd. amounted to a cool £3,019,365, details of which are quite scanty; and this against net assets of the company of £5,241,514! (260

According to Clause 24 of the Agreement between the parent company in Britain and the local subsidiary, the contract is to be construed and take effect as a contract made in England and accordance with the laws of England and accordingly Metal Box Kenya Ltd. has submitted to the jurisidiction of the High Court of England.

The consideration here is the question of the advisability of imposing foreign jurisdiction on commercial transactions basically affecting Kenya most. In European countries, there is a factor that is used as a last resort in localising a contract. In France, Italy Belgium and Holland, this is the place where the contract is entered into but this approach- which is adopted in the Agreement under discussion- is by no means instrically sound. There is also the question of the place of performance. As in the case of the Agreement between the

U.K. company and its subsidiary in Kenya, there is no single place of performance as such - definitely the place of delivery is not the same place where payment originates. As such then, what we have is an unsatisfactory result of having one law governing the duties and rights of Metal Box Kenya Ltd. under the existing contract. This is so especially when it is evident that it is Kenya with which the contract has its most significant relationship. The matter is of concern since Government intervention - in say matters concerning the consultancy fee and the hodge-podge of commissions and discounts - is bound to give rise to repercussions antithetical to British capitalist interests. Deference to foreign law on the sole ground that it appears to attach importance to regulating a given type of transaction is an aspect of English 'public policy' which is mainly concerned with denying assistance in the enforcement of certain types of transactions. One legal writer has summed up the position thus:

> "Although it seems that a court in dealing with a contract involving foreign elements is justified in considering the pretensions of foreign law to govern a particular fact situation, an English court will not give as broad play to foreign legal policy

as it will to its own, even if there is no inevitable clash between the two."(261)

The express intention in the Agreement for the English law jurisdiction to predominate might be bona fide and legal but it is certainly antagonistic to the Kenya's interests. It is hard to understand the tendency of multinational corporations to forget that they are carrying-out business in foreign countries rather than at home:

"Another mistake sometimes made by business-men in foreign countries is that, though they may be mindful of the importance and influence of the rules of law of the other country on the contemplated agreement not only from their own position, but also with the eyes of other party and under local rules of law, which control the other party. If both sides would consider the agreement which they intend to conclude not only under their own rules of law, but also under the rules of law of the other party, they would be better able to appreciate the attitude of their future business partner will evince toward the agreement and the influence of the foreign rules of law on such attitude.".(262)

The traditional American view is that any contractual clause which limits causes of action arising under the contract to courts of a particular juridiction is void and contrary to public policy as an attempt to oust the courts of jurisdiction. However, there has been a shift in outlook to the effect that a local court would be required to honour a contractual stipulation for exclusive jurisdiction of a foreign court provided that the stipulation, under all the circumstances, appears reasonable. An American case supports this view:

> "..the parties by agreement cannot oust a court of jurisdiction otherwise obtaining; notwithstanding the agreement, the court has jurisdiction. But if the proper exercise of its jurisdiction, by a preliminary ruling of the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented..."(263)

The submission here is that the Agreement is unreasonable in many respects (already discussed) and that in the circumstances local jurisdiction should prevail. In view

of the legal dependency on the "metropolis", not very much point of departure can be expected, but /is of /it course incumbent on the local courts to interprete the law in the spirit of the preservation of national interests. This is so , especially when Government institutions now own some shares in Metal Box Kenya Ltd. With the right proposition that Government corporations are instruments by which public interest should be asserted, it is a pity that both ICDC, DFCK and IDB have not expressed concern over the overtly generous terms of the Agreement. Either the above institutions have never bothered to read the Agreement, which is a very likely possibility, or simply that they are performing their true capitalist role, that is, as state institutions becoming autonomous power structures of their own, resembling in structure, influence and manner of operation the private corporations which they invest in.

Clause 2 of the Agreement puts the duration of the contract as 19 years. This a long period indeed especially when there is no clause in the Agreement providing for necessary review especially as regards the various payments made to the U.K. office. The Central Bank of Kenya has already asked the Capital Issues Committee

to review the Agreement in this regard but the truth is that the Agreement does not accomodate such revision before April 1, 1986 when the Agreement is to expire. Such long periods of duration of licensing agreements should be discouraged as the host country company is left with very little/for manouvre. A /are country like Yugoslavia has found it necessary to incorporate in its Foreign Investment Law a provision controlling the duration of joint venture agreements. Such agreements must be for a fixed time period "considered necessary to accomplish the mutual business goals for the purpose of which the joint venture is being established."(264) The spirit of the law herein is to discourage uncessarily long-term provisions which might be contrary to the Yugoslav economic interests. A similar type of legislation would also be useful in Kenyan context.

4. THE IMAGE OF THE COMPANY AND ITS FUTURE IN KENYA

Being a branch of Metal Box Ltd. in the U.K., the company no doubt basks in the limelight of the former. Such connection also brings the "local" company's role into question. The parent's involvement, and thus infringement of human rights arising out of trade links with South Africa is a case in point. During an interview

with the company's Financial Director, no pretence was shown in denying the business links with that racist country: "It is a situation where there is business regardless of the political implications. There is a wide stable field of activity there and we will remain serving the community."

The above tallies with the earlier history of Metal Box. Metal Box's subsidiaries in the Commonwealth when the Overseas Company was founded included one of the oldest and largest subsidiaries, namely Metal Box South Africa Ltd. which was founded in 1933. "Our policy seems clear enough", wrote Sir Robert Barlow, (Chief executive officer of Metal Box) in 1949: "To prepare for a substantial increase in the volume of South African business over the next few years; to be eager to widen our scope geographically and by products packed; to support the South African company with vigour and imagination, financially, technically, and with skilled men; but to watch closely the political and economic phases through which the country passes".(265) Sir Robert spoke of "vast and untapped" resources but "the nature problem", he also said, "is more intractable, than ever and its menace overhangs the scene with a sense of brooding suspense." (266)

The result, over the years, has been substantial

expansion and by 1971 sales had soared from £8.7 million (in 1957) to a figure of £30.1 million.

On the Kenyan scene the company has plans to enhance its image. According to its Medium Term Plan Reports 1977/78-1979/80 dated January 1977, the company states that it is intent on discarding its previous "amateurish and spasmodic" advertising and instead embark on a policy to develop a public relations "theme" in their advertising and to apply it more consistently. The objective will be to show the company's name and activities more clearly to the leading members of the public. The theme will be "the company's contribution in various fields to the country's economy and prosperity."

There is of course posssible criticims of unethnical monopolistic practices, and this is in no way unjustiable criticism. In October 1967, the Board of Trade in Britain referred "the supply of metal containers, metal parts thereof and semi-manufacturers" to the Monopolies Commission for investigation and report. The Commission were required, in the usual way, to decide whether a monopoly[267] existed and, if it did , whether "things were done" to preserve it or the monopoly itself, were against the public interest.

The Commission reported that a monopoly existed in the supply of metal containers because Metal Box, in 1967 and 1968, were supplying 77 per cent, by value, of the metal containers coming on the market in the United Kingdom. Though complimenting the company for its technical advance and accepting the company's claim to be ahead of everyone in the world outside America, the Commission nevertheless pointed out that "it does not follow that (Metal Box) has always been alert ... as it might have been in the presence of stronger competition."

Throughout Metal Box's history, trading in the open-top industry[268] had been based on shrewd manipulation of the terms of closing machinery and of the selling terms of cans. The earliest form of business was to enter on long contracts - three or five years mostly - so as to give the customers carefully worked out discounts for quantity, so that the more of their business they gave to Metal Box the better it paid them. Thus, Metal Box relied on purchase agreements as a bait for attracting and keeping customers and making the task of any potential competitor as difficult as possible. A good example of such contract is the one existing between Metal Box Kenya Ltd. and the Kenya Canners Ltd.

As well as selling cans to their customers Metal Box had on occasions, been willing or intent upon supplying "seaming" or sealing machinery for closing the cans after filling. It had to be on the canners' premises, obviously, but it was as much a part of the can-making plant as any equipment in Metal Box's own factories.

This in effect meant establishing control over the canner's seamers, that is, for the can-maker to control canner's seamers as closely as possible as if they were on his own factory floor. The next stage in control was to ensure that canners used the can-makers' seamers rather than seamers made by other firms. Such seamers can be leased at a figure below the normal rate of depreciation and the can-maker usually provides free maintenance as well.

The above measures, which, incidentally are still practised in Kenya by Metal Box Ltd., were viewed by the U.K. Monopolies Commission with disfavour and concern as no doubt the chief aim seemed to kill any budding form of competition. The Commission accordingly concluded that such conditions of monopoly did operate and might be expected to operate against the public interest. They recommended that Metal Box should do away

with such manipultive practices (269) and expressed the view that the supply of closing machinery and of spares and service should be put on a profitable basis instead of being subsidized. Long-term contracts - that is, contracts for two years or more - should no longer be entered into.

The Consultancy Agreement between the parent company in Britain and the subsidiary in Kenya contains a provision which is clearly in restraint of trade. Clause 12 of the Agreement prohibits the exportation of empty containers by Metal Box Kenya Ltd. to any country outside East Africa in which"either the Consultant or a subsidiary company of the Consultant or an associate of the Consultant" is engaged in the manufacture of containers without "the express consent in writing of the Consultant and of such subsidiary company or associate." Such an arrangement infringes the principles of anti-monopoly and anti-trust legislation and would be vulnerable to legal action in both the United States and the United Kingdom.

Agreements to divide markets are usually illegal because they can have no objective othe than to suppress competition. It could of course be argued that no

consipiracy exists since the U.K. company and the Kenyan company are one economic unit but case law both in the US and on continental Europe would seem to establish otherwise. An example of a parent and subsidiary being guilty of conspiracy because of injury for a third party is given in Suburban Car Rentals v. International Telegraph and Telegraph, ITT Avis and Avis Rent-a-Car System.(270) Avis-Rent-a-Car was wholly owned by ITT. Suburban was the exclusive licensee of Avis in the car rental business for a small part of Westchester Company, a part of New York. Suburban wanted to extend its operations and sought another licence for an adjoining city of Westchester County but was refused by the licensor Avis on the ground that Avis itself wanted to operate there. Suburban sued, alleging consipiracy to exclude licensees from big urban areas in order to retain those areas for themselves. The interesting part of the defence of no conspiracy was that defendants were related and subsidiary companies, that is, the intracorporate doctrine, and that what they had agreed to do was no more or less what an individual licensor could freely do. The court underlined the principle that runs through all of antitrust: what may be legal when done by one person or acting unilaterally may be illegal when done by two or more in agreement.

The position in Europe is not so clearly articulated, but in a decision dated January 2, 1973[271] the Commission attacked the main producers of sugar in the European Economic Community alleging that sharing of their respective markets and importing only through sales or organisations under their control were illegal concerted practices although there was no agreement in the usual sense. So the Treaty of Rome is concerned with division of market because article 85 expressly names "the limitation or control of production, markets..." as a prohibited practice.

In the past, there have been some attempts to dent the monopolistic position of Metal Box Kenya Ltd. For example, in 1965, a survey was carried out by an official of the Development Finance Company of Kenya[272] on the market and Sales prospects with respect to the African Can Corporation Ltd. (ACCL) project[273] to establish an additional can-making industry in Kenya.

Since the setting up of ACCL was first mooted, there was naturally a great deal of speculation as to the likely reaction to competition by Metal Box in Kenya. At one extreme, there were suggestions that a price war would develop with progressive reductions in

price by Metal Box until ACCL went out of business; at the other extreme it was suggested that Metal Box would immediately cut out all its marginally profitable lines and divide the market with ACCL on a price fixing basis and agreement as to which firm makes which type of can. Much depended on the extent to which Metal Box could work under capacity. Since Transcandia Ltd. and E.A. Industrial Promotion Services (K) Ltd. first suggested a competing project, Metal Box were at great pains to publicise that not only was it working only one shift but that on that one shift was 40% under capacity. Under the tripartite labour agreement, Metal Box did not employ the extra 10% in the factory but paid the labour and loaned it to Thika Municipality. Against this background, it was surprising that Metal Box appeared to give poor service to the smaller consumer and also to Kenya Canners Ltd. and Kenya Co-operative Creameries, for example, being very late deliveries. In this respect, the compiler of the said Survey stated: "It is of interest that it is understood that according to Metal Box they sold 23.6 million round cans and 11.2 million rectangular cans in 1963/64 against a one shift capacity of 36 million and 24 million respectively. Shoe polish tins, paint tins etc. are additional to these figures."

According to the DFCK analyst, the apparent inefficiency of Metal Box in Kenya was attributable mainly to the very wide range of cans produced. Most of the production lines were then not fully automatic and the demand was such that each could be in production on an average only one day a week. The report continues: "It would therefore be more economical in the context of their monopoly to keep a small labour force and switch from line to line as orders dictated. Metal Box would no doubt claim that their wide range of cans provides a service to the canning industry, which is true, but it also helps them to retain their monopoly by closing likely avenues for competitive production."

In the case of ACCL starting operation, Metal Box was expected to take either or all of the following measures:

(1) make marginal price reductions (as the company has in the past done with respect to plastic products) in all types in which it was in competition with ACCL but not to the extent of a "price war."

(2) instal the necessary equipment to meet KCC's exact dimensions for the 13 oz. milk can.

(3) cut out certain lines of marginal productivity or alternatively agree only to produce these types

if the consumer takes all its cans from Metal Box.

(4). give serious consideration to installing a production line for A10 lock seam cans.

(5) set y up a sales organisation.

However, ACCL never actually got off the ground. The DFCK Board turned down the proposal[274] on the grounds that the likely market was such that it would not possibly be viable on the scale envisaged. At the same time, the Board considered it might well prove feasible for a much smaller project to be started up in the first instance.

At present, there is no competition on open top can making and none is expected up to 1980. According to the company's Medium Term Reports 1977/78-1979/80 dated January 28, 1977, the threat of self-can manufacture from Kanya Canners Ltd. and Kenya Meat Commission is there, but is not expected to materialise. There is a threat from plastics on ½ litre oil cans and there are indications that oil companies are considering this move "for policy reasons than convenience". In the General line field, (that is containers comprising tins for packing such products as paint, lubricating

oil, edible oil, polish, collapsible tubes for tooth paste and solution and a fairly large variety of smaller items including such things as biscuit tins and display plaques) there are small competitors manufacturing square and rectangular containers and offering round tins to some customers. The major competitor is Premium Drums in Nairobi Industrial Area. This competition is not thought to be a serious threat to the company's general line business. There is some threat from plastics on a 5-litre motor oil containers but it is not considered very serious at present because the oil companies have found a preference for tinplate in their export markets.

Competition on the 20-litre debe tins from the equivalent plastic containers selling at more than double the price has been strong in Mombasa and has affected Betacan sales. The sale of 4 gallon cans to Kenya Cashewnuts and other nut factories is threatened by imported laminated bags which would be packed in cartons. The company should expect to lose this business if the pack proves efficient for the export market. The packers have had complaints from the U.S.A. that though the quality of the debe pack is excellent, it is extremely difficult for them to dispose of it and this a serious drawback to sales in developed countries.

As regards expansion outside, Kenya Metal Box have for some years back been interested in starting full-scale can manufacturing industry in Uganda. Now that there has been a return to civilian rule in that country, it is very likely that the company will broach the subject.

A visit was made to Uganda in January 1972 by two directors of Metal Box Company of Kenya to see officials of Uganda Industrial House Ltd. During the same year, a visit was made to Tin Cans Ltd. in Uganda by the then company's Technical Superintendent at Thika Factory. Discussions were held with/senior /a official of the Development Finance Company of Uganda and a director of Uganda Industrial House Ltd.[275] The view of the directors of Metal Box Kenya Ltd. was that, whilst business would not be profitable in its initial stages, a trading profit of approximately £18,000 would be expected in the first full years of operation after the factory had been reorganised. The suggested joint venture arrangement was to be 60% Metal Box Overseas Co. Ltd., 25% Development Finance of Uganda and 15% Uganda Industrial House Ltd. During the discussions at the Board Meeting of March 1972, it was stated that, whilst all the requirements for the Uganda market for metal containers could be supplied

from Kenya, it was felt that there were good reasons for establishing manufacturing facilities in Uganda to "meet national aspirations". A report was at that time prepared for submission to the Overseas Company recommending that the Metal Box Group should participate in a metal container business in Uganda Industrial House Ltd., Tin Cans Ltd. An offer of U£42,500 was made for the plant and machinery of the tin box business, payment was to be made separately for stocks of raw materials on the date of acquisition. The acquisition plans apparently never took place due to deteriorating political situation under the military regime.

In Tanzania, the Government has compulsorily acquired a 50% holding in the Metal Box Company of Tanzania. After protracted negotiations, the National Development Corporation, a parastatal organisation, settled for the share of the capital at a cost of £350,000. The agreement was reached in pursuance of the Industrial Shares (Acquisition) Act passed in 1967. In the period immediately after nationalisation of various industrial enterprises, it appeared Metal Box would be one of the toughest cases to settle. From Tanzania's viewpoint, the retention of the Metal Box trademark was important because it was an important sales plug for Tanyanyika' Packers'

large meat exports. Another form of compulsory acquisition of share took place in Nigeria in 1977. As a result of the Nigerian Enterprises Promotion Decree, the Nigerian shareholding was increased to 60% by means of a public share issue in December 1977. Metal Box Overseas holds the balance of 40% of the equity.

In Kenya, one of the main reasons for offering shares to corporations like ICDC, DFCK and IDB is, as we have already seen, to raise funds mainly for capital expenditure. Another inescapable reason is in the form of the benefits accruing from such association. Such association means easy access to Government departments for solutions of such matters as price increases, renewal of work permits, local borrowing, repatriation of funds, etc.

The policy of Metal Box Ltd. has always been the hold over some basic control despite the degree or extent of shareholding percentage. For example, Metal Box's investment in Europe until 1959, was entirely a matter of minority holdings in the associates. None individually was significant and the dividend income from all the associates, including those outside Europe only contributed £78,087 for 1958/9 to the Overseas Company's trading profit (before tax) of more than £2.4 million. "The value of the holdings lay in the

influence (emphasis supplied) they represented rather than their voting power or financial return.(276)

However, this trend changed later and we find Metal Box in 1959 taking a controlling interest in an Italian company: La Superbox Fabbrica Contenitori Metallici SpA. In 1961 another agreement was signed to establish a factory in Greece. Hellas Can A E was set up with Metal Box and Continental Can of America owning 35% and 25% of the total shareholding and the Greek interests holding the remainder. Agreements with Metal Box for supplies of machinery and for management were linked with a Consultancy Agreement under which Hellas Can would pay 2½% on the first £1 million sales and 2% thereafter, the fee to be divided between Metal Box and Continental Can.

And as for the "appendages" of the British Empire, Dr. Reader summarises the position thus:

"Metal Box's earliest overseas subsidiaries, still much the largest in 1970/1 were in South Africa and India. They sprang from the trading policy, common in years gone by to most British companies operating overseas, of paying special attention to Britain's 'natural markets' within the Empire.

There, even if nationalism was strong, political conditions at least seemed to be stable and British businessmen could feel secure, even if they found oriental races as bewildering or exasperating as...the Chinese.

During the years after the Second World War this traditional policy began to change. Many ex-imperial territories offered opportunities superficially more attractive than they had ever been before, and they were not neglected, but the politics of the situation became very much more difficult, particularly as the rush to independence gathered way in the sixties. The pressure to transfer management into local hands, sometimes too fast, was always strong. The threat of expropriation was far from negligible and in Tanzania, during the late 'sixties, it became explicit, leading to a 50 per cent Government holding in the the Metal Box company there from April 1968. In India, taxation left very little profit and made it expensive indeed to employ expatriate managers."(277)

In Kenya, the writing on the wall is not threatening, and so Metal Box Kenya Ltd. continues to make profitable

business almost completely unshackled. The company's Finance Director commented in an interview with the writer:

> "Our company view the investment here as profitable in a stable country and we would be reluctant to give up our business enterprise."

The above view was expressed in the Annual and Medium Term Plan Reports 1978/79-1980/81 when examining the political trends of the year 1977.

> "The past year has been a stable year for Kenya politics following the cancellation of the KANU National Elections planned to take place in April,1972.
>
> The political controversies which were expected to arise as a result of these elections remained dormant and whatever new political groupings and agreements were effected during this phase, have been made without publicity. Any such agreement will perhaps prove very important during the period of the Plan in the event of the President's retirement or demise or when a transfer of power will have to be swift and effective.
>
> The assumption in the Plan is that this will be managed satisfactory and that there will be no significant

change in the Government's economic, or political aims should there be a change of leadership".

The company was right in its assessment for not only was there a peaceful transition of power after the death of President Kenyatta but there was no significant change at all in economic and political policies in Kenya.

Though the company's products are bought directly by manufacturers of various items like canned fruit, vegetable and meat.as well as vegetable oils, and that the bulk of such food cans are for export, neverthe-less, the company's operations do affect the ordinary people economically. Things like food cans for fats, shoe polish tins, paint cans, cosmetic tins, tooth paste tubes,solvents and adhesive tubes as well as plastic bags, - are items which are on popular demand by wananchi.(278) This is to say that when pricing mechanism is employed by the company, these people are directly involved as one of the most iniquitous practices of capitalism is always to pass the element of production costs and "overheads" to the consumers as if they were born with their pockets bulging with

hundred shilling notes, a point which persuades one to apply to these people Tressel's title of the novel: The Ragged Trousered Philanthropists. Even such items as cheques, Sweepstake tickets, travellers cheques, etc. - which are also produced by Metal Box Kenya Ltd. - finally reach the consumer with their burden of exploitation.

There is also a prospective customer for beverage cans, that is, Dixi Cola Ltd. for which expected investment is in the region of Kshs.20 million. The poor customers again will have to dig into their pockets when buying the novel drink. In addition, cans for meat and containers for powdered milk are bought by parastal bodies which are similarly supported financially by wananchi. In May 1976 alone, Kenya Meat Commission bought 1.9 million cans from the company and 2.24 million for the month of July.(279) From talking to some senior executives of the company, it was evident that this very clear economics did not dwell in their minds, and it seemed as if they were making cans for dumping, at a profit, in some far-off planet where the consumers were actually robots. This is so because of the faint efficacy and effectiveness of the price control system, a structure which seems to depend very much on the figures submitted by the company (and other manufacturing firms for that matter). In general, information is sought

on direct material costs, direct labour costs, manufacturing overheads and administrative and selling expenses, if any. The manufacturer's margin is set at a level which enables the manufacturer to earn a "normal" rate of return on capital employed. The Price Control Advisory Committee, however, is not able to go to the extent of ascertaining whether certain costs especially operating costs, are really warranted or not or whether the manufacturers had in fact tried alternative methods of reducing these costs before resorting to cover them through applying for price increase. The 1975 application by the company for increases of at least 30% in Nairobi and 25% at Betacans (in respect of 20 litre cans containers was aimed at having an effect of raising the selling price of the Nairobi container to around sh.9/-. Such return was calculated by the company at the rate of 6 per cent. The figures shown on Appendix VII clearly mean nothing or - very little for people who are not involved in running of a can manufacturing industry. Such a sorry situation obviou results in there being little or no incentive to manufactur to cut costs; and in fact they can even report non-existent costs that cannot be easily traced by the limited staff of the Price Control Advisory Committee.

Whilst competition may help in keeping prices relatively stable, the future of the packaging industry in general does not point towards meaningful

localisation, and the penetration of more foreign firms does not seem to help the situation as the same manipulative practices, consultancy fees, management fees still go into production expenses. For example, Elson Plastics which started operations in 1968 has a good number of shares, about 60% held by the English Finance Co. in partnership with Sukisui Chemical Co. Ltd. and the Mitsui Co. of Japan. Emco Plastica International Ltd., a Madhvani group company producing a variety of household plastic containers, plastic bottle crates etc., entered into negotiations with a Spanish Firm Iberplasticos SA in Madrid in 1969 under which the local company was allowed to manufacturer plastic crates in more than 25 different varieties for sizes under an exclusive licence.

Notwithstanding a set- back in 1974, Metal Box Kenya Ltd. is overall complacently riding the crest of monopolistic control and direction of the packaging industry. With the conducive political and economic climate, its operations are bound to expand. Of interest here is the relatively smooth industrial relations and the apparent "innocent" Africanisation measures.

Industrial relations have, by and large, been good but in August 1977 there was a stoppage of work and

the workers were persuaded to return only with police and Union assistance. Apparently, there was no overt Union support for the stoppage. A Union meeting was held afterwards to discuss the items of complaint which were the same as those which had caused stoppage of June the same year. The complaints comprised allegations of abusive language by the (African) Personnel Officer which had not been satisfactorily settled in the view of the Union. There was no agreement at the meeting held in August and subsequently the Union issued a 3 week strike notice on August 20, 1977 demanding the transfer of the Personnel Officer. The dispute was declared illegal and did not take place. As a consequence of the stoppage of work at Thika, the Ministry of Labour appointed an investigator to examine the complaints about the Personnel Office. No positive results seem to have come out of the exercise. Earlier, in 1975, a breakdown in negotiations on cost of living increases was referred to the Industrial Court for arbitration and the Union won a wage increase of shs.33/40 p.m. Also early this year, there was a strike by 500 employees at the Thika factory but the dispute was finally solved with the company having the upper hand in the matter: they had even taken on some new people and could only admit the strikers on new terms of service, terms in effect dictated by the company. Such corporate arrogance is of course not a new thing in the Kenyan context, but two things are important here.

Firstly, the company does not seem content with the present regulations making strikes difficult to stage. They would still wish artisans to remain non-members of a trade union. The general attitude towards the interests of its workers as members of society remains callous as can be evidenced by the following statement:

> "The factory at Thika was closed by order of the District Commissioner on the 23rd of February to allow the workers to demonstrate against President Amin's recent statement claiming parts of Kenya territory. Therefore, a day's production was lost during this month. The Nairobi factory, however, was able to continue operation on the day when similar demonstrations were scheduled in Nairobi."(281)

Secondly, the lethargy of the Union, that is, Kenya Engineering Workers Union, in articulating the far reaching goals like more say in management and effective Africanisation policy of the company leaves a lot to be desired and the same goes with the lack of political education of the Union members. To the 1280 or so Unionisable members of staff, the company is a source of veneration and one is reminded of the main character in The Jungle:

"To all these things our friends would listen open-
mouthed- it seemed to them impossible of belief
that anything so stupendous could have been devised
by mortal man... it was a thing as tremendous
as the universe - the laws and ways of its
working no more than the universe to be questioned
or understood. All that a mere man could do,
it seemed to Jurgis, was to take a thing like
this as he found it, and do as he was told; to be
given a place in it and a share in its wonderful
activities was a blessing to be grateful for, as
one was grateful for the sunshine and the rain."(283)

And what about the African executive and management
cadre in the company? These people are also possessed by
the "multinational awe" and the majori/shareholders /ty
are keen to see that the up and coming elite will be
properly schooled in the capitalist "ethic". Overseas
training is often extended to this level of managerial
structure and the public relations machine harps on the
theme of handing over to these people once they have
attained the necessary technical experience. More
often than not, education and training shape individuals
and determine their entire lives. The schools of the "The
Third World", states Ivan Illich, administer their
opium with much more effect than the churches of other
epochs:

"The process by which the marketing of 'foreign' products increases underdevelopment is frequently understood in the most superficial ways. The same man who feels indignation at the sight of a Coca-Cola plant in a Latin America slum often feels pride at the sight of a new normal school growing up alongside. He resents the evidence of a foreign 'licence' attached to a soft drink which he would like to see replaced by 'Cola-Mex'. But the same man is willing to impose schooling - at all costs - on his fellow citizens, and is unaware of the invisible licence by which this institution is deeply enmeshed in the world market.

...The fraud perpetrated by the salesman of schools is less obvious but more much fundamental than the self-satisfied salesmanship of the Coca-Cola or Ford representative, because the schoolman hooks his people on a much more demanding drug."(284)

The above quotation is meant to illustrate the false belief that the replacement of a Whiteman by a Black man in the running of a capitalist instrument would make any difference. If the same manipulations of profit making are employed for the benefit of the "metropolis", it really does not matter who is "the captain" of the

particular industry in Kenya. The same would be the case even if the Government takes or nationalizes the packaging industry.

> "In practice, nationalizations are not necessarily antithetical to the interests of capital - in fact, some months before they were decreed in Uganda (by Obote Government in May 1970) the state was approached by the oil companies 'with proposals for participation in equity to the extent of 50 per cent by Government.' A year earlier the most important Uganda Indian industrial capitalist, Madhvani, had offered the government 50 per cent participation in all his holdings. Why would a multinational corporation invite a host government to 'nationalize' 50 per cent of its units? Precisely because such a nationalization would give the corporation access to state capital (since it would be 'compensated' for the assets nationalized), keep all management in its own hands and give it the political advantage of being known as a national economy."[285]

But even the possibility of nationalization is not likely in view of the avowed Government policy to encourage free enterprise in the country and to intervene in terms of shareholding only if this is motivated by a

mutual intention. So in the case of Metal Box Kenya Ltd. what is likely to take place in future is for increased local participation - mainly through the Government institutions already having some shares in the company. Such local participation may finally be higher than 50 per cent of the total shareholding of the company. Clause 22 of the Consultancy Agreement states that Metal Box Ltd. of U.K. has the right to terminate the said Agreement if there is a significant change in share ownership. But this is unlikely so long as the U.K. company is allowed to retain its benefits accruing from the present Agreement which, as has been illustrated above, clearly shows that technology has achieved a commercial facet: it has become a system of property and its transfer is no longer free, the knowledge is monopolised and bought and sold :

> "Although in the majority, the indigenous capital is the prisoner of its foreign partner. Mixed investment is, perhaps, the worst form of new-imperialist exploitation for it ties up the indigenous capital of the host country and denationalises it."(286)

5. SOME COMMENTS

The Consultancy Agreement between Metal Box Kenya

Ltd. and Metal Box Ltd. of U.K. is a good example of a very one sided contract which has been reached about through unequal bargaining power and whose main purpose is to enable the U.K. company to make as much profit as possible. The operation of the Agreement clearly illustrates the problem of ascertaining quantitative evaluation of various forms of technological transfer. As pointed out in the foregoing paragraphs, it is quite baffling to arrive at comprehensive figures for the cost of importing technology among poor countries. This is so because the "technology transfer takes so many divergent forms, paid for in divergent ways".(287) Further, it is a truism that private capital has never had any purpose beyond that of aiding its owners:

> "The fundamental problem of the underdeveloped countries is one of primitive accumulation, to which the profits of foreign enterprises make a very small contribution, since the bulk of the profit extracted goes abroad, there to be transformed into capital which will strengthen imperialism, thereby making the relative position of the Third World in general even worse."(288)

The cost element regarding importation

of technology is an important factor which needs to be scrutinised more closely. By examining the various payments, it is evident that this technology is excessively costly. As in the case of raw materials, to explain the value of capital equipment by the value of the goods it produces is to be caught in a vicious circle:

> "The last refuge of conventional economics is the myth of the productivity of capital. It is indeed a myth because to consider wages as given for the production unit is to accept from the outset the essential logic of the capitalist mode of production which reduces the worker to labour power, the precondition for all rationality in the microeconomic calculation."(289)

The Governments' overall readiness to allow the various payments overseas is therefore not based on clearly worked out technological quantitative cost values and it is safe to state that the company has an upper hand in this respect for it is more in the picture as concerns the computation of the various payments. Take the payment of tinplate as an example. It would seem that for tinplate there are no published figures and that even if these were available, they would be

averages or simply quoted basic prices applicable only to certain products specifications thus being only a rough approximation of prevailing international prices at which transactions actually take place.

There are also indirect foreign exchange costs: these as in the Metal Box Consultancy Agreement, talk of restrictions on sources of input and access to market outlets. By practice and as a result of the informal and automatic result of operations being conducted by Metal Box Kenya Ltd., there is an implicit restriction tying the purchase of imported inputs equipment and spare parts to U.K.: "Like tied aid this often has the effect of tying the purchase of imports to a more expensive source than would be used in the absence of the agreement and thus increasing the cost of the transfer."(290)

The payments of dividends and the various payments based on sales of performance bring about a disturbing feature, that is: the payments are not based on the general economic performance of the country in general or in relation to long-term development goals. The Yugoslav position is relevant here: According to the Foreign Investment Law of 1978, the Joint Venture Agreement must establish the maximum amount of profit

available for distribution to the foreign partner. The limit is calculated by reference to the previous profit performance of the domestic partner, the profit performance of that sector of the Yugoslav economy and the world economy as well as the importance of that particular investment to the development policy of Yugoslavia. (291) This approach is definitely reasonable as it takes into account various factors which form a rational basis of estimation of cost value of "transferred" technology. Indeed, a decision in a 1969 American case suggests that if a patentee insists on a percentage of sales royalty on all products and the licensee refuses those terms and instead offers only to pay for actual use, not only has patent misuse been established but the patentee must also accept the licensee's terms. The court stated:

> "We also think that misuse inheres in a patentee's insistence on a percentage of sales royalty, regardless of use, and his rejection of licensee proposals to pay only for actual use. Unquestionably, a license/e must pay if he uses the patent. Equally, however, he may insist upon paying only for use, and not on the basis of total sales, including products in which he may use a competing patent or in which no patented ideas are used at all." (292

The Consultancy Agreement we have been discussing certainly did not receive a critical evaluation by the Attorney-General's Chambers and would certainly be severely attacked in England (where it seems not have been registered(293)) if brought to the attention of the Patent Office. This is so because of the various provisions susceptible to anti-trust legal proceedings. For example, it is unlawful for a patentee to require licensee (as is the case in Clause 9(2) of the Consultancy Agreement between Metal Box Kenya Ltd. and Metal Box Ltd. of U.K.) to assign to the patentee any patent which may be issued to the licensee after the licensing arrangement is executed. In addition, the various prohibitions imposed on the licensee (already discussed) are areas of anti-trust valnerability: these are, restricting manufacture or sale under licence to a specific territory or to certain methods, or restricting the use of the product.

What is the answer to the technological dependence illustrated in the foregoing discourse? One possibility is of course to embark on a search for alternative technical resources or to localise the imported technology. Search for alternative technical resources will mean the termination of the Consultancy Agreement and so will it be the case if the imported

technology is modified locally. With the termination of the Agreement, the local company is not allowed (for a period of ten years) to use the name of "Metal Box" or "any sound or sounds similar thereto or capable of being confused therewith".(294) Although the words "Metal Box" are commonly accepted as "connoting the existence of certain technical and business standards adhered to by the Consultant" (Clause 14), nevertheless a departure should be made towards reproducing technology locally. Of course, such a possibility is beset by the market structure manipulations and prejudice that favour the use of foreign technology and tend to an exaggeration of the benefits of such imported technology. However, such psychological underestimation of local technical capacity is just a further proof of colonial mentality which serves to kindle the technological dependency we have been discussing, and can be done away with through political education process. The only caveat is that reproduction of imported technology <u>per se</u> is not necessarily a method of breaking away from the capitalist mode of production:

> "It is understandable that backward countries which are freeing themselves from capitalism and imperialism are forced to adopt, at least in some sectors, the modern techniques that are at

present the only ones known, while launching a specific criticism of that technology. China imports machinery. But the 'modern' machinery is taken to pieces in front of all the workers, who are thus invited not only to learn in a practical way how it functions, but laso to reassemble the machinery in their own way and to organize their work as they like. Japan and Russia also imported machines and dismantled them, but only for the benefit of skilled engineers who were required to reproduce the machinery and if possible to improve it according to their own logic. What China is doing is different: it has set itself the goal of accomplishing an industrial revolution, but an industrial revolution which opens the way to the development of techniques which carry with them socialist relations of production.")(295)

What emerges from the foregoing is an environment whereby the legal system has been a passive bystander to the various activities of multinational corporations in Kenya. And not only that. The legal system has been a co-conspirator in conserving the existing system. Law has allowed a legal-economic framework to be created by

which the fruits of technology are monopolised and invisible 'costs' are disseminated. The legal system has placed no significant restrainst on the rape of economic surplus developed by technology at great cost to the country and no effective constrainst to the distribution or utilization of this abundance. Thus in the case of Metal Box Kenya Ltd. the thread which runs through the analysis is that of a subsidiary of a multinational corporation whose monopolistic position has assured it a safe market for its products(286) and whose operations - apart from the restrictive protection inherent in the Consultancy Agreement - is pampered by Government's willingness to allow the local subsidiary to raise money locally on quite generous terms. Such a conducive climate for carrying out business, a climate which allows easy ways of repatriation of funds only serves to give rise to a neo-colonial industry which, despite token injections of capital, depends on exhausting local capital resources for money generation to the extent that annual outflow of funds greatly exceeds the inflow of funds potentially available for investment.

CHAPTER VI

CONCLUSIONS: PERSPECTIVES AND POLICY PROBLEMS

"The question is not whether nations control their economy, but how they do so; the real ideological choice is between controlling the economy through domestic private enterprise or doing so through some state or other collective institution.

But although this is an ideological choice, it is extremely doubtful whether it is a practical choice from an African nationalist. The pragmatist in Africa... will find that the real choice is between foreign private ownership on the one hand and local collective ownership on the other. For I do not think there is a free state in Africa where there is a sufficient local capital, or a sufficient number of local entrepreneurs, for locally based capitalism to determine the economy. Private investment in Africa means overwhelming foreign private investment. These are the facts of Africa's situation. The only way in which national control of the economy can be achieved is through the economic institutions of socialism."(297)

The Kenyan situation is that the emphasis is

on reforming the political economy within the political context. This is not to say that reforms <u>per se</u> are not useful. For example, take pieces of legislation relating to labour and industrial relations. It is evident that the bulk of the protective labour legislation operative in Kenya was enacted in the colonial times. The Shop Hours Act and the Employment Act were introduced as far back as 1925 and 1938 respectively. Other pieces of legislation in this regard were the Employment of Women, Young Persons and Children Act, the Factory Act, the Workmen's Compensation Act and the Regulation of Wages and Conditions of Employment Act. The above laws no doubt have improved the working conditions of the workers, but we have to accept the fact that capitalists have brains, or shall we call it business accumen(?): they know that amelioration of the workers grievances is a prerequisite to substantial productivity which usually results in substantial profits. But as we know, the laws have improved the lot of the working class <u>just up to a point</u> and have in no way even attempted to denude the more pronounced forms of exploitation, namely, relatively meagre wages, that is, in relation to the immense surplus values achieved. Of course there are trade unions, but the trade union movement, as described earlier, remains a typically feeble institution, rarely responsible for major initiatives in Kenyan industrial relations. The movement has shown clear lack of

any coherent counterstrategies, or indeed any clear understanding of the challenges which face it.

The above illustration of laws was taken to show that there are clear limits of legal safeguards -when political, economic and social structure is intended to retain its bedrock. In the case of trade unions in Kenya, it is apparent that the existing Government perspectives necessarily accord closely with those of employers, some of them being the multinatinal firms, for the country's capitalist economic strategy is closely linked to the welfare of owners of capital. One writer has diagnosed the situation quite clearly: "if the social process of investment and accumulation is left to private ownership then the fate of society as a whole is inextricably bound up with the fate of the rich... so long as productive resources are in private hands they must be allowed to produce a sufficient reward to maintain growth".(298) With an economy characterised by avarice, commercial crookedness, inequalities of income and opportunities, the Government has characteristically embraced the twin preoccupations of stimulating investment and holding down labour costs. Both objectives, as economists only know too well, are most readily attainable through a change in

the distribution of the national income in favour of profits. Hence these actions by workers and their unions which threaten managerial goals are a challenge to government economic policy also.

Another example whereby measures of control have proved palliatives only concerns consumer protection. Modern advertising, that loyal handmaid of capitalism, does not function in a competitive manner, but generally presents only the advantages of a product and not the disadvantages of the marketed product by competitors. It frequently excludes or distorts information which consumers need, such as useful information about one another, partly because of sympathy and partly because of a fear of retaliation. A good example of unfair advertising occurs in the drug industry. In an excellent <u>expose</u> Sanjay Lall notes very disturbing features of the drug market:

(1) A large number of patented brand-named drugs represent little or no therapeutic advance over previous medicines, yet are used extensively because of heavy marketing pressures.

(2) Their prices are very much higher than (a) genuine equivalents, where these are available from non-patent-observing countries or from licences compulsorily granted, or where patents have expired.

(b) slightly older drugs which have been modified in order to get a "new" product but which are therapeutically practically the same;

(c) older forms of medication, which may be somewhat less effective but whose cost represents a mere fraction of the cost of the newest products.

3. Many drugs lack "evidence of effectiveness," according to official tests in the United States and Britain (the proportion may be as high as 60-80 per cent), yet are widely prescribed.[299]

It was the observation of the above which led one Member of Parliament to warn in Parliament that Kenya should not be made a dumping ground for experimental drugs, saying it was a habit to bring in drugs which have not bee tested properly: "This makes us look like guinea pigs to be experimented with the drugs".[300] There are probably 23000 drugs and pharmaceutical preparations[301] in regular use in rich countries with around 1,600 of these in use in Africa. If, as we are doing, allow the free importation of virtually any drugs our doctors wish to use, we face an immense drain on our foreign exchange reserves. This is because many doctors - willy nilly or motivated by commercial avarice-

wish to use the latest and most expensive drugs for their paying patients.

In 1957, Dr. Hafdan Mahler, Director-General of World Health Organization, criticised the flooding of the medical profession with masses of drugs, advertised at great cost, when 95 per cent of health problems could be solved with a range of less than 200 drugs. "Part of our bitterness", he attributed to the fact that the drug companies had not yet applied their resources to seeking drugs of certain major diseases, "because they will not be the big money makers."(302) Dr. Mahler has also criticized the drug companies' practices in the "Third World":

> "Drugs not authorised for sale in the country of origin - or withdrawn from the market for reasons of safety or lack of efficacy - are sometimes exported and marketed in developing countries: other drugs are promoted and advertised in those countries for indications that are not approved by the regulatory agencies of the countries of origin. Products not meeting the quality requirements of the exporting country, including products beyond their expiry date, may be exported to developing countries that are not in a position to carry out quality control measures. While these practices may conform to legal

requirements, they are unethical and detrimental to health."[303]

Now, what does one do about ineffective drugs? Resort to court?

This is theoretically ideal, but is not what is liekly to happen here. One can also go further and say that even if one went to court, the remedies are not that forthcoming. The same would apply to defective pangas, matches (we seem to have the worst type of matches on earth!), defective tyres, etc. etc.

One important point to note is that there are limits to the effectiveness of the common law in protecting consumers. A general feature of the common law is that the consumers must take the initiative to enforce their legal rights as the assumption is that consumers know their rights and are sufficiently motivated to press them. But we know better. Most consumers of necessaries - drugs, pangas, and matches could be said to be necessaries - hardly recognise that they have been affected by a trade practice and thus lack sufficient incentive or drive to complain. In many cases where the impact of wrong-doing manifests itself in the future, there are no victims to complain in the present. The adverse effects of some food activities and drugs are cases in point, for their effects are not manifest until they have been used over a period of

time. As far as legal proceedings are concerned, the courts can appear remote and forbidding to wananchi whereas businesses which handle litigation more as a matter of routine, find them less daunting. More importantly, the cost, including the opportunity cost of the time and effort, deters consumers from taking legal action. Lawyers are reluctant to assist since in any event they are loyal passengers in the capitalist boat, and alas, poverty lawyers ready to represent the most powerless (and as corollary the most poor) in our society are not many. Comments R.O. Gaya in his dissertation,"Sale of Goods and Consumer Protection in Kenya":[305]

"By and large, growth of monopoly capitalism has rendered materially ineffective any protection the sale of goods legislation affords the consumer. In fact this growth can be traced clearly in the legal battles between the courts on the one hand and corporations on the other involving the application of exemption clauses: Standard form contracts entered into exclusively in terms imposed by the seller are apt illustration of the power the seller can and in fact do wield. Manufacturers association form themselves into cartels, regulating the terms which buyers are to enter into

contract with the individual member manufacturer".

And in the book, The Consumer, Society and Law(306) Lord Devlin says that courts could not relieve in cases of hardship and oppression because the basic principle of freedom of contract included the freedom to oppress. He continues:

> "...the common law has in some fields not shown itself sufficiently capable of radical development and the field of consumer protection is the outstanding example. The doctrine of precedent - the notion that the judge's task is merely to apply the principle laid down in earlier cases - has inhibited it from playing a more creative role. The courts have failed to move beyond cherished laissez-faire conceptions that were appropriate in the 19th century but are out-moded in this, because those conceptions are embodies in the judgements of the past; they impose the precedents which present-day judges feel bound to follow."(307)

In recent years, the realities of mass production and consumer economy have eroded the fiction of traditiona contract law whose heartbeat has been synchronized within the principles of equality and freedom of choice. The

reality, however, is that, wananchi, enter scores of contracts every week without any sense of agreeing to the terms that are imposed on them. In such circumstances, such terms cannot be said to be fair and standard contracts have thus become a hidden form of exploitation. These standards form contracts, probably accounting for more than 90% of all contracts made, (for example theatre tickets, bus tickets, laundry receipts, insurance policies, leases, deeds, mortgates, etc.) continue to plague us with probably the benign blessing of the courts in their adherence to largely outmoded contract doctrine.

The proliferation of management agreements, between parent multinational companies and their subsidiaries here or with a Government institution not only highlights the dangers inherent in such arrangement vis-avis freedom of choice and equality -especially with regard to the bargaining procedures - but clearly flashes a light of warning: there is a latent contradiction between the ideology of the law and the underlying social and economic relationship but the irrational legitimatio of unjustified inequalities of power. When for example, we take the technical agreement between Metal Box Ltd. of U.K. and its subsidiary in Kenya, the reality is such

that the agreement is made at the initiation, direction, pressure and even prodding by the parent company. The "multinational men" running the local subsidiary have no choice and in any case why should they want to have better terms, for after all, the parent company is actually their ultimate employer. The agreement between Firestone and its subsidiary in Kenya is undoubtedly one of the types of contractual relationships which ridicule the sovereignty of an independent state, and one cannot but help regretting the apparent arm-twisting tactics employed in the conclusion of the agreement. The salient generous concessions are:[308]

a. a virtual monopoly of the Kenyan tyre market, supported by a ban on all imports;

b. the right to use its own price formular in sales, despite this monopoly;

c. the right to duty free import of machinery and material inputs required in the factory;

d. Government financial participation in the project to the extent Firestone desired (sufficient to give government a stake in the subsidiary's success, but not enough to threaten Firestone's managerial control);

e. the right to count its technical and service assistance in setting up the plant assistance

in setting up the plant as US$1 million contributed in equity; .

f. and the right, at the same time, to charge technical fees, as a percentage of sales, on the ongoing operations of the factory.

Fortunately, times are changing and the Government has said that the agreement will not be renewed in its present form when it expires this year, and that negotiatio will be taken to have another company establish a tyre factory in the country. But if past experience is anything to go by, the expected competition may prove unhealthy in so far as the interests of the consumers are concerned. Various examples validate this warning. Secret sale agreements may be made as a strategy of competition, or a price war may be engineered, or worse still a price collusion may be undertaken. Such practices are, unfortunately, possible under our company law framework. For example, Bamburi and East African Portland Cement have got involved in a market-sharing agreement facilitated by the cross-holdings of equity between the two companies.(309) Also, there was an aggressive initial price war in the paint industry which was checked by tariff protection against overseas competition. Thereafter, the four major

foreign firms involved formed themselves into a cartel called the East African Paint Industries Association with "agreements covering fixed prices and bulk purchases discounts."(310) Such a situation, as stated earlier in the case study of Metal Box Kenya Co. Ltd., is likely phenomenon should a competitor emerge in the canning industry. In the case of Rothmans, the ruthlessness of competition was clearly marked. By 1966, Rothmans of Pall Mall was already running 32 factories in 18 countries over half in the Commonwealth. Yet when they entered East African market in 1966, they found water-tight competition from BAT who plunged themselves into a tearing advertisement campaign which was hard to be matched by the new comer as the latter was utilising accumulated funds to engage in the "exceptionally heavy advertising and marketing expenditure which was necessary to meet this competition."(311) Rothmans' operating expenses became quite high and not long afterwards, they were forced to close down their operations and sell their assets to BAT at quite low price. But in Zambia a merger was found more realistic. An extraordinary general meeting of Rothmans shareholders in Lusaka approved plans for a merger with the British American Tobacco Company to form Zambian Cigarette Manufacturer Ltd. A statement issued after the meeting said the merger would leave Rothmans with 70 per cent of/shares and BAT /the with 30% in the new company.

The above practices are not possible in many of the developed countries. In America there are the anti-trust laws. In 1890, an Anti-Trust Act (Sherman Act) was passed with the intention of arresting the trend towards monopoly capitalism by giving power to the government to prosecute trusts in courts. It declared that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" was illegal. The original act was supplemented in 1914 by the Clayton Ant-Trust Act, which stated more precisely the monopolistic practices which prohibited and exempted labour unions from the Anti-Trust provisions. Executive action and supreme court decisions have been built upon the original foundation a complex code which today regulates the conduct of big business. (312)
In Britain, the Monopolies and Restrictive Practices Commission was set up in 1949 under the Monopolies and Restrictive Practices (Inquiry andControl) Act, 1948 and enlarged by subsequent legislation. The work of the commission is independent of that of the Restrictive Practices set up in 1956 and its function is to enquire into the existence and effect on public interest of monopolies in the supply, processing and export goods and of certain restrictive practices not dealt with by the court. The commission is not an executive body; it can only report and recommend. Its reports are made to the

Board of Trade who are responsible for laying them before Parliament and for publishing them. In West Germany, there is the Anti-Trust Act of July 27, 1957. This piece of legislation prohibits in principle all contracts and arrangements restricting competition (article 1) and subjects monopolies to a large measure of state control directed against abuses of such monopolies. It also imposes obligations to inform the state administration in case of a merger of enterprises.

The above measures of control of abuses arising out of restraint of trade are being minimised in countries which we usually depend for much in our policy formulation and it is a reflection of our legislative inertia that we are lagging behind in many respects of legislative innovation. For example, despite various amendments to the 1948 English Company Law, our Companies Act is almost static and such things like minority protection, stringent disclosure rules, workers' participation in company affairs etc., are dismally mssing in the statute books or in projected reform programmes.

In the area of the transfer of technology here is an area where confusion and sheer darkness comfortably

co-exist.

The most common form of supply of technology is whole or partial ownership of a subsidiary by a multinational enterprise. In addition to product design and production know-how, the foreign parent company usually contributes Management, Marketing and centralised services.

Technological inputs in this respect consists mainly of (i) machinery, equipment, capital goods, etc. for which outright payments are made; (ii) process technology and directly related know-how for which a host of fees - royalties or lump sum payments are usually made; (iii) technical services, including design, engineering and other consultative operations, for which service payments are required. Together, their expenditures are usually paid in many of the consultancy agreements, for example, that of Metal Box Kenya Ltd. Coupled with this as is the case with Metal Box Kenya Ltd., is the licensing arrangements which is associated with patents and brands, a practice which serves as a vehicle for restrictive business practices by the parent (holding) company, not only with respect to export but also with respect to other aspects of business

operations including volume of output, tied purchases, sales by the licensee and the like. It would seem that management contracts, especially in the manufacturing sector, have been requently undertaken by firms that have a motive besides the profits that will accrue directly under the contract. The firm, often an equipment supplier, becomes interested largely in selling equipment or licensing technology and undertakes to run the plant in order to induce equipment sales.

Under such arrangements, payments for technology in the various forms outlined above, usually comprise a bigger chunk of foreign exchange allocation compared to the figures for dividends. This is clearly illustrated when we look at the figures of remittances for the various heads /in the case of Metal Box Kenya Ltd./ Take February 1979 figures, for example:

Dividends & Profits	Ksh.17.612,6
Services	**Kshs.**
Royalties	57,426
Technical/ Management/ Consultancy/ Professional Fees	33,800,195
Commission/ Commitment/ Agent fees	9,245,967

	Kshs.
Directors/HO Expenses	290,121
	Kshs.43,393,709 (313)

The above figures indicate that there are more "reliable" ways of repartriating funds especially when we observe that during the same month transfers through inter-company accounts amount to Kshs.39,782,428 presumably as payments for machinery and even dubious payments of commissions, etc. Interest onl loans amounted to shs.34,226,837 while the figure for Capital Repatriation/Loan repayments amounted to Kshs.34,907,368 It is also interesting to compare the payments overseas and the receipts during the same month, i.e. February 1979.

A. Payments	Kshs.	B. Receipts	Kshs.
	225.9 million		25.9 million

A recent statement from the Central Bank of Kenya stated that "overseas receipts were larger than payments by shs.247 million, which suggests that control measures on imports and their payments are working in accordance with Government intentions".(314) Now this statement tells us very little as the nature of the payments is not disclosed neither the nature of receipts which are usually in the form of loans and

shares.

To counter the outflow of funds arising from the so-called transfer of technology, the thrust of the Mexican legislation seems relevant here:-

> "Contract shall not be approved when they refer to technology freely available in the country; when the price or counterservice is out of propotion to the technology acquired or constitutes an unwarranted or excessive burden on the country's economy; when they restrict the research or technology supplier to interfere in the management of the purchaser company or oblige it to use, on a permanent basis, the personnel appointed by the supplier; when they establish the obligation to purchase inputs from the supplier only or to sell the goods produced by the technology importer exclusively to the supplier company; when they prohibit or restrict the export of goods in a way contrary to the country's interest; when they limit the size of production or impose prices on domestic production or on exports by the purchaser; when they prohibit the use of complementary technology; when they oblige the importer to sign exclusive sales or representation contracts with the

supplier company covering the national territory; when they establish excessively long terms of enforcement, which in no case may exceed a 10 - year obligation on the importer company, or when they provide that claims arising from the interpretation of fulfilment of such contracts are to be submitted to the jurisdisction of foreign courts."[315]

The other reliable method of utilising the advantages of technology is to establish technical skills locally. The bulk of technology in use in Kenya is foreign owned. Since independence, there has been great emphasis on the transfer of technology through import substitution in the manufacture of consumer goods and intermediate products. This mode of industrialisation, however, is beset by various problems. In the first place, most of the industries established are on a turn-key basis, and in addition there has been little or no adaption of the technology to local socio-economic and cultural settings.[316]

The country, desirous of creating a pool of technological advance, has by an Act of Parliament[317] a machinery for advising the government on matters relating to the scientific and technological activities and research necessary for the lessening of technical know-how

dependence on the developed countries. The Act of Parliament established a body known as the National Council of Science and Technology whose main functions are:

(i) to determine priorities for scientific and technological activities in Kenya in relation to the economic and social policies of the Government and its international commitments;

(ii) To advise the Government on a national science policy, including general planning and the assessment of the requisite financial resources;

(iii) To ensure the application of the results of scientific activities to the development of agriculture, industry and social welfare in Kenya;

(iv) To ensure co-operation and co-ordination between various agencies involved in the machinery for making the national science policy;

(v) to advise the Government on the scientific and technological requirements for the conservation of the natural and social environment in Kenya; and,

(vi) to promote public confidence in scientific expenditure and an atmosphere conducive to scientific activities.

Associated with /the/ Council are four sectoral scientific Advisory Research Committees (ARCs) in the fields of

agricultural, industrial, medical and natural sciences. The main functions are to advise, within their sectors of scientific responsibilities, on:

(i) the details of the research programmes and projects required to implement the research priorities arising from the national science policy;

(ii) the concomitant budget, promotion and co-ordination of all types of research; and,

(iii) the application of the results of research through the technical and development service of the Government.

The Act recognises two other science groups namely social sciences and physical sciences (including chemical sciences and mathematics). Although no ARCs have been established for these two groups, there is provision for their establishment.

In certain areas like agriculture, there have been some positive results in technological invention. Investments in research and development have resulted in improved plant and animal species, development of crop and animal husbandry and storage techniques. However, agricultural inputs such as fertilisers,

pesticides and agricultural machinery are still imported.

In the field of medicine, very little has been achieved mainly as a result of resorting to licencing agreements with foreign firms. In January 1978 for example, an agreement was reached between the Beecham Group, a British-based research company, and the local pharmaceutical company, Dawa Pharmaceuticals, to extend the range of Beechman semi-synthetic penicillins being "manufactured" under licence in Kenya by Dawa Pharmaceuticals. But such an arrangement in no way involves proper transmission of technology because all the bulk compounds are sent from Beecham plant in Singapore to the Dawa factory where they are formulated into capsules and syrups for use by doctors throughout Kenya. In the field of traditional medicines, Kenyan modern bio-scientists have of late linked with traditional medicine men and women in determining the active ingredients of herbs. This has resulted in the discovery of anti-tumor drugs, muscle contraction and relaxants. But as a result of financial bottlenecks, the African scientists do not have manufacture and improvement of the drugs done, and more often than not, the Kenyan-based foreign pharmaceutical firms actually do the manufacture of such chemicals or drugs. Dr. Njuguna J. Mugo of

an indigenous patent law regime should be instituted mainly as a result of the lack of machinery to implement and enforce the instruments of control thereof. One of the basic reasons for the cumbersomeness is the long and expensive legal procedure through which the present patent system is administered. "Because the corrective measures are not automatic and because legal procedures are long and costly the financially stronger transnational corporations have an advantage over the relatively weaker national firms."(319)

All the same, various considerations-sovereignty, sense of innovation and inventiveness, do persuade one that the existing patent system needs a total reappraisal so as to correct the inadequacies which appear to have negative effects particularly on the economics and interests of poor countries.

Through talking to a number of senior Government officials in the Ministries of Finance and Commerce and Industry, Central Bank and some parstatal bodies, it is encouraging that the old laxity and complacency towards the operations of the multinational corporations are on the wane. There is now a keen wariness vis-a-vis demands by foreign firms when establishing firms, a closer scrutiny over the nature and content of management agreements and the overall role of the industrial sector in the political economy of the economy. What is, however, disturbing is that this apparent new-

the University of Nairobi, has for example, discovered a drug which has been registered in the U.K. under the patent law, but the important thing here is the availability of funds - which if not immediately forthcoming - will finally result in a foreign multinational firm sponging on the drug formula and manufacturing the final product.(318) Here is where the Government can come in and financially help promising scientists in their research endeavours. The present trend is that the majority of patents are owned not by individual investors but by multinational corporations; the consequence of the concentration of patents in the hands of a small number of firms is that patents are to a large extent oriented towards the control of the market so as to maximise the overall interests of a small number of firms who are owners of industrial property privileges. This market control, as has been indicated earlier, results in monopolistic concentration which is reinforced through the system of cross-licensing between companies which in turn reduces a world-wide oligopolistic structure into a regionally monopolistic one. There have been suggestions to introduce mechanisms in the country's legal system to correct the existing alien policies in the patent system. However, a senior official of the National Council of Science and Technology stated that theRegistrar of Companies did not feel that

an indigenous patent law regime should be instituted mainly as a result of the lack of machinery to implement and enforce the instruments of control thereof. One of the basic reasons for the cumbersomeness is the long and expensive legal procedure through which the present patent system is administered. "Because the corrective measures are not automatic and because legal procedures are long and costly the financially stronger transnational corporations have an advantage over the relatively weaker national firms."[319]

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born vigilance has come about after a lot of harm has already been done. A few examples will suffice.

Sometimes back, a sub-committee of the Industrial Protection Committee which deals with the various forms of incentives granted to foreign investing companies, carried out an investigation into the operations of Kenya Toray Mills , a textile factory backed by Japanese funds. A large scale exercise of over-invoicing was discovered and the persistent "losses" shown on the company's accounts were to all intents and purposes bogus. The company was finally taken over by ICDC and is currently operating under the name Kenya Taitex Mills. The results of the change in terms of technical independence have, however, yet to be established. Another case which shows encouraging vigilance from Government officials is that of E.A.Sugar Industries in which no multinational is involved but where Mehta Group has a stake by way of shareholding. As at August 1978, the sharholding structure was as follows:-

		Capital	%
(a)	Agricultural Development Corporation	14,000,520	60.28
(b)	Mehta Group	3,915,860	16.86
(c)	Kenya Government	3,226,060	13.89
(d)	D.F.C.K.	1,999,740	8.61
(e)	Others	83,620	0.36
		23,225,800	100

What is disturbing from the above figures is that the Mehta Group, despite its relatively small holding, has managed to milk a lot of money from the company by way of management fees and commission. Under the Management Agreement, the company is being managed under management agreement which costs:-

(a) Fees Fixed at shs.500,000 p.a.

(b) Commission of 10% on profits.

Between 1973 and 1977 the following amounts were incurred with respect to the management fees and commissions paid to the Mehta Group:

	Fees	Commission	Total[320]
1973	500,000	583,738	1,083,738
1974	500,000	183,627	683,627
1975	500,000	120,695	620,695
1976	500,000	910,518	1,410,518
1977	500,000	540,420	1,040,420
	2,500,000	2,338,998	4,848,998

The above figures are quite large particularly as the ordinary shareholders had not during a period of seven years received any dividens. The internal memorandum footnoted above remarks forcefully:

"One wonders how the agreement defines the profits because in 1973 the profit after all charges - is only shs.115,962. Nevertheless a sum of shs.583,738 is charged as 10% commission on profits! Similar payments of shs.120,695 was paid in 1975 while the loss made was shs.3,570,352. Apparently this is calculated before charging loss incurred on foreign currencies and management commission. For comparison, the profit made after all charges is indicated herebelow:

			KShs.
1973	Profit		2,587,181
1974	"		115,962
1975	Loss		(3,570,352)
1976	Profit		7,293,359
1977	Profit		3,535,924
	Total	Kshs.	9,962,074 (Profit)

"As indicated above, the total profits realised over the last five years, after all charges are made, is shs.9,962,074 and the Mehta Group have so far been paid shs.4,848,994 in form of management fees and commission. This is 49% of the profits.

"This is manifestly excessive and theTreasury ought to review the Management agreement in force

and see where amendments may need to be made in order to safeguard Government financial interest. It appears easy money for a company to get into partnership with the Government, manage the firm, never declare a dividend and take home all the profits in the guise of management fees. The situation becomes even more serious where these payments have to be made in foreign exchange - the Government gets nothing despite the fact that it could be the majority shareholder."

Del Monte Corporation, the world's largest canner of fruits and vegetables whose headquarters are in San Francisco, has also been accused of siphoning money out of the country without regard to the interest of Kenya. In a confidential report entitled, "Foreign Exchange Leakages with Particular Reference to Transfer Pricing",(320) it is stated that Del Monte has been engaged on large scale transfer pricing. Del Monte, which owns Kenya Canners of Thika, does it this way: Kenya Canners sells its entire pineapples output on paper to another Del Monte subsidiary, Del Monte Inc. based in England, charging low prices. Del Monte Inc. then/sells them at a higher price on the European /re market, although the actual goods are shipped directly from Kenya to France, Germany and other European countries. Kenya Canners also pays Del Monte "service

charges", which, according to the confidential report are so juggled that the bulk became due for payment just when Kenya Canners was due to begin making a marginal profit, in 1976. These "service charges" eliminate the profits and the taxes which would have been due. Among other loopholes is the near monopolistic position for 30 years achieved by the company and advantage of duty free access to the E.E.C. market. According to Kaplinsky, there are variety of reasons for underinvoicing exports from a subsidiary. Two of the most important reasons are tax-evasion and the minimisation of the effects of currency fluctuations. Kaplinsky observes:

> "In the case considered here service payments are routed through a Panamanian associate, in U.S.A. dollars, thereby avoiding taxes and minimising currency losses to the parent. However, in the case of underinvoicing sales, the advantages accrue to the British subsidiary. Since these are taxable (unless further currency manipulations enable the British subsidiary to avoid tax as well), there is no tax advantage to the company from this maneouvre. And furthermore, particularly in the 1975 - 7 period, sterling was rapidly depreciating

currency and the underinvoicing of exports from Kenya may have led to a net loss to the company. (The Kenyan pound is tied to the dollar rather than to the British pound). We have no way of explaining this situation, except to observe that the Kenyan subsidiary is in fact owned by the British of this American firm, and given that the British subsidiary may be a profit centre in itself, this might explain the observed pattern of underinvoicing."(322)

The powerlessness of the Government in such a situation should, however, not be exaggerated. In the case of the Sales Agreement with Del Monte, it is clearly specified that the company "shall sell goods purchased hereunder to its customers to the best advantage of (the subsidiary), taking into account the place of sale, time of sale, type or class of customers and other competitive factors". The correct interpretation of the Agreement, based on the company's financial operations and sales, should guide Government officials in curbing dubious practices. What is more, the government has the right to revoke all three agreements by giving three months' notice or alternative arrangements of co-operation could be devised.

From talking to a senior official in the Ministry of Commerce and Industry, it will be increasingly difficult in future to engage in transfer pricing and concomitant practices engaged in by multinational corporations. There are discussions to establish a supervisory body under the umbrella of the Industrial Protection Committee to arrest the dubious practices at the nub stage. Bargaining experience is being gained gradually, and indeed the Application Form to the New Projects Committee is being amended for approval as it contains "amorphous" questions at present. For example, as regards environmental considerations the present Form(323) only concentrates on such matters like water and air pollution but completely ignores other useful environmental considerations pertaining to human factors - human settlements, ecology, etc. With regard to renewals of consultancy agreements, etc., multinational firms in the country can expect some tough discussions; one official of the Investment Section of the Central Bank of Kenya was, for example, quite mindful of the fact that Firestone East African (1969) Ltd. had repatriated over shs.2 billion since its establishment - a high figure indeed. That the Government can now afford to wage a spirited war against unfair elements of bargaining is clear from

its decision to allow another investor in the tyre industry, hitherto a holy shrine of Firestone East Africa (1969) Ltd.

The "new" Government outlook towards multinationals is no doubt commendable, but it just indicates a form of new economic nationalism characterised by various legal instruments, which as we have seen, are characterised by various loopholes. Such a situation accords with this statement by Prof. Sawyerr:

> "Our attention has thus been concentrated on the more or less passive functions of the law in reflecting or creating conditions for social evolution. But in a period of such fundamental changes and accelerated development perhaps the law must assume a more positive role in some spheres, must seek to influence the direction of development even if with only <u>marginal effect</u>" (emphasis mine)[324]

Thus the legal machinery in Kenya can marginally be a useful vehicle in controlling the activities of multinational corporations in the country, but this is as far as one can go. The nature of legal machinery is umbilically tied to the socio-political economy of the

country and if no structural changes are made in the body politic, one could hardly envisage meaningful points of departure in the legal edifice. The regulatory machinery - coupled with its lacunae - though successful in certain respects, has not in any way constituted a disengagement from the system of internationalised capitalism; there has been no significant erosion in the internalised capital; as represented by the multinational corporations. What is taking place is the modification of international capitalist order by permitting "the incorporation of a greater number of national bourgeoisies."(325)

Africanisation is a case in point here. The top jobs in multinationals have been given to safe members of the African elite, whose Western succeptibilities and mannerisms are quite well marked and who, in search of a local bourgeois class, are only too willing to implement the wishes of multinationals:

> "While the Government has taken action in the name of a truly nationalist and independent leadership, in reality, its Africanisation policy has been the ideal safeguard for its class interests. There is no conflict between itself and an increasing sub-petty bourgeois class

aspiring towards it... Such a sub-class and the Government have an identical interest in retaining the status quo. The broadening base of the sub-class continues to weaken the emergence and effectiveness of any true or rural proletariat class." (326)

And the workers do not seem to have the proper motivation in being involved in the day-to-day operations of multinationals, and workers participation on the Boards in a sacred cow. Our Company law still goes on emphasising the need of protecting the interests of the shareholders, with questionable neglect of the interests of consumers and workers.

It has been suggested that a revised Company Law should require every company to include in its memorandum of association "a general objects clause", setting out the directors' responsibilities to consumers, workers and the community.(327) A special director would be appointed to each board with responsiblity for consumer interests; another would have a special concern for local community interests, yet another would be a "workers" representative. In Europe, the trend is in this direction,(328) but Kenya is far from this, bearing that its company law has seen no significant changes since the enactment of Companies Act in 1948, this being a model on the English

pattern. But the English legislation on companies has been amended greatly since then, sometimes with moderately far reaching reforms. But for workers to participate fully in the affiars of the company, political consciousness is necessary. Such consciousness, as M. Mann has written, involves four main elements:

> "Firstly, we can separate class <u>identity</u> - the definition of oneself as working class, as playing a distinctive role in common with other workers in the productive process. Secondly comes class <u>opposition</u> - the perception that the capitalist and his agents constitute an enduring opponent to oneself. These two elements interact dialetically; that is to say opposition itself serves to reinforce identity, and vice-versa. Thirdly, is class <u>totality</u> - the acceptance of the two previous elements as the defining characteristics of (a) one's total social situation and (b) the whole society in which one lives. Finally comes the conception of an <u>alternative</u> society, a goal towards which one moves through the struggle with the opponent. True revolutionary consciousness is the combination of all four".(329)

The current level of class of consciousness in Kenya comprises little but the first two elements and even not without qualification, the latter apply only in the most vestigial sense. Nor can it seriously be suggested that a radical kindling of consciousness can occur naturally or spontaneously. This must be planned, indeed fought for, in a continous struggle against the grip of bourgeois ideology: a struggle which is only possible because existing working-class consciousness does contain contradictions, and because workers' taken-for-granted assumptions about their society do come into constant conflict with their immediate experiences and activities. Effective intervention in the current exploitation necessitates an adequate general theory of capitalism and the transition to socialism; a theoretical analysis of the present disposition of the class struggle - the objectives of the ruling class, the role of the unions, and the state of working-class consciousness.

Tanzania, because of its socialist goals, has established a Workers Council in every public corporation or firm employing more than ten workers.(330) The functions of the Workers Council in, and in relation to, the business for which it is established are:

(a) to advise on the requirements of the existing wages and incomes policy as announced

by government from time to time;

(b) to advise on the marketing aspects of the community produced;

(c) to advise on matters relating to the quality and quantity of the commodity produced;

(d) to advise on matters of planning;

(e) to advise on other aspects of productivity, such as workers and enterprises organisation, technical knowledge, workers' education, etc.;

(f) to receive and discuss the balance sheet.

The above are far reaching powers indeed, and are further strengthened by a further provision in the Presidential Circular of 1970, namely, the Board of Directors shall have at least one of its members nominated by the National Union of Tanganyika Workers. However, it seems that the programme has had cold reception in many quarters and at times representatives on the councils have not been ordinary workers, but allies of the management by virtue of posts held by them in the company. In an official paper to the 1971 National Development Corporation Group Managers' Conference dealing with "participation" it was said that the NDC companies had experienced, to a greater or lesser degree, disappointments, frustrations and even real doubts as to the value of the 'Workers' participation programme. A student carrying out research in this area has even stated:

"For certain, premature participation in decision making is gradually ruining the economy and discipline within the Civil Service."[331]

The matter becomes more complicated when it is realised that the management consists principally of the usual capitalist "boards of directors", who under a true bourgeois system are the organs of the shareholders whose only interest in the business is profit: "It is unfortunate that they have been allowed to continue unaltered even in this supposedly new scheme of management".[332] In the Kenyan sitution, token shares have been given to workers in a number of companies, e.g. House of Manji, Nation Newspapers and Publishers / etc., but without any meaningful share of /Ltd., participation in company's decision making machinery. The same applies to companies where the Government has shares or even where some form of nationalization has taken place. After all, parastatals have become, by their capitalist policies,"the instruments for the development of classes in Kenya with a built-up political resistance to real and meaningful social change from the colonial inheritance".[333]

What is to be done? To counteract the evils of internationalized capitalism whose conduits are the multinationals, it is necessary to disengage from the

camp of exploitation. Samir Amin, Africa's foremost political economist and at present Director of the African Institute for Economic Development and Planning at Dakar, Senegal, does a neat anatomy of the challenge which involves:

(a) getting rid of the multinational corporations and replacing them by long-term State-to-State agreements, thus giving more autonomy to the underdeveloped States and enabling them to use the profits resulting from their higher export prices as they choose;

(b) rejecting the project of the new international division of labour and developing their economies on the basis of a maximum social and technological autonomy, the long-term State-to-State agreements being geared to that perspective;

(c) refusing the division of the "Third World" on the basis of "sub-imperialism"/"subcolonies", and on the contrary accelerating the process of the constitution of large blocks with the prospect of an equal development of partners therein.(334)

Such disengagement does not mean isolationism, for even those countries pursuing socialist ideas,

a flirting with multinationals is only too apparent. This is interesting, for such co-operation is of recent origin. Before *detente* by multinational corporations were seen by Eastern writers as business organisations that were developed for the sole purpose of furthering the imperialist aims of Western - especially American-Capitalists the world over. Later, however, as a result of increased demand for advanced Western technology, products, and know-how the Eastern socialist countries gradually revised their views on multinational corporations and these received substantial support in 1973. First, the Soviet publication *Mirovaya Economic i Mezhdunarodniye Otnosheniya (World Economics and International Relations)* made the following observations:

> "It is highly probable that in the years to come the development of the world economy will continue to be marked by a tendency toward the growth of large - batch and mass production, and of the optimal size of enterprises, the appearance of ever new kinds of manufacturers and increased costs of research. These processes will, without doubt, make international

specialization in production and coordination of production and research programmes of countries and individual enterprises increasingly beneficial."(335)

Then later in the year, Jerman M. Gvishiani, deputy chairman of the Soviet Union's Council of Ministers for Science and Technology, stated in San Francisco at the closing session of the International Conference attended by 650 industrialists from 75 countries, that:

> "multinational corporations will find an enthusiastic host in the Soviet Union (because) the economic relations between the Soviet Union and the Western economies is passing over from sporadic commercial deals to a planned and programmed economic cooperation on a stable and long-term basis. One can hardly over-estimate both the economic and social implications of this tendency.".

Thus we find that multinational corporations are operating in the Eastern countries, the Soviet Union, China, and Eastern Europe. As regards China, the country has now established trade connections with more than 150 countries and regions. New long term trade

agreements have been concluded with several developed countries.

During his visit to Brussels in April this year (1979), Chinese Minister of Foreign Trade, Li Qiang, signed a trade agreement with the European Economic Community. The sides agreed to accord each other most-favoured - nation status. In December, 1978, China and France signed an agreement of economic co-operation. France was to build two atomic power installations in China, each with a generating capacity of almost 1 million kilowatts. West German companies - Krupp, Lubeck and Wedag- have concluded contracts with China on the construction of large coal mine and a coal dressing plant. Since 1972, China has been importing from the US, farm products, ammonia plants, passenger planes, and other machinery. By the mid-1970's, more than 200 American co-operation businesses had entered into agreements of industrial co-operation with Eastern organisations; three out of four of these are multinational. And so are many of the Western European and Japanese corporations involved in such projects in Eastern Europe. In Hungary, the presence of Royal Dutch Shell is fairly conspicuous. Shell gas and service stations are scattered all along the

highways. For many years, Fiat, Renault and Ford have been involved in various types of production ventures with Soviet, Polish and Romanian enterprises in building cars and trucks for local sale and exports.

Are these socialist countries as vulnerable to the machinations of multinationals to the same extent as Kenya is? The answer is an emphatic NO. China despite the introduction of Coca-Cola (the symbol of American capitalism: "things Go Better With Coke!") into the country still has socialist goals to pursue and cannot allow a new form of colonialism to permeate. China says that she will accept loans from foreign governments as long as the terms are "appropriate' and that she is ready to set up joint enterprises in the country. These jointly - financed enterprises will not be more than 49 per cent owned by foreign investors. The valid rights and interests of foreign companies will be protected by the Chinese Government and Chinese law. Under China's new policy, the outlay of foreign firms for equipment, expertise and services are to be paid for in goods produced in the country. Investments in oil fields, coal mines or factories, for example, will be paid for in kind - with oil,coal or other products.

And Russia is not likely to depart from its ideological path: the Soviet economic system and state monopoly of foreign trade enable the Soviet Union to arrange its relations with foreign countries and multinationals in such a way that it can safeguard its national interest. Overall, in a planned economy, state control of labour force, wages, and prices, coupled with monopoly of foreign trade and inconvertible currencies - all together make the multinationals come up against "a sort of chastity belt. To ensure that the belt remains locked, socialist participation in joint ventures is required to be at least 51 per cent."(336)

What transpires from the foregoing is that the role and effects of multinational corporations in the socialist world are not the same as they are in the capitalist bloc. A convincing case can certainly be made that, at least for present, the socialist countries are adapting technological inputs from multintional corporations to their own internally - determined development process, rather than the other way round, as it is in the capitalist world.(337) The Tanzanian experience further buttresses the argument that measures of nationalization which are not of positive structural change are at best, half-hearted and of limited

results. Up to today, the debate continues as to the socialist importance of the parastatal organisations in Tanzania. The most virulent critic of the Tanzanian parastatal set-up is undoubtedly Issa Shivji, a Tanzanian of Asian origin, teaching Law at the University of Dar es Salaam. Writing in East Africa Law Review in 1972 Shivji calls for an urgent need to analyse specifically the newer forms of relationship with foreign capital, and the management agreements in particular, as such relationships seems to be carried on within the capitalistic ethics and notions. According to Shivji, Tanzania appears to be in a situation of flux; on the one hand, there is the economic and political bureaucracy (objectively backed by the international bourgeoisie, the country being still in the neo-colonial framework), and on the other are the workers and peasants as represented in their most vocal and conscious elements - largely small groups of intelligentsia, including a few enlightened leaders.(338) Under the leadership of the economic and poltical bureaucracy, the bulk of the investments by the National Development Corporation of Tanzania is in luxury industries and its relationship with multinationals leaves a lot to be desired:

> "..the foreign 'partners' being global monopolies have a very strong bargaining position vis-a-vis

Tanzania. The partnership being between unequal partners - and especially when one of the partners is a capitalist corporation, it does not need much economics to see that the weaker partner stands to lose. A neo-colonial economy essentially remains a trading economy. It remains an export - oriented economy whose industrial units are vertically integrated with parent industries in the metropolis with no or very little integration with other industries or sectors in the neo-colony itself. Thus it may make sense and is economically rational for the Brooke Bond Liebig Group, which operates on global level, to have a plant - the Tanganyika Packers - exploit Tanzania's livestock (raw material) and process it into meat and export for its markets in Bahamas, Europe, Jamaica, Borneo, etc. But it makes no sense and is economically irrational for Tanzanian economy to have Tanganyika Packers, if (as it is now) only 5 per cent of its products are consumed locally. Again the high prices fixed for the canned products of the Tanganyika Packers may be completely in accord with Brooke Bond - Liebig's international market but may not at all be justified for the Tanzanian market. It is in fact, possible (even desirable) for the Tanzanian socio-economic plan to require that the prices of canned meat should be fixed at

a lower level so as to raise the nutritional level of the country's industrial proletariat - a real asset for development."(339)

The Tanzanian situation underlines the truth that you cannot have socialism without socialists(340) and that you cannot expect to implement socialist ideas effectively if the body politic is a slave, and continues to be so, of the international bourgeoisie and all that class stands for both in values and property rights. This was the hard lesson which the late Kwame Nkrumah learned rather late, in his active political life. Nkrumah in pursuing a socialist path of development had chosen to phase out the private sector of the economy through the expansion of the public sector rather than attempt an all - out programme nationalisation. Immediate nationalization, it was said, would have brought an economic blockade by the West.(341) In addition, while the politicization of the Ghananian people was proceeding, the forces of feudalism and conservatism in Ghana were still strong. "The veranda boys paid lip-service to socialism without any intention ever to put it into practice. There was no law against that."(342)

It is a dialetical fact that the ruling classes always have motives behind reforms, motives which are inescapably tied in with their interests. Take for example

the Black Act passed in England in 1723. This Act made the death sentence mandatory to a variegated motley of offences which included the hunting, wounding and stealing of deer; poaching hares, rabbits or fish; damaging fishponds; cutting down or damaging trees; maiming cattle and even sending anonymous threatening letters. With such trivial offences fetching harsh punishment, law no doubt suffered a stain and one would think that the reform movement was motivated by this consideration. But, no; even with the mask of humanitarianism, the reason was to be found elsewhere. The arguments of the reformers were pivoted on the observation that the death penalty was not an effective deterrent. This is borne out by the report of the Select Committee on Criminal Law:

> "Numerous and respectable witnesses have borne testimony, for themselves and the classes they represent, that a great reluctance prevails to give evidence, and to convict (for minor property offences); and that this reluctance had had the effect of producing impunity to such a degree that it may be considered among the temptations to the commission of crimes."(343)

As a proof of the above observation, as soon as the death penalty was abolished, the number of successful prosecutions soared. The fact of the matter is that

offences against property were considered by the reformer more important as opposed to crimes against the person. It is also noteworthy that the charitable activity in Britain, including probation, operated as a mechanism which politically incorporated "a possibly oppositional working class culture based on middle class values and ideologies."(344) Thus, social work during this time should not be seen as the midwife of liberalisation and democratisation of society but as a deliberate move to curtail the living conditions and aspirations of the working people. One observer puts this point quite crisply:

> "From the thirties onwards middle-class people were continuously digging channels by which working-class demands could be drained away from the foundations of property."(345)

In our situation in Kenya, there are still scholars who still kneel confidently before the chalice of reforms. One such scholar is Professor Mutungi who in his doctoral thesis states that in order to Africanise commerce and industry in the country and to promote the African business interests, what is needed is the creation of a new type of business organisation within the present economic system.(346) Such an approach is

however, unacceptable for the reason that to suppose that the state can permanently encompass and regulate the economic process without touching the principle of private property is to ignore the political and psychological foundations of capitalism. It is also because of this reason that a book like <u>Company Law and Capitalism</u>(347) fails to articulate the structural change of the fundamental forces of capitalism. The title of the book no doubts whets the scholarly appetite of progressives but disappointment soon seeps in. The author presents a useful sketch of small and unquoted firms and some reasonably admirable proposals for reform. However, his analysis and proposals are given a context which is severed from the recent developments in British capitalism. A reviewer of the book states:

> "... in the contextual sections, the author adopts a fairly deprecatory style. He repeatedly takes distance from the 'contentions' or 'political' issues. If one is writing seriously about company law in context, then one is squarely in the field of political economy and must overcome timorousness, because sometimes political sensibilities will be offended no matter one says..."(348)

In his LL.M. thesis, W. Mutunga approaches the

impact of the Rent Acts in Kenya from the dialetical interrelation between the Kenya economy and British monopoly capitalism and the multilaterisation of such phenomenon after independence.(349) Accordingly, he is able to examine the extent of protection offered to the working class by the Rent Acts within the capitalist milieu in Kenya. Mutunga observes:

> "...In the eyes of a capitalist system of economy, Rent Control legislation is bad in principle: it violates and throttles however ineffectively, the 'holy' rule that there should be unfettered exploitation and making profits. It meddles with property and vested interests. Sanctity of property rights and interests is a fundamental commandment under capitalism. The system would not bear its name if landlords did not make profits. This explains why the legislation is a half-hearted measure. What we mean by half-hearted measure is that the legislation does not seek to deal with the root cause of the problem it aims to solve: Why are there excesses? Why is there a housing shortage? Thus the legislation aims at curbing the effects and not the cause of the housing shortage. This

dilemma is a contradiction within the capitalist system of economy."(350)

From the foregoing, disengagement from international monopoly capitalistic structure does not mean autarky or splendid isolation. "As long as capitalist systems exist on this earth, socialist revolutions can hardly cut all links unless socialists are going to another planet! And I don't think that they should either. Retiring into a monastery in order to escape from the devil may well fit religious beliefs. But such a 'disengagement' would hardly stem from revolutionary motivations."(351)

In Kenyan context, to have disengagement, it is necessary to talk of socialism in a more serious manner, for the slogan of African Socialism seems very toothless bark indeed, and is indeed reliable cloak for burgeoning capitalism. What is needed is a bold commitment of uplifting the lot of the workers and peasants of this country.

But Kenya's ruling elite and the bureaucrats seem always apologetic even when some mild reforms are made. Take for example, the slight amendments to the Foreign Investment Protection Act. The Minister for Finance in his 1976 Budget Speech was keen on impressing on the

foreigners that the amendments thereof were in no way detrimental to the investors' privileges and concessions:

> "...I should like to say something about the recent amendments to the Foreign Investment Protection Act. A certain amount of fear and dismay has been built up amongst foreign investors following the publication of these amendments. I would like to reassure them that such fears are quite unwarranted.
>
> Kenya has not changed its fundamental policy towards foreign investment. Neither has it changed the way in which the Foreign Investment Protection Act has been administered since 1964. All that we have done is to remove the ambiguities that have up till now existed in the original wording of the law. We have not guaranteed the foreign currency for the payment of loans denominated in foreign currencies. We have declined to guarantee - the foreign currency equivalent of the original equity investment expressed in Kenya shillings... A foreign invester is still welcome in Kenya. We accept that he comes to make a profit and we allow him to remit that profit at the going rate of exchange."

To make far reaching reforms and changes in the legal structure and the ethos thereof, different outlook, education in political economy and the eschewing of capitalistic ethic are necessary. For example, the language in this thesis is hardly the language, to easily "invade" the staid corridors of the Kenya's Attorney-General's Chambers, neither likely to be civilized "or" legal" language in the eyes of the country's Law Society. This is understandable in a situation where lawyers, by and large, are more concerned with making money than in the legal and constitutional safeguards of wananchi and the political future of the country. As witchdoctors are apt to protect their "professional secrets", so the lawyers are keen on mystifying law shrouding it in/mystery of"wherefores" /the and "whereas", an exercise which seems to reflect adversely even on/actual legal knowledge acquired. Phrases/th gained by rote and sprinkled, where possible, by medium of some Latin academic jargons, seem to be the "wealth" of quite a number of lawyers in the country, and systematic surveys on the effects on the administration of the various laws are left to the academic few, many of these being benighted children of bourgeois scholars like Professors Allan, Fuller, Schwarzenberg, Hart, Wheare, Griffith, ad infinitum. It is such complacency - which has enabled multinational men to land here armed with draft management contracts which are usually sent to the AG's chambers for easy ratification, without

being subjected to close scrutiny, a situation which would not obtain in cases of lawyers well versed in political economy knowledge. After all, a management contract is not judged as to whether it has all the legal finesse and elegant scholarly expressions, but as to whether there are elements of exploitation in such document. If the document talks of royalties, fees or commissions based on sales, the economics behind such payments.must be made clear. It is with this stance in mind that the following final points are made.

To have an effective control over multinational corporations in the country, a socialistic strategy is a prerequisite. This will then bring about the need for socialist law. With the establishment of socialist foundations (the political power of the working people, the socialist ownership of the means of production, the creation of socialist economic relations), economic construction becomes the main content of the activity of the socialist state. In accordance with the socialist laws, in particular the economic laws, the socialist state has to implement the further comprehensive development of socialism. Socialist law, as an instrument of the socialist state, serves the implementation of the objective social laws. Through the law, the socialist

state has to direct the socialist economic system. This system is founded on the social ownership of the means of production and has to be conducted according to a uniform plan.

In the above connection, it must be remembered that the national economy of a socialist country serves the strengthening of the socialist order, the constantly improving satisfaction of the material and cultural needs of citizens, the development of their personality and their socialist relations in society. The socialist economic system needs central state planning and the principal tasks of social development. This it does in combination with individual responsibility of the socialist commodity producers and the local state organs. The features of the socialist economy achieved thereby are, _inter alia_:

(a) The abolition of the exploitation of man by man, the absence of exploiting classes; (b) the existence of socialist property in two forms nationally owned property and co-operative property; (c) the necessity of a system of planning for economic development, in particular, and for the development of a society as a whole, and (d) the production relations conform to the character of productive forms, i.e. the

the social ownership of the means of production.

The development of socialist law should be seen as a part of social development as a whole. A comprehensive and developed socialist economic system needs a special branch of the law to shape, guide and control it. Economic law acts as a decisive means of directing a socialist economy and is characterised by the close relations between direction, planning, implementation and control of the basis of socialist property. For the shaping and the interpretation of socialist law, in particular of economic law, the Marxist property concept is significant. Marx wrote:

> "Finally, the last category in M. Proudhon's system is constituted by property. In the real world, on the other hand, the division of labour and all M. Proudhon's other categories are social relations forming in their entirety what is today known as property: outside these relations bourgeois property is nothing but a metaphysical or juristic illusion. The property of a different epoch, feudal property, develops in a series of entirely different social relations."(352)

The regulation of the foundations of the socialist economy is the taks of state and constitutional law. Thus

state and constitutional law is the basis of economic law, whose primary task is to guide the implementation of socialist planning in the process of socialist production and distribution.

It should be realised that economic law must not only ensure the implementation of certain measures, it must also help to control the realisation of these measures and their effectiveness. Control in a socialist economy is not only the task of state organs and managers. The participation of the working class people in the whole economic process - from the planning state to the implementation of the plans and control and their effectiveness - is the decisive prerequisite.

An important prerequisite for the further development of economic law in every country aspiring to be socialist is analysis of the given economic and political situation and of the quality of the leading cadres within the state and economic organs. Only on the basis of such an analysis is it possible to achieve and create conditions for the effectiveness of the objective economic laws of socialism and to shape economic law as an essential instrument of the socialist state for directing the national economy.

Is Kenya capable of launching herself on the road to socialism? There are considerable obstacles which militate against such a course. In the first place, there is her gluey intergration into the capitalist system. What's more, the country is getting rapidly urbanised with an upcoming petty bourgeoisie and a creation of a kulak class in the rural areas. Such a situation no doubt makes a "move to the Left" a difficult propostion, but it is certainly unscientific to state that Kenya cannot go socialist. In the short-term, such a possibility seems remote, but as we continue to have a large concentrated and embattled proletariat and an increasingly vast impoverished peasant masses which are exploited and close to the proletariat, the star of socialism becomes a reality. This will be further accentuated by the continued frustrations and hard lessons to the black bourgeoisie. Such potentiality of change is possible it two conditions are fulfilled: (1) a broad anti-imperialist front being constituted and articulated, and (2) the clear cut ideological and organizational ability of the leadership of the said front in close collaboration with the impoverished peasantry. Under such a situation the emerging leadership will be able to reach out to all the forces, both internal and external, which stand against imperialism, and it is then, and only then, that

a firmly grounded socialist strategy will become a reality, and thus become possible to articulate a meaningful war against the many evils of the multinational corporation.

APPENDIX I

Metal Box Kenya Limited

P.O. Box 30101 Nairobi
Kenya
Nanyuki Road Nairobi

Tel.No.557811

15th February 1979

The Faculty of Law,
University of Nairobi,
P.O. Box 30197,
NAIROBI.

Attention : The Chairman, Post-Graduate Studies Committee

Dear Sir,

Thank you for your letter of the 23rd of January. Mr. Mulei has been in touch with us and must, I admit, be commended for his polite persistence in spite of my own somewhat negative attitude.

We are a busy organization and our staff are busy - As far as we know we are not a multinational company - whatever that means - we are a Kenyan company making cans for the canning industry in Kenya.

We have not the time or staff to assist in the sort of investigation that Mr Mulei is apparently trying to carry out in writing his thesis. If there is such a phenomenon as a multinational company and, assuming he is clear in his (sic) what such a company is, we believe he might find out we are not in the category in any case.

We are very pleased to be able to help the University graduates and post-graduate students wherever possible and if Mr. Mulei chose to look in depth at some of the items he has listed in his letter such as personnel organization and authority structure, industrial relations production, research and development, we would probably be more helpful believing that discussion on these more tangible subjects would be more to the general advantage of commerce and industry.

Yours faithfully,

ELM Moss,
Managing Director.

ELMM/tdo

APPENDIX II (a)

Metal Box Limited

Subsidiary Companies

Company	Interest in equity	Locations
Metal Box Packaging Limited	100%	Reading
		Open Top Acton Arbroath Braunstone Carlisle Glasgow Leicester Neath Poole Portadown Rochester Westhoughton Winsford Wisbech Worcester.
		General Line Aintree Carlisle Hackney Hull Mansfield Palmers Green South London Sutton-in-Ashfield
		Paper Plastics Bromborough Manchester Peterborough Portadown Portslade Portsmouth Southwark Speke Swindon Tottenham Wrexham
		Customer Technical Services Worcester
		Research and Development Acton Borehamwood Park Royal
Metalcraft (Leeds) Limited	100%	Guiseley
Venesta International Packaging Ltd.	100%	Salford
Caps & Closures Limited	100%	Salford
The Collapsible Tube Co. Ltd.	100%	Salford
UMP Plastics Limited	100%	Salford
UMP Vesta Limited	100%	Salford Poplar
UMP Venesta (Engineering) Ltd.	100%	Salford
Metal Box Diversified Products Ltd.	100%	Reading
		Metal Box Engineering Alperton Crawley Shipley Timperley Westhoughton Worcester
		Precision Toolmaking Alperton East Kilbride

.../2

APPENDIX II (a) Cont...

FormFlo Limited	100%	Cheltenham
Ideal Stelrad Limited	100%	Henley-on-Thames
Stelrad Group Limited	100%	Henley-on-Thames Dalbeattie Hull Mexborough Monmouth Verwood
Stelrad Overseas Limited	100%	Henley-on-Thames

		Interest in equity	Country of incorporation and operation
	Stelrad Overseas Limited	100.00%	England
Europe:	Ideal Stelrad Heizung GmbH	100.00%	Austria
	Ideal Stelrad Heizung GmbH	100.00%	Germany
	Ideal Stelrad S.A.	100.00%	Belgium
	Robbe Radiatoren BV	100.00%	Netherlands
	Stelrad Components Ltd.	100.00%	Eire
	Stelrad S.A.	100.00%	France
	Metal Box Overseas Limited	100.00%	England
Africa:	Metal Box Kenya Ltd.	74.48%	Kenya
	Metal Box Toyo Glass Nigeria Limited	53.45%	Nigeria
	Metal Box Central Africa Limited	91.67%	Rhodesia
	Metal Box S.Africa Ltd.	58.36%	South Africa
	Metal Rollings and Tube Holdings Limited	58.36%	South Africa
	Metal Box Tanzania Ltd.	50.00%	Tanzania
Asia:	The Metal Box Company of India Limited	60.26%	India
	Metal Box Berhad	52.42%	Malaysia
	Metal Box Malaysia Berhad	52.42%	Malaysia
	Metal Box Singapore Limited	61.67%	Singapore
	Metal Box Thailand Ltd.	37.00%	Thailand
Europe:	Superbox S. p.A	96.97%	Italy
	SCERA S.A.	99.54%	France
	Metal Box Nenderland BV	100.00%	Netherlands
West Indies:	Metal Box Jamaica Ltd.	100.00%	Jamaica
	Metal Box Trinidad Ltd.	71.43%	Trinidad
	Other Principal Foreign Investment		
	Metal Box Nigeria Limited	40.00%	Nigeria

APPENDIX II (a) Cont....

Hashimi Can Company Ltd.	33.33%	Pakistan
Containers Limited	14.21%	Australia
Fricke und Nacke GmbH & Co. KG	49.00%	Germany
Hellas Can S.A.	35.60%	Greece
Brebbia Metal Box S.p.A.	40.00%	Italy
ORMIS-Embalagens de Portugal S.A.R.L.	29.29%	Portugal
PLM AB	4.31%	Sweden

The percentage given represent the Company's interest at 31st March,1978 in the equity capital of subsidiary companies. Underlying subsidiaries are shown inset under their own parent companies which are not material have been omitted. Those investments marked with an asterisk are quoted on Stock Exchange overseas.

Source: Metal Box Limited Reports and Accounts 1978.

APPENDIX II (b)

It is interesting to compare sales figures as this gives significance to the operations carried out in the African region:

Year Ended 31st March,1978

(UK£ in millions)

	1978	%	1977	%
Africa	£137.8	55	143.5	60
Asia	64.9	26	55.9	23
Europe	41.6	16	33.2	14
West Indies	8.0	3	8.0	3
	£252.3	100	£240.6	100

N.B. Trading profits before taxation (excluding associates) amounted to £19.9 million and including associates £20.9 million.

Source: Metal Box Overseas Ltd. Annual Reports and Accounts 1978

APPENDIX III

PRODUCTS MANUFACTURED

1. FOOD CANS - THIKA

   Processed Food Cans for Meat Fruit & Vegetables and Dairy Products

2. FOOD CANS - NAIROBI

   Non-Processed food cans

   Food Powders and Fats

3. GENERAL LINE TINS - NAIROBI

   Shoe Polish Tins

   Paint Cans

   Oil Cans

   Cosmetic Tins

4. EXTRUDED ALUMINIUM TUBES - NAIROBI

   Toothpase Tubes

   Cosmetic Tubes

   Solvents and Adhesive Tubes

5. PLASTIC PRODUCTS - RUARAKA

   Bags

   Film and Mulch

   Water Pipes

   Floor Strips

6. PRINTING DOCUMENTS - THIKA

Cheques

Sweepstake Tickets

Travellers Cheques

Luncheon Vouchers

Security Printed Documents.

APPENDIX IV

THIS AGREEMENT made the 24th day of July One Thousand nine hundred and sixty seven BETWEEN THE METAL BOX COMPANY LIMITED a company incorporated in and according to the laws of England (hereinafter called "the Consultant") of the one part and THE METAL BOX OF EAST AFRICA LIMITED a company incorporated in and according to the laws of the Republic of Kenya (hereinafter called "the Manufacturer") of the other part.

WHEREBY IT IS A GREED as follows:

Definition 1. IN this Agreement the following terms shall unless the context otherwise requires have the following meanings:

(a) "Container" or"Containers" means (except in clause 19) all or any of the following:

(i) receptacles used for packaging and manufactured wholly or substantially of metal and the parts thereof

(ii) metal caps, metal lids and metal covers for receptacles made of any material used for packaging including beverage caps of the ..kind known as crown caps (whether cork or compound lined) and vacuum caps of the kind commonly known as Whitecaps used for sealing glass and other receptacles with a rigid mouth defining rim.

(iii) composite cans, used for packaging, the body whereof is constructed of either paper or paper plastic or paper and paper foil and with plastic paper or metal ends having a capacity not exceeding one imperial gallon.

(iv) extruded metal tubes

(v) metal advertising articles

(vi) receptacles used for packaging made wholly of paper and/or board

(vii) any article made either wholly or substantially from plastics by injecting moulding methods by extrusion of polythene film by extrusion coating of polythene to other materials or by adhesive lamination of two or more plastic materials

PROVIDED THAT the terms "Containers" or"Container making" shall not include any article or the use of any process as to which the right to manufacture or use or the technique of manufacture or use is purchased or acquired by either party during the term of this Agreement for a consideation consiting wholly or partly of a lump sum whether in the form of cash or shares or in consideration of periodical payments other than royalties payable on a patented article or process In clause 19 the term "Containers" shall mean any type of receptacle made of any material

(b) "Machinery" means and includes Manufacturing Machinery Sealing Machinery and Allied Equipment as hereinafter defined

(c) "Manufacturing Machinery" means machinery for the preparation of materials intended to be used in the manufacture of Containers for carrying out such manufacture and for printing or coating Containers but does not include any machinery device or process for the making of articles not covered by this Agreement

(d) "Sealing Machinery" means machinery specially designed for any of the following purposes:

(i) reforming handling and assembling Containers

(ii) applying covers lids ends and caps to bottles jars cans and other receptacles or closing and sealing the same It includes equipment for applying and seaming ends to open top cans and for applying caps such as crown caps and vacuum caps to bottles jars and similar recep-receptacles used for packaging

(e) "Allied Equipment" means certain specialised machinery which is adapted to the packaging of food products in glass and other receptacles other than Sealing Machinery

(f) "the Territory" means the Republic of Kenya The United Republic of Tanzania and Uganda

(g) "sterling" means such form of United Kingdom currency as shall be appropriate to the transaction to comply with the provisions of the Exchange Control Act 1947 of any other English Act or Regulation controlling exchange for the time being in force

(h) "Trade Secrets" of the Consultant means the secret and confidential research and development projects manufacturing processes technical designs technical data formulae and knowledge formulated developed and acquired by the Consultant or of which the Consultant is entitled to make use in the Territory regarding the utilisation or application of industrial techniques which relate to

(i) Manufacturing Machinery Sealing Machinery Allied Equipment and other technological achievements used in the manufacture of Containers and

(ii) Containers and their design manufacture handling packing and usage

(i) "net sales price" means the invoice price after deducting transport charges sales discounts and allowances and the amount of any sales tax purchase tax or other similar tax PROVIDED THAT where the price charged is greater or less than the price which would be charged in an arm's length transaction "net sales price" means the price appropriate to an arm's length transaction

(j) "Manufacturer" shall include The Metal Box Company the majority of whose voting share capital is owned or controlled by either of the parties hereto or by a company which in accordance with the foregoing definition is itself a subsidiary of either of the parties hereto

DURATION (2) THE Consultant as the same is now or may hereafter be consituted shall be the Consultant and Technical Adviser of the Manufacturer on the manufacture of Containers and the use of Machinery and the Consultant and its successors in business whether under the same or any other style or name shall (subject to Clauses 21 22 and 23) continue and be such Consultant and Technical Adviser of the Manufacturer from the First day of April One thousand nine hundred and sixty seven until the Thirty first day of March One thousand ahine hundred and eighty six

Services of Consultant's Employees Available to Manufacturer

3. (1) THE Consultant will during the continuance of this Agreement whenever requested by the Manufacturer and insofar as in the opinion of the Consultant it is reasonably possible and necessary so to do send to the Territory its representatives technical or otherwise whose services and advice may be required by the Manufacturer at such times and for such periods as may be conveniently arranged The manufacturer will:

(a) provide adequate and safe facilities in and equipment and tools with which Consultant's representatives are to furnish the aforementioned services;

(b) be responsible to such representatives and to the Consultant for any personal injuries which such representatives may sustain whilst within the Territory for the purpose of or in rendering their services; and

(c) pay or reimburse to the Consultant the travelling hotel and incidental expenses of such representatives together with their cost of employment for the full period of their visit

(2) Throughout the period of this Agreement the Manufacturer will continuously refer to the Consultant as its consultant and for advice upon technical problems The Consultant shall be entitled to call upon the Manufacturer at any time for assistance (including the use of the Manufacturer's executive directors and staff upon payment of their salaries and expnses) in relation to any

activities or projects in which it or any of its subsidiary companies have any direct or indirect interest or concern

Trade Secrets and other Information

4. (1) THE Consultant will communicate to the Manufacturer all technical information and date and Trade Secrets which the Consultant is entitled to disclose and can lawfully exploit in the Territory

(2) The Consultant hereby grants to the Manufacturer the exclusive right to use in the Territory all such Trade Secrets (subject always to the restrictions contained in this Agreement) during the continuance of this Agreement in the operation of Machinery and the manufacture and use of Containers

(3) The Consultant will further give to the Manufacturer full information advice and assistance in all matters within the competence of the Consultant relating to the operation of Machinery purchased from or through the Consultant and the container making industry in general and the Manufacturer will in like manner keep the Consultant informed of any developments or improvements made or owned by the Manufacturer and relating to Containers and to Machinery.

(4) The Consultant will allow access by such properly accredited representatives of the Manufacturer as the Consultant shall approve to its machine shops laboratories and container making plants in the United Kingdom and permit

and assist such representatives to study the work of and methods employed in the Concultant's factories and so far as the same reasonably can be arranged to work therein

(5) The Consultant will use its best endeavours to procure that the benefits of any existing or future agreements whereby it is or becomes entitled to receive technical information and data from Container makers in the United States of America shall insofar as such agreements relate to matters covered by this Agreement be extended to the Manufacturer

Engagement of staff

5. THE Consultant will on behalf and in the name of the Manufacturer from time to time engage on terms to be approved in writing by the Manufacturer for service in the factories of the Manufacturer managers and other technical and sales staff and foremen as the Consultant in its discretion may consider suitable and necessary The Consultant will so far as may be reasonably possible afford training facilities at its factories on behalf of the Manufacturer to men judged suitable by the Consultant to fill any of the aforesaid posts Any man afforded such training facilities shall while under training at the works of the Consultant be deemed to be the servant of the Manufacturer by whom his salary or wages and his travelling hotel and all other expenses shall be paid and the Manufacturer hereby agrees to indemnify the Consultant against all

claims whatsoever for compensation or damages by reason of accidents injury or otherwise which may be made:

(a) by or in respect of any such person under such training; or

(b) by anyone else in consequence of anything done or omitted to be done by such person

Machinery Sales

6. (1) THE Consultant will sell to the Manufacturer upon the terms hereinafter mentioned as ordered by the Manufacturer Machinery of its own manufacture free on truck at the Consultant's factories properly packed for expor at prices in sterling not greater than the Consultant's regular sales prices thereof or in the case of Machinery usually manufactured by the Consultant for its own use or for the use of its subsidiaries and for which there is no such regular sales price at the total cost thereof to the Consultant plus ten per cent (10%) The certificate of the Auditors of the Consultant shall be so provided if required by the Manufacturer PROVIDED THAT the Consultant shall not be obliged to commence or make any preparation for the manufacture of any such Machinery until it is satisfied that the Manufacturer has obtained valid licences and completed all other formalities to ensure the import thereof into the Territory

(2) Except so far as the same shall be covered by the said regular sales prices the Manufacturer will pay the cost of export packing insurance and freight from the Consultant's

factories to the point of export and the Consultant shall if so requested by the Manufacturer arrange for account of the Manufacturer for shipment and insurance therefrom Unless otherwise agreed by the Consultant payment in full shall be made in sterling by the Manufacturer against delivery of shipping documents in London or if shipping instructions are not given by the Manufacturer within thirty days after the date of despatch by the Consultant of cabled advice that such Machinery is ready for delivery then forthwith on the expiration of such thirty days

(3) The Consultant may at its sole discretion require the Manufacturer as a condition of the acceptance of an order hereunder or of the manufacture or delivery of any Machinery to open and maintain as required by the Consultant an irrevocable sterling letter of credit with a bank in London on terms which shall to the satisfaction of the Consultant ensure payment as aforesaid.

(4) All Machinery purchased hereunder shall be delivered within a reasonable time from order or such other time as shall be agreed in writing. PROVIDED ALWAYS that the Consultant shall not be liable for any loss or damage caused by delay or failure to deliver due to special priority being given by the Consultant to British Government orders or to fire strikes accidents to plant war-time conditions or other causes

beyond the control of the Consultant but in case such delay shall or shall be likely to continue for an unreasonable time the order affected thereby may be cancelled by either party hereto unless it shall be an order for special Machinery the construction of which has already begun for the account of the Manufacturer

Consultant not to sell Machinery to others

7. THE Consultant will not knowingly during the continuance of this Agreement without written consent of the Manufacturer sell Machinery manufactured by it whether or not patented to any person firm or corporation (other than the Manufacturer) for use in the territory

Consultant not to sell Containers to others

8. THE Consultant will not knowingly quote on any enquiries received from any source for or supply wholly or partly manufactured Containers for shipment empty to the Territory during the continuance of this Agreement but will refer all such enquiries to the Manufacturer PROVIDED ALWAYS that should the Manufacturer not accept any order or part of an order for the reason that it relates to a type or types of Container which are not then currently being manufactured by the Manufacturer or because of lack of manufacturing capacity the Consultant shall be at liberty to accept such order or part for its own account

Patent Licences

9. (1) THE Consultant hereby grants to the Manufacturer sole and exclusive licence for the Territory under all patents registered designs or other similar rights of the Territory owned or (so far as in its power to do so) controlled by the Consultant at the present time or at any time

during the continuance of this Agreement The Consultant shall at all times keep the Manufacturer fully informed of any inventions relating to Containers for which letters patent have been or shall be obtained and of designs registered in the United Kingdom by the Consultant and shall if so requested by the Manufacturer and at the cost of the Manufacturer apply for and use its best endeavour to obtain the grant of corresponding patent or registration of such designs (as the case may be) in such part or parts of the Territory as the Manufacturer shall stipulate

(2) The Manufacturer hereby grants to the Consultant sole and exclusive licence for the United Kingdom under all patents registered designs or other similar rights relating to Containers and Machinery owned or (so far as in its power to do so) controlled by the Manufacturer at the present time or at any time during the continuance of this Agreement The Manufacturer shall at all times keep the Consultant fully informed of any invention relating to Machinery and Containers for which lettes patent have been or shall be obtained and of designs registered in the Territory by the Manufacturer and shall if so requested by the Consultant and at the cost of the Consultant apply for and use its best endeavours to obtain the grant of corresponding patents or registration of such designs (as the case may be) in the United Kingdom

(3) The parties respectively offering and accepting a licence in accordance with either of the two preceding sub-clauses are hereinafter referred to as "the Licensor" and "the Licensee" All patent applications and resulting patents and all design registrations shall be in the name of the Licensor or its nominees and the Licensee shall reimburse the Licensor on demand for:

(a) all amounts including royalties which the Licensor must pay to others for use by the Licensee of inventions covered by such applications or patents or for the use of such designs;

(b) all expenses incurred by the Licensor in filing patent and design applications in the Territory or the United Kingdom(as the case may be); and

(c) all annual renewal or other fees which the Licensor must pay in connection with letters patent or registered designs or applications for either in respect of which Licensee becomes licensed hereunder

PROVIDED ALWAYS that the Licensor shall whenever it is practicable so to do before paying any annual or renewal fee enquire whether in the opinion of the Licensee it is worthwhile continuing such patent or registered design in force and whenever possible (and subject always to any prior commitment which the Licensor shall in its absolute discretion consider it has to maintain such patent or registered design in force) the Licensor shall endeavour to comply with any request of the Licensee, to allow a patent or registered design to lapse

(4) The Licensor makes no warranties or representations regarding the priority or validity of any present or future patent or registered design to which this Agreement relates but will at the written request and expense of the Licensee reasonably co-operate in prosecuting all infringements and in defending all patents and design registrations and applications for patents and design registrations under which the Licensee shall by virtue of this Agreement be or become licensed PROVIDED ALWAYS that it is understood and agreed between the parties hereto that no action for infringement shall be taken in respect of the importation into any country of Containers which at the time of importation formed part of a filled packaging assembly or are combined or assembled with other articles and which were manufactured by either of the parties hereto or by a Licensee of one of the parties hereto

(5) Every licence shall include power to the lincesee to grant sub-licences to its subsidiary companies but the Licensee shall not further or otherwise be entitled to grant sub-licences

(6) References in this clause to licences shall include also sub-licences which the Licensor is permitted to grant in respect of patents or registered designs owned or controlled by a third party

Trade Marks

10. (1) If at any time during the continuance of this Agreement the Consultant shall be the registered proprietor of a registered trade mark of the United Kingdom which is then being applied

by the Consultant to Containers of its own manufacture the Consultant shall at the request and expense of the Manufacturer and provided it is satisfied that the Containers of that description made by the Manufacturer conform to the standards of quality currently applied by the Consultant to its own production make application for and use its best endeavours to obtain registration of goods in any trade marks registry in the Territory selected by the Manufacturer

(2) Upon registration of the said mark in its name the Consultant shall by means of a registered user agreement grant permission to the Manufacturer to use and obtain registration of the Manufacturer as permitted user of the said trade mark

(3) The Manufacturer shall use the said mark only upon Containers of the description specified in the said registered user agreement manufactured by it and in advertising matter relating thereto

(4) The said registered user agreement shall contain provisions enabling the Consultant to prescribe standards of quality to be maintained by the Manufacturer and other provisions customarily found in such agreements including a right for the Consultant to terminate such agreement upon breach of any of its terms

(5) The Manufacturer shall not use any trade mark of the Consultant (whether registered or not) otherwise than in accordance with the use permitted by a registered user agreement at the date when such mark is used

(6) In addition to all costs incurred in connection with an application for and registration in the Territory of any trade mark in accordance with the provisions of this clause the Manufacturer shall also repay to the Consultant the amount of any costs from time to time incurred in maintaining in force any such trade mark so registered in the Territory

Restrictions on disposal of Machinery by Manufacturer

11.(1) MACHINERY agreed to be sold by the Consultant to the Manufacturer hereunder is intended and its use authorised solely for the purpose of enabling the Manufacturer to manufacture Containers within the Territory and to use and sell the same

(2) Notwithstanding the provisions of sub-clause (1) of this clause it is hereby expressly agreed and declared that nothing contained in this Agreement shall be deemed to prohibit the Manufacturer from selling or leasing Sealing Machinery and Allied Equipment (whether or not embodying a Trade Secret) to its customers to enable such customers to reform handle or assemble Containers to apply to bottles jars Containers and other receptacles covers lids ends and caps or to close or seal the same provided such Containers covers lids ends or caps shall have been wholly or partly manufactured in the Territory by the Manufacturer

12. THE Manufacturer hereby agrees with the Consultant as follows:

Manufacturer not to engage in certain activities outside Territory

(a) Not knowingly either alone or jointly with or as agent for any other person firm or company directly or indirectly to carry on or be engaged or concerned or interested in the exportation of empty Containers to any country outside the

Territory in which either the Consultant or a subsidiary company of the Consultant or an associate of the Consultant (such associate being a person firm or company with whom the Consultant then has a consultancy agreement whereunder the Consultant has undertaken to act as consultant shall have notified the Manufacturer in writing of the existence of the said agreement) is then engaged in manufacture of Containers without the express consent in writing of the Consultant and of such subsidiary company or associate

(b) Not knowingly either alone or jointly with or as agent for any other person firm or company directly or indirectly to carry on or be engaged concerned or interested in the manufacture of Containers within any country outside the Territory without the prior consent in writing of the Consultant

(c) That it will make it a term of all its contracts for sale of Containers that such Containers are not to be exported from the Territory empty without the written permission of the Manufacturer which shall only be given where the Manufacturer is satisfied that the Containers are to be filled in a country or contries to which the Manufacturer could under the provisions of paragraph (a) of this clause itself have exported Containers without the prior consent of the Consultant

Michinery not to be imitated

13. THE Manufacturer shall not without the Consultant's express written permission reproduce or imitate or causes to be reproduced or imitated any Machinery manufactured by the Consultant or purchase any Machinery or equipment from any person firm or corporation which shall be a reproduction or imitation of Machinery manufactured by the Consultant but this provision shall not preclude the Manufacturer from (a) repairing or making or supplying new parts to any such Machinery where such repair or making or supplying of new parts by the Consultant would not be reasonably practicable (b) making or purchasing from any other person firm or corporation Machinery or equipment which shall not be such a reproduction or imitation as aforesaid

Use of Name "Metal Box"

14. THE Manufacturer admits that the Consultant and its subsidiary Companies have created a reputation throughout the British Commonwealth for the words "Metal Box" which are commonly accepted as connoting the existence of certain technical and business standards adhered to by the Consultant To preserve the reputation of the said words it is hereby agreed that the Manufacturer shall only be entitled to use them as part of its name so long as it has access to the technical methods and processes used by the Consultant and that if the Consultant shall at any time cease to be such Consultant the Manufacturer's right to use those words as part of its name shall cease Upon this Agreement terminating or the

Manufacturer purporting to terminate it or committing any breach of its terms the Manufacturer shall forthwith change its name so as not to include the words "Metal Box" or any sound or sounds similar thereto or capable of being confused therewith and shall not include any such words or sounds in its name or description during a period of ten years after the termination of this Agreement

Buying Agency

15. IF and when the parties so agree and for such a period or periods as may be agreed the Consultant will act as Agent for the Manufacturer of tinplate and other goods but so that the Consultant shall not be bound to undertake any duties or assume any obligations other than the placing of orders on behalf of the Manufacturer for such goods the arranging for the shipment of such goods to the Territory and for the insurance of such goods during transit and the Manufacturer shall when so requested by the Consultant place at the disposal of the Consultant in London such funds as may from time to time be required to pay for such purchases shipments and insurance The Consultant shall be entitled to retain for its own sole benefit all discounts commissions rebates and other emoluments or deductions paid or allowed to it by the suppliers of any goods purchased throug it as agents as aforesaid and the Consultant shall further be entitled (after giving one month's notice in writing or by cable of its intention so to do) to charge to the Manufacturer commissions (payable in sterling) on the f.o.b.

price of all goods so purchased through the agency of the Consultant at the rate of one per cent in the case of tinplate and two and one half per cent in all other goods

Force Majeure Etc.

16. ADDITIONAL to the immunities provided for in Clause 6 (4) neither the Consultant nor the Manufacturer shall be liable in damages for any breach non-observance or non-performance of any of the stipulations and agreements on their respective parts hereinbefore contained resulting from or caused by reason or on account of any circumstances beyond their respective controls including expressly (without prejudice to the generality of the foregoing) strikes or lockouts of workmen war riot or civil commotion acts of God or the act or decree of any governmental body national or local whether acting under lawful or usurped powers or any inevitable accident

Safeguarding of Consultant's Trade Secrets

17. WITH a view to safeguarding the Trade Secrets of the Consultant the Manufacturer shall:

(a) Not except as may otherwise be expressly permitted by this Agreement trnsmit or make available such Trade Secrets directly or indirectly through or by any means or device whatsoever including among other means or devices the transfer sale lease or loan of Machinery or parts embodying such Trade Secrets to any other person without the prior written consent of the Consultant

(b) Exercise all reasonable efforts to prevent any person from using any such Trade Secrets otherwise than in the sole interest of the parties hereto To that end the Manufacturer shall inform those of its officers and employees to whom any Trade Secrets may be disclosed or made available of the Consultant's property rights therein and of the Manufacturer's obligations with respect thereto and shall take such protective measures as may be available to preserve the secrecy and to prevent the use thereof except as authorised by this Agreement

(c) Continue to be bound by the provisions of this clause until such time as the information constituting such trade Secret shall have come into the public domain and notwithstanding the prior expiration or termination of this Agreement Upon such expiration or termination the Manufacturer shall at the request of the Consultant transmit to the Consultant all embodiments of such Trade Secret except Machinery and parts

<u>Payments</u> 18. (1) IN consideration of the undertakings by the Consultant herein contained the Manufacturer shall (in addition to any royalties commissions and other payments hereinbefore provided) pay to the Consultant in respect of each period of twelve months ending on the Thirty first day of March during the continuance of this Agreement a fee which shall be the greater of:

(a) Twenty five thousand pounds(£25,000) or

(b) A sum computed by reference to the aggregate net sales price of all containers sold by the Manufacturer during that twelve months period as follows:

(i) One and one-half per centum (1½%) on the first one million pounds (£1,000,000) of sales

(ii) One per centum (1%) on the next one million pounds (£1,000,000) of sales

(iii) One-half per centum (½%) on the next three million pounds (£3,000,000) of sales

(iv) One-quarter per centum (¼%) on all sales in excess of five million pounds (£5,000,000)

For the purpose of this Clause:

(a) Containers sold by a subsidiary company of the Manufacturer or by any person firm or company with whom the Manufacturer then has an agreement whereunder the Manufacturer supplies technical or other information relating to the manufacture, use or sale of any Containers (as in this Agreement defined) shall be deemed to be sales of Containers by the Manufacturer

(b) Net Sales Prices are to be computed in sterling on the basis that twenty Kenyan shillings are equal to one pound sterling

(2) The said remuneration shall be paid to the Consultant in the United Kingdom in sterling as follows:-

(a) On the First day of January April July and October in each year the Manufacturer

shall remit to the Consultant the sum of six thousand two hundred and fifty pounds (£6,250) the first of such payments to be made on the First day of April One Thousand nine hundred and sixty seven

(b) On the First day of July in each year (beginning with the First day of April One thousand nine hundred and sixty eight the Manufactuer shall send to the Consultant a statement of the total net sales prices of Containers sold by the Manufacturer during the twelve months period ended on the preceding Thirty first day of March and shall with such statement remit to the Consultant in respect of that twelve months period

(3) The Manufacturer shall for the purpose of enabling the Consultant to verify the accuracy of any statement submitted to the Consultant by the Manufacturer in accordance with sub-clause (2) of this clause permit the Consultant and its accountants solicitors or agents at all reasonable times to inspect and take copies of or extracts from any books accounts receipts papers and documents in the possession or under the control of the Manufacturer and relating in whole or in part oto the manufacture or sale of Containers

Other <u>Processes</u>

19. IF during the continuance of this Agreement either party shall acquire the right to develop the production of types of containers or machinery or techniques for the manufacture of containers or for printing excepted from the definitions in Clause 1 hereof or otherwise not covered by the terms of this

agreement such party shall before entering into any agreement with any other person or corporation for the use of the same in the territory of the other party (hereinafter called "the grantee") consult with the grantee with a view to the grant to the grantee of rights for the manufacture and sale in the grantee's territory of such containers and the use in the grantee's territory of such machinery or techniques on terms to be agreed and each of the parties hereto hereby undertakes that it will not dispose of such rights in respect of the other party's territory to any other person or corporation if the other party is willing and able (such willingness to be notified by it in writing within four weeks of being informed of the terms so offered) to accept the grant of such rights on the same terms as are offered by such other person or corporation For the purpose of this clause the Consultant's territory shall be deemed to be the United Kingdom of Great Britain and Northern Ireland and the Manufacturer's territory shall be deemed to be the Territory as defined in clause 1 hereof

Agreement not to be assigned

20. THIS Agreement shall not be assigned by either party without the prior written consent of the other but such consent shall not be unreasonably withheld PROVIDED ALWAYS that the Consultant shall be at liberty to carry out all or any of its obligations hereunder through the medium of its subsidiary companies or agents as it shall deem convenient

Consultant's rights in the event of disposal etc. of Manufacturer's business

21. IN the event of the Manufacturer:
(a) entering into any agreement for the disposal of its business or of the whole or any part of its property otherwise than in the ordinary course of carrying on its business or

(b) entering into any agreement for the disposal of a controlling interest in any subsidiary company or

(c) being wound up at any time during the period of the continuance of this Agreement for the purpose of amalgamation or reconstruction

the Consultant (in lieu of exercising any right to terminate the Agreement which it may have under clauses 22 or 23 of this Agreement) may require the Manufacturer to make it one of the terms of any such disposal amalgamation or reconstruction that the transferee or the subsidiary company or the amalgamated or reconstructed comapny (as the case may be) shall maintain continue the appointment of the Consultant as its Consultant and Technical Adviser and shall be bound by the other provisions of this Agreement for such unexpired period and with the like powers and authorities and upon the like terms and conditions and stipulations as are expressed in this Agreement and save and except with such conditions and stipulations as one of the terms of the disposal amalgamation or reconstruction the Manufacturer shall not enter into any such transaction as aforesaid

Right to terminate on Significant change in share ownership

22. IN the event of the Manufactuer:

(a) becoming merged into or consolidated with any other company other than a wholly owned subsidiary company; or

(b) twenty per cent (20%) or more of the issued stock or shares of the Manufacturer carrying voting rights shall at any time

be owned either directly or indirectly by any person exclusive of any person owning such amount of stock or shares at the date of this Agreement and exclusive of any person becoming entitled to any gift or settlement by or under the will or intestacy of any person or persons owning any stock or shares at the date hereof

The Consultant shall (unless being entitled so to do it exercises its rights under Clause 21) be entitled to terminate this Agreement by giving thirty days notice in writing to the Manufacturer such notice however to be given not later than six months after the date when the Consultant first became aware of the circumstances entitling it to give notice pursuant to the provisions of this clause

Right to terminate on winding-up of party

23. IF either party shall commit any breach of the provisions of this Agreement or shall commence to be wound up (other than voluntarily for the purpose of reconstruction) or in the event of a reciver being appointed of the assets of either party and remaining in possession of such assets for more than three months then in any such case the other party shall(without prejudice to any accrued right of action which it may have against the first mentioned party) be entitled to terminate this Agreement by giving to the first mentioned party thirty days notice in writing.

Law of England Applicable to Agreement

24. THIS Agreement shall be construed and take effect as a contract made in England and in accordance with the laws of England and the Manufacturer hereby submits

to the jurisdiction of the High Court of Justice in England and hereby appoints Bank Limited and every clerk for the time being of that bank to be the Manufacturer's agent in London for the purpose of accepting service on the Manufacturer's behalf of any writ notice order or judgement or any other legal process or document in respect of any matter arising out of this Agreement Such appointment shall not be revocable and service of such notice on such appointee shall be deemed to be good service on the Manufacturer for all purposes and the Manufacturer elects domicile at the registered office of the said bank in England

Termination of old Consultancy Agreement

25. THIS Agreement supercedes and cancels an Agreement between the parties hereto dated the Twenty eighth day of July One thousand nine hundred and fifty five and the Deed of Variation thereto dated the Twenty sixth day of September One thousand nine hundred and sixty two

Marginal notes

THE marginal notes are for reference purposes only They do not form part of the Agreement In construing any of its provisions the marginal notes are to be disregarded

IN WITNESS whereof the parties hereto have caused their respective Common Seals to be hereunto affixed the day and year first hereinbefore written

THE COMMON SEAL of THE METAL)
BOX COMPANY LIMITED was)
hereunto affixed in the)
presence of:-)

(Signed) Director

(Signed) Director and Secretary

THE COMMON SEAL of THE METAL)
BOX COMPANY OF EAST AFRICA)
LIMITED was hereunto affixed)
in the presence of :-)

(Signed) Director

(Signed) Secretary

EC15/0582

Central Bank of
Kenya,
Nairobi.

9th Dec. 1978

The Secretary,
The Capital Issues Committee,
The Treasury,
P.O. Box 30007,
NAIROBI.

Dear Sir,

CONSULTANCY AGREEMENT BETWEEN METAL BOX (E.A.) LIMITED AND METAL BOX COMPANY LIMITED OF UNITED KINGDOM

The General Superintendence Company have in the course of their inspection detected some discount discrepancies within the pricing of different specifications of Tinplate Supplied to Metal Box (E.A.) Limited by their parent company in the U.K. They also ascertained that British Steel have no Standard Export Price List and an export price is merely determined by the forces of demand and supply in the market at any one time.

The subject of the difference between the General Superintendence and Metal Box U.K. is levelled on clauses 6 and 15 of the above agreement approved by Exchange Control in 1967 for a duration of 19 years. Briefly these clauses provide for the following:-

(a) Clause 6 stipulates that Machinery from U.K. to Metal Box Kenya will include 10% of the total cost. It is not clear as to what services are covered by the 10%, which is an addition to total cost of Machinery purchased in the U.K. We feel this charge is unreasonable.

(b) Clause 15 stipulates that a commission of 3% will be charged on other purchases and a commission of One and three-quarter per cent will be on all tinplated goods. Further, Metal Box U.K is entitled to retain for her sole benefit all commissions, discounts, rebates and other emoluments or deductions paid or allowed to it by the suppliers of any goods purchased through themselves for their subsidiaries.

(c) According to the Contact Report submitted by the General Superintendence Company, Metal Box U.K. enjoys another commission of

.../2

3½% by a separate Credit Note on all tinplate purchases destined for Kenya. When added together, the parent company enjoys commission at the rate of 5½% on tinplate goods destined for Kenya.

We strongly feel that the agreement should be reviewed with a view of reducing the commision charged to a rate of 3% normally applicable with all other buyers. The duration period should also be reduced and payments for imports should not be through Inter-company Account but should be handled in accordance with Exchange Control Notice No. 10.

We are enclosing copy of the above agreement for your study and would appreciate your views on the above as soon as possible.

Yours faithfully,

(Signed)
Central Bank of Kenya
Exchange Control

Encl.

APPENDIX V I

PERSONNEL STRUCTURE: 1978

	Expatriates	Executives (excluding expatriates)	Management Staff	Supervisory	Apprentices	Monthly	Unionisable staff	Total
Thika	5	4	8	32	49	36	448	582
Nairobi	3	3	5	30	20	39	468	568
Ruaraka	2	3	2	8	-	6	119	140
Betacans	-	1	2	6	-	12	60	81
Head Office	3	1	2	6	-	10	-	23
Total	13	12	20	82	69	103	1095	1394
Thika	3	6	10	40	30	40	550	679
Nairobi	2	5	7	36	15	44	490	599
Ruaraka	2	4	3	10	5	12	180	216
Betacans	-	2	2	6	-	12	60	82
Head Office	3	3	3	6	-	11	-	26
Total	10	20	25	98	50	119	1280	160[illegible]

APPENDIX VII 27/8/76

Traditional Medicines and 'poaching'
By Foreigners

On several occasions recently, the public has been bombarded with the news of the discovery of a new drug maytansine which is supposed to have shown great promise in the treatment of cancer.

No doubt this has raised a lot of false hopes in a lot of sufferers from this deadly disease. For this reason, I think that it is high time the people of this country were given a clearer picture of what the story is all about as seen with a pair of Kenyan eyes.

It is important to explain first of all that the word cancer is not strictly a medical terminology as it means several types of diseases and up-to-date I do not think that there is anyone who has claimed that maytansine will cure all types of diseases that are classified as cancer.

What has been claimed of maytansine is that it has some activity against leukemia - the cancer of the white blood cells, and two other types of cancers, the Lewis lung carcinoma and the B16 melacarcinoma(skin cancer).

Some sections of the local Press have also gone on record as claiming that the Kenyan plant from which maytansine has been extracted has "no other use to man......"! I beg to differ from this point of view because I have been reliably informed that this plant is locally known in Ukambani as kitanda mboo and is used by the Wakamba traditional medicine men for the treatment of all sorts of illnesses.

To those of us who are in the research field of traditional medical practice, in an attempt to develop new drugs, we know that whenever such a huge claim on a medicinal plant is made

.../2

by a knowledgeable traditional medicine men, it simply indicates that the plant concerned probably has a potent alkylating compound(s) which acts as the basis for the medicinal activity of the plant extract.

Maytansine is such an alkylating compound. As such, the medical biochemical basis of the Akamba claim establishes a prior claim on the discovery of the medicinal value-probably based on maytansine - of the plant Maytenus buchananii, lack of written records by the Wakamba, notwithstanding. It is therefore a lot of nonsense for anyone to say that this plant had only the nuisance value of "strangling trees" before Dr. Robert Perdue, a botanist by training, came along and showed us the medicinal value of this plant.

We are told that maytansine is also known as vincristine. Vincristine is an anti-tumour drug that has been known to the medical world for more than 10 years. As such,the most that can be claimed from the American work on maytansine is simply the extraction method and the source of the drug but not the novelty of the drug.

This then makes one wonder as to why Dr. Perdue has to make the long trip from America to this country next month when the drug itself is probably available in the Central Medical Stores in Nairobi's Industrial Area, if not in Kenyatta National Hospital,"to treat 100 or more Kenyan patients at Kenyatta National Hospital".

From my interviews with a large number of traditional medicine men in this country, a recurrent disturbing note has been struck by most of them and that is that they have been interviewed repeatedly by "White men with tape-recorders"about their work. I have got no doubt in my mind

APPENDIX VII Cont.....

that these foreigners go back with the plant samples and their well-preserved knowledge from our medicine men and when they get to their countries, they put two and two together and come up with tall stories as to how they "discovered" previously unknown drugs from Kenyan plants.

If anyone doubts me, a perusal through some of the scientif literature in the Chiromo campus library of the University of Nairobi will perhaps help to dispell their doubts. It is rather dishonest of these international scientists not even to aknowledge the help they have received from our medicine men when they write up about their findings.

It is disturbing that the Office of the President should entertain applications for permission for these sort of interviews to be carried out by foreigners in this country. The office should be more careful in the future when granting permission for scientic research in this country. It is even more important a National Medicinal Plant Resources Laboratory should be set up immediately and without further delay for Kenyan scientists to tap the drug potentials of the plants of this country with the help of our medicine men.

Dr. Njuguna J. Mugo
Dept. Medical Biochemistry,
University of Nairobi.

CASH FORECAST-UK£ IN '000

	January 1979	February 1979	March 197
Balance-Local Overdraft	(1,327)	(1,832)	(1,493)
Balance-London Overdraft	(1,321)	(1,372)	(1,242)
Medium Term Loans	(227)	(227)	(618)
Dollar Bills	(1,938)	(1,896)	(1,881)
Citibank Overdraft	-	(286)	(644)
	(4,813)	(5,613)	(5,878)

London Overdraft Details			
Blance	989	1,321	1,372
Payment to Parent Company-UK	423	51	85
	1,412	1,372	1,457
Remittances	91	-	215
	1,321	1,372	1,242

The various payments, for example, interests on the loan account in London and the principal sum are paid through the inter-company account, a practice which needs closer supervision bearing in mind the uncertain currency rate fluctuations, of tinplate price and the too often price hikes and the accounting complexities thereof.

The following figures indicate the extent of interest paid on external credit facilities, (i.e. Net interest paid for the month of December 1978): in £Sterling.

	Dollar Bills	Medium Term Loans	Citibank/ UK Overdraft
Interest	120,000	21,000	75,000

N:B. The Sterling Overdraft Account is operated on behalf of the local company by Metal Box Overseas Ltd. and remittances are made by the company to Barclays Bank in the U.K. in settlement of amounts advanced upto 180

APPENDIX IX

RETURN OF INVISIBLE TRANSACTIONS (F.I.O.)

MONTH: February, 1979

A-PAYMENTS	ITEM	AMOUNT (SHS)
1. (Transport)	Shipping	
	1. Airline accounts.......	3,869,033.00
	2. Landing fess....................	0.00
	3. Shipping..........................	
	4. Ship disbursements............	0.00
	5. Hires (and charters....	9,441,587.00
II. (Travel)	1. Business travel allowance	4,309,606.00
	2. Student travel......................	
	3. Government travel........	521,919.00
III (Income)	1. Dividends and profits	17,612,649.00
	2. Interest...............	34,226,837.00
IV (Other Services)		
	1. Rental Income..................	0.00
	2. Royalties..................	57,426.00
	3. Technical/Management/Consultancy/ Professional fees......	33,800,195.00
	4. Directors/Head-Office expences..................	290.121.00
	5. Commission/Commitment/Agents fees.....................	9,245,967.00
	6. Annual Contribution/Membership dues.....................	2,627,043.00
	7. Recruitment/Telex/Handling Charges.................	8,060,829.00
V. (Transfers)	1. Charitable remittances..........	0.00
	2. Education maintenances..........	0.00
	3. Wills/Trusts......................	0.00
	4. Leave salaries/Savings....	719,543.00
	5. British farms/Land compensation............	2,630,120.00

.../2

APPENDIX IX Cont.......

VI (Capital)

1. Intercompany accounts.......39,782,428.00
2. Capital repatriation/
   Loan repayments.............34,907,368.00
3. Stock redemption...............463.917.00
4. Winding-up proceeds..................0.00
5. Outward Investments..................0.00
6. SA/Rhodesia..........................0.00
7. EAC Corporations.........................
8. Local Authorities...........31,460,765.00

B-RECEIPTS

1. Shares...............................0.00
2. Loans(AS)...................25,911,636.00
3. Loans(CAE)...........................0.00
4. Others...............................0.00

Key: 7 Sundries 8,060,829.00

Source: Central Bank of Kenya

APPENDIX X

MINISTRY OF COMMERCE AND INDUSTRY
P.O. BOX 30430,
NAIROBI.

FORM A

Date.......................

FOR OFFICIAL USE ONLY
1. Project No................
2. Date Received ....
3. Action Take ....
(REFERENCE ONLY)

APPLICATION TO THE NEW PROJECTS COMMITTEE
FOR APPROVAL FOR AN INDUSTRIAL PROJECT

Note (1) Three copies of this Application together with enclosures, if any, should be sent to The Secretary, New Projects Committee, Ministry of Commerce and Industry, P.O. Box 30430, Nairobi.

(2) Before completing this Application Form it is strongly advised that you should read the Ministry of Commerce and Industry handbook entitled "Criteria for Appraisal of Industrial Projects".

PROJECT DESCRIPTION

1. Project

(a) State briefly what the project will manufacture and the franchise/royalty source if any.

(b) State the proposed location of the project. State whether it could be located elsewhere in Kenya, e.g. in a rural areas.

2. Sponsors
State briefly who is sponsoring the project including information as to:

Project management.

Provision of technical know-how.

3. Project Company

(a) State name of project company and whether formed (give date) or whether in formation.

(b) State authorized, issued and fully paid-up capital of company.

(c) Where the expansion of an existing company is involved, state how long it has been trading and whether it is currently profitable. Also list the shareholders..

4. Capital Cost

(a) State estimated total capital cost inclusive of working capital

(b) Provide a break-down of the above cost under the headings as follows:

	(Sh.'000)	(sh.'000)
Fixed Assets		
Land...........................		
Buildings......................		
Site improvements..............		
Machinery and equipment (including all Government duties and taxes)..		
Installation costs (including inland transportation) Fees (if any)....		
Vehicles.......................	________	________
C Contingencies..................................		________
Preliminary and Pre-operational..................		________
Working Capital..................................		________
TOTAL		________

5. Capital Structure

How will the capital cost as in paragraph 4 above be provided-set out as follows:

(sh.'000)	Equity	%	Loan	Machinery Suppliers Credit	Overdraft	Tot
Sponsors and Associates						
Kenya Investment Institutions						
Other Local Machinery Supplier						
Commercial Bank(A).................................						
Totals.................................						

Note:(A) Normally as overdraft for working capital finance.

6. Arising from the answer to paragraph 5 above:

(a) Will the project company be overseas controlled or locall controlled-state the proportions

(b) State terms of proposed loan finance, i.e. the rate of interest, length of loan period and proposed source:

(c) State terms of machinery suppliers' credit including the effective rate of interest and proposed source.

(d) State whether guarantees are required for the loans/ credits as above and the proposed source.

(e) State who will be responsible for providing the overrun finances should the project cost exceed the estimates.

7. Timing

Assuming approval to this application is given within eight weeks of its submission to the Ministry of Commerce and Industry:

(a) State the estimated date for start of work.

(b) State estimated date for start of commercial production.

8. Profitability

(a) State when it is estimated that the project will be profitable, i.e in what year of commercial production.

(b) For the first five years of commercial production provide and append to this application form:

Profitability Estimates

Sources and Application Funds Schedule

Balance Sheet Projections

Note- These estimates should be prepared in accordance with the examples given in the handbook,"Criteria for Appraisal of Industrial Projects".

(c) Submit as an appendix to this application form detailed calculations of the local value added in the manufacturing process in accordance with the example given in the handbook "Criteria for Appraisal of Industrial Projects".

(d) Provide an estimate of net foreign exchange savings under the project-see explnatory paragraph in the hand book "Criteria for Appraisal of Industrial Projects".

9. Market

(a) Provide full details for the market for the project and state whether a market survey has been carried out and if so by whom. Where applicable, these details should include a summary of information, if any, regarding imports of similar products that may be derived from the official Trade Statistics giving averages over the past five years. (If necessary, enclose this information as an appendix to this application form)

(b) Provide details of competing projects in Kenya both existing and about to be established. Give a comparison between prices projected for the project and competing prices of imported equivalent products free-on-rail Nairobi.

(c) Provide details of competing projects in the East African Region.

(d) State briefly how the marketing of the project/company's products will be carried out.

10. Factory, Machinery and Technical Processes

(a) Provide details of the machinery and equipment to be installed capacity on 1,2 and 3 shift production), its likely source and whether new or secondhand, or reconditioned.

(b) Provide details of the proposed factory and factory site, i.e. size in acres or hectares of the site and its exact location and whether an existing building or a building to be constructed. If the former, is the property to be rented?

(c) State briefly the technical processes involved.

(d) State whether the machinery is to be obtained by competitive tender from selected sources, and selected countries of origin or by open tender on a world-wide basis. State also whether any commitment already entered into.

11. Raw Materials

(a) Provide full details of all raw and semi-manufactured materials required in the manufacturing process and their source. If of local origin state whether there is a programme to develop this source (this should include packaging materials).

(b) State whether backward integration is proposed and the programme with timing-see the explanatory paragraph in the handbook"Criteria for Appraisal of Industrial Projects".

12. Management and Employment

(a) State in detail how the project will be managed and how the technical know-how will be provided. Provide details of the franchise fees, royalties, etc., if any, to be paid for the technical processes, trade marks, etc. State the management fee, if any, the duration of the management agreement and what services will be provided under it. State how many expatriates will be required and for how long.

(b) Provide details of the training programme both locally and overseas to enable Kenyans to replace expatriates at all levels of the project's management.

(c) State how many workers will be employed-both initially and when the project achieves full production.

13. Protection and Incentives required from the Kenyan Government

(Note.-It is important that reference be made to the handbook "Criteria for Appraisal of Industrial Projects" before attempting to answer this question).

(a) State what protection, if any, will be expected against competing equivalent products at present imported, e.g. increased customs tariff, quantitative restrictions, etc.

(b) State whether other incentives will be expected, e.g. duty refunds/remissions on the imported raw materials

14. Future Expansion

State briefly how the future development of the project is visualized.

15. Environment

(a) State how much water will be required on the basis of one shift/two shifts/three shifts operations. State whether the water will then go to waster or be re-cycled.

(b) State what effluent is contained in the waste water and how it will be disposed of, e.g. into a river, into soak-aways, into settling ponds.

(c) State whether air pollution is involved and its nature, e.g. from the effluent, emission of gases, fumes, etc.

16. Additional Information

Attach as a separate paper any additional information which may be of interest and assistance to the New Projects Committe, this should include any feasibility/market study prepared by sponsors. This applies also to any question in this application form where insufficient space has been provided to enable you to answer adequately.

Signed.........................
Date...........................

APPENDIX VIII cont....

days after the dates on which sterling advances were made in London. Interest is payable monthly at a rate of 1½ per annum above the Bank's published base rate. The Central Bank of Kenya approved the facilities and the payment of interest thereon at the agreed rate. There seems to be no basis for the "above the board" interest rate and such excess payment is of necessity of doubtful nature.

FOOTNOTES

1. Local companies unlike foreign companies which are firms registered under Section 206 of the Companies Act can raise capital in Kenya and also have certain tax advantages.

2. See letter from Managing Director of Metal Box Company of Kenya Limited which is given at the end of the Introduction as Appendix I.

3. Interview with Managing Director of Metal Box Company of Kenya Limited,(1979).

4. Newsweek, February 26,1979.

5. P.A. Thomas, ed. Private Enterprise and the East African Company,in the article, "Legal and Social Responsibilities of the Limited Company to the Public" (Tanzania Publishing House Ltd.1969) Preface, p. xiii

6. American Economic Review, May 1975, p.302

7. The term "bourgeois" to characterize economic theories was introduced by Karl Marx. In the foreword to the second edition of the first volume of Capital Marx states that the essence of "bourgeois economy" consist in the fact that "it looks upon the capitalist regime as the absolutely final form of social production, instead of as passing historical phase of its evolution." For further details on this and related aspects of political economy, see Oskar Lange in Political Economy Vol.I General Problems (translated from Polish by A.H.Walker). (PWW - Polish Scientific Publishers, 1963).

8. W. Rodney, How Europe Underdeveloped Africa (Published simultaneously by Bogle - L'Ouverture Publications and Tanzania Publishing House,1976) pp.9-39,also pp.40-83.

9. See "Africa Cannot Afford Capitalism" a discussion between Dr. Kivuto Ndeti and the writer appearing in The Sunday Post of November 5, 1972, p.12 Dr. Ndeti is a former senior lecturer of sociology at the University of Nairobi, and is the author of Elements of Akamba Life (East African Publishing House 1972) Ironically, the following words by Kenya's Minister for Finance (as well as the Republic's Vice-President) give credence to Dr. Ndeti's assertion (Source: Sunday Nation, December 15, 1974 when commenting on the effects of Inflation on the national economy):

"It is the peasant sector that is suffering most of all but because of the concentration of all influential organs of society in the urban areas the peasant farmer does not get a fair hearing. If you look at our country, all the effective media, Press, radio are centred in Nairobi and very much influenced by what goes on in the urban sector. The Government itself is centred in urban areas, very much influenced by the more vocal, more articulate, more organised sections of our society which are themselves headquartered in the urban areas.

"There is a tendency, therefore, for the voice of the great majority to be less heard and, above all, to bear very little influence on the decision making process even at a time of a crisis like this."

"This is one of the serious shortcomings of our political and social system. I do believe that this is a matter which we should bring to the notice of all Kenyans more forcibly than we have done before, through the party and through all institutions, including the Press."

10. Dr. Ndeti, <u>Sunday Post</u> November 5, 1972 <u>(supra)</u>.

11. <u>Ibid</u>.

12. A caveat is necessary here for capitalism whether White, Yellow, Brown or Black is unacceptable in any just society out to end exploitation of man by man.

The origins of the capitalist mode of production are basically three:

(1) the separation of the producers from his means of production;

(2) the concentration of the means of production in monopoly form in the hands of a single social class the bourgeoisie;

(3) the appearance of a social class which has no possessions save its own hands and no means of subsistence other than the sale of its labour-power. (For a further discussion of the above see Ernest Mandel in <u>An Introduction to Marxist Political Economy</u>, (Pathfinder Press, New York, 1970)

The aim and purpose of capitalist economy is of course the acquisition of gain. This immutable trend is

neatly summarized by Zakir Hussein in <u>Capitalism-Essays in Understanding</u> (University of Delhi, 1967) p. 101: "This (the aim of Capitalism), implies that the capital which one puts into it must come back - come back with increment. This increment is the profit of an individual undertaking on its capital. If we consider the total capital of a society we call this increment surplus value, Mehrwert. Producing surplus value is the aim of capitalistic economy."

Socialist production on the other hand means that the means of production are the property of the whole society (social property). Under certain conditions part of the means of production may be jointly owned by co-operative associations or municipalities rural communities etc. The production process is deliberately planned and directed by society, that is, by agencies representing the whole of the community, in order to satisfy the needs of all its members.

13. The word <u>Nyayo</u> has been incorporated as a national word under the National flag, Emblems and Names Act (Cap.99) as per Legal Notice 32 of 1970 dated March 15, 1978.

From the political viewpoint, the word has more meaning than that of its literal connotation, that is, footsteps. It would seem that following in the <u>Nyayo</u> means following the footsteps of the new leadership (after the death of the First President, Jomo Kenyatta). In addition, the new President has expressed the intent of following in the footsteps of the late President while <u>wananchi</u> should follow in <u>his</u> (Moi's) <u>nyayo.</u>

14. <u>Private Enterprise and the East African Company, p.14</u>

15. <u>Ibid.</u> p.15

16. Working Paper No.335, Institute for Development Studies, University of Nairobi, April, 1978.

17. For a decidely liberal approach, see Yair Aharoni and Neil H. Jacoby in "<u>On the Definition of a Multinational Corporation and The Multinational Corporation.</u>" pp.3-18 and pp.21-23 respectively. These /are essays in "<u>The Multinational Enterprise in Transition: Selected Readings and Essays</u>" edited

A. Kapoor and Philip D. Crub, (The Darwin Press, 1972).

The following attempt at describing a multinational corporation, can, in liberal circles, be considered radical enough: "The most striking characteristic of the modern multinational company is its central direction. However, large it may be, and however many subsidiaries it may have scattered across the globe, all its operations are co-ordinated from the centre. Despite frequent assertions to the contrary, the subsidiaries are not run as separate enterprises each of which has to stand on its own feet. They must work within a framework established by an overall group plan drawn up at headquarters, and their activities are tightly integrated with each other. They are judged not by their individual performance, but by the contribution they make to the group as a whole."

Cristopher Tugendhat, The Multinationals (Penguin Books, 1979) p.31.

18. East African Publishing, 1968.

19. R. Kaplinsky, ed., (Oxford University Press,1978).

20. Interview with Company Secretary/Finance Controller of Metal Box Kenya Ltd. (1979)

21. Ibid

22. East African Standard, July 26, 1969.

23. East African Standard, July 25,1978.

24. See "Major Trends in the Kenyan Economy 1966-1977" p.2.9. Extract from forthcoming book, "Ownership and Equity in Kenya, 1966-1976" by R. Kaplinsky and others. Extract given as a Paper by R. Kaplinsky at the Training Course on the Appraisal and Monitoring of Foreign Investment, 21st August-15the September, 1978. Jointly sponsored by the Ministry of Commerce and Industry, Government of Kenya and the Industrial Division, UNIDO, Vienna at the Management Training and Advisory Centre, Parklands, Nairobi.

25. International Herald Tribune, August 23, 1978.

26. (Cambridge University Press, 1975).

27. Osita C. Eze,

"Patents and the Transfer of Technology - With Special Reference to the East African Community", Eastern African Law Review, Vol.5 Nos. 1&2, 1972, pp.135-36.

28. 288 U.S. 517,565,535S.Ct.481,496, 77L.Ed. 929,593,85,A.L.R.699,724.

29. Ibid, p.732.

30. Aktiengesetz (Share Company Act) of January 30, 1937, RGBI 1 107 (1937) Quoted in the article by Bernhard Grossfeld & Werner Ebke "Controlling the Modern Corporation: A Comparative View of Corporate Power in the United States and Europe", in The American Journal of Comparative Law Vol.26, No.3 Summer 1978.

31. Daily Nation, August 22, 1978. The Minister for Commerce and Industry was opening a one-month UNDP and UNIDO - sponsored course for industrial negotiations in Nairobi.

32. Ibid.

33. The company has since been placed under receivership on an application by the Kenya Government.

34. The Weekly Review July 5, 1976

35. The phrase "Third World" is unscientific in approach and it is surprising that the term is used so freely by scholars with even some modicum of rigorous thinking. The term no doubt smacks of "cold war" politics with Rich Uncle Sam on one hand and the Sickle and Hammer on the other. The other nations should, in this view of things, then form a third bloc or world obviously in terms of non-alignment. However, the world struggle cannot be seen in the context of the cold war, that is, of nation states and power blocks but in terms of revolutionary peoples. In an iluminating article, "The Mythe of the 'Third World' the late Kwame Nkrumah expressed the correct view that the oppressed and exploited peoples of the world could not be described a 'Third World' adding:

"There are...two worlds only, the revolutionary and the counter revolutionary world - the socialist world tending towards communism, the capitalist world - the socialist world tending towards communism, and the capitalist world with its extensions of imperialism, colonialism and neocolonialism'. (see "The Myth of the 'Third World' " first published in Labour Monthly, October 1968, in The Struggle Continues Panaf Books, 1973, p.76).

In the context of the above, it is a pity that a country like China, a country of "The Long March," should hold the view of the reactionary forces in approaching this matter. The 11th Congress of the Communist Party of China in 1977 adopted the "three worlds" doctrine as the ideological platform of China's present foreign policy : "In 1974, United States and the Soviet Union formed the first world. Japan Europe and Canada, the middle section, belong to the second world. We are the third world. The third world has a huge population. With the exception of Japan, Asia belongs to the third world, and Latin America too." (Source: of quotation: World Marxist View, a theoretical and information journal published in Pragaue, Czechoslovakia in the "Three Worlds Theory" by W. Namiotkiewicz, which though a solid theoretical exposition is unfortunately sprinkled with Soviet Union peppertry propaganda.

36. How Europe Underdeveloped Africa, op.cit., p.86

37. It is interesting to contrast this with the unequivolval and clear stand by the socialist-oriented Mozambican Government. Early 1978 Mozambique nationalised almost all foreign and local banks and set up a second state - owned bank according to an official decree. A preamble to the decree reads:

> "The banking structure in Mozambique is a result of colonial capitalist competition which is reflected in a proliferation of banks, concentrated in the cities, wasteful equipment and installation and marked by the spirit of racism and elitism."

The above clearly indicates the revolutionary government's intention to overhaul the economic system as opposed to just effecting a few reforms therein.

38. R.H. Green, in the essay, "The Peripheral African Economy and the MNC, appearing in Multinational Firms in Africa edited by Carl

Widstrand (Scandinavian Institute of African Studies, Uppsala).

39. Expression "Smuggled" from Sembene Ousmane's novel, God's Bits of Wood (Heinemann -African Writers Series, 1970)

40. See Whigs and Hunters:The Origin of the Black Act by E.P. Thompson (London: Allen Lane 1975).

41. Ibid., p. 234-5

(N.B. As for the Capital statutes, these did not prove an effective tool of class control and discipline, and the result of this was recourse to authority: "the example of terror... Economists advocated the discipline of low wages and starvation, and lawyers the sanction of death. Both indicated an increasing impersonality in the mediation of class relations. Whigs and Hunters, p.206-7

42. One useful book on this topic is Law, Order and Power by W.J. Chamblis & R. Seidman (Phillipines: Addison Wesley Publishing Co. Ltd.) 1971 x and 533 pp. The book was reviewed by D. Leat in The British Journal of Law and Society Vol.1 No.1 Summer 1974.

43. Kaplinsky, Readings on the Multinational Corporation in Kenya, p.5

44. Foreward in Eastern Africa Law Review Nos.1&2, 1972, supra

45. For more details, see Essential Works of Lenin, H.M. Christman, ed. (Bantam Books, Inc. 1966), pp.271-364.

46. (Penguin, Harmondsworth 1964) pp.22, 205-7.

47. Maureen Cain, "The Main Themes of Marx and Engels' Sociology of Law", British Journal on Law and Society, Volume 1 No. 2, Winter, 1974 oo, 136-148.

48. (Lawrence and Wishart, London 1965)pp.349-83.

49. Is Marxism relevant to Africa? Dr. Ndeti in an interview (op.cit.) answered:

"Whether we like it or not, Marx is the only social scientist who has produced serious analytical model of human society. If you have a society interrupting its own environment, there are certain consequences to be expected; the problem of fragmentation of society is quite evident in human history. Marxism is relevant in that it tries to end exploitation which comes in a situation where you have a society of the haves and the have-nots. It is also relevant in so far as it gives us a model which we can use in analysing our societies. In other words, it expands beyond the range of critical appraisal of our society. However, the insociological systems of Marx do not apply to our system because Marxism like Capitalism is really an imminentarisation of the transcendental categories, and this tradition has no place in African system - we are basically a cosmological people".

50. See The Marxian Legacy by Dick Howard (The Macmillan Press Ltd., 1977) p. ix.

51. Chapter XXIV, "Primary Accumulation"(1930, Everyman, London).

52. E.P. Thompson, "Open Letter to Leszek Kolakowski" in The Socialist Register 1973 (The Merlin Press, 1974) pp.52-55.

53. Ibid., p.52

54. Ibid., pp.52-53.

55. Even bourgeois scholars like Eugene Karenka & Alice Erh - Soon Tay acknowledge the following:

"Throughout his life Marx was to have nothing but the deepest contempt for nihilism, for the denial of culture and rationality, for the nameless authoritarianism, of terroristic individuals or terroristic groups. He was always loothe that crude 'barracks communism' which pretends to achieve equality by forcing men into an undifferentiated mass by rejecting talent, education, all that which cannot be reduced to a common measure."

"Beyond the French Revolution: Communist Socialism and the Concept of Law", article appearing in University of Toronto Law Journal Vol. xxi, No. 2, 1971.

56. R. Milliband, Marxism and Politics (Oxford University Press 1977) pp.162-3

57. P. Tillich, The Socialist Decision by Harper & Row Publishers, 1977) p.141

58. R. Miliband, "The Coup in Chile", an essay appearing in The Socialist Register op.cit. p. 468. See also Miliband's article, "The State and Revolution" in The Socialist Register 1970

59. Miliband, "The Coup in Chile", supra, p.468.

60. Anchor Books, 1973.

61. Thompson's "Open Letter to Leszek Kiolakowski" op.cit. p.34

62. For example, some Western capitalists have now become aware of the need to espouse certain far-reaching precepts to protect their own structure. Thus, Prof. Allen in Personnel Management (The Journal of the Institute of Personnel Management December 1976 Vol.8 No.12 pp.18-19) puts forward the advice that personnel managers in commerce and industry need rather more than just the usual smatterings of Marxist theory if they are to understand the true nature of the problems they have to deal with. In the article "Marxism and the Personnel Manager", the author explains how an appreciation of Marxism can help put current industrial questions into perspective. Thus , Marxism should be understood "because it is important to know one's enemy".

63. 13 Offensives Against Our Enemies (E.A. Literature Bureau, 1973).

64. By D. Hay, L. Linebaugh, J.G. Rule, E.P. Thompson; book reviewed in British Journal of Law and Society Vol.3 No.1 Summer 1976.

65. Martin Albrow, "Legal Positivism and Bourgeois Materialism: Marx Weber's View of the Sociology of Law" in British Journal of Law and Society Vol. 2 No. 1 Summer 1975,p.27

66. Ibid., p.29

67. Chamblis & Seidman, Law, Order and Power , p . 3 op.cit. pp.533

68. R. Folsom & N. Roberts,"The Warwick Story:Being Led Down the Contextual Path of the Law", Journal of Legal Education, Vo.30, pp.166-183.

69. For example, the United Nations definition sees the term as "covering all enterprises which control assets - factories, mines, sales office and the like in two or more countries." (Source: New York: United Nations Department of Economic and Social Affairs, U.N. publication no.E 73II. AII,1973), p.3

70. Sol Picciotto, "The International firm, International Law and Nation State", Eastern Africa Law Review, Vol.6 No.1, 1973, p.6

71. Ibid, p.6

72. See Companies Act, Chapter 486, Laws of Kenya, Revised Edition, 1978, section 154.

73. Metal Box Ltd., Europe's largest packaging manufacturer, is a company incorporated in England and whose subsidiary is Metal Box Overseas Ltd. which in turn owns 16 principal subsidiary companies overseas including Metal Box Kenya Ltd.

74. Metal Box Ltd. Annual Reports and Accounts, 1978.

75. Anthony Sampson, The Seven Sisters- The Great Oil Companies and the World they Shaped (1970 Bantam Books) p.7

76. Ibid, p.9

77. See Fortune magazine (August 1978, p.184) showing the fifty Largest Industrial Companies in the World. 1977 was a good year for General Motors with sales totalling US$54,961,300,000 and a Net Income of US$3,337,500,000 thus outstripping the riyal on the previous Fortune lists, viz.Exxon.

78. Fortune, September 26,1978, p.86

79. H.R. Hahlo, ed. Nationalism and the Multinational Enterprise-Legal, Economic and Managerial Aspects (A.W. Sijthoff International Publishing Company), p.4

80. Ibid., p.4.

81. Ibid., p.4

82. See Picciotto, "The International Firm, International Law and Nation-State" _op.cit._ p.6

83. Norman Girvan, "Economic Nationalists v. Multinational Corporations:Revolutionary or Evolutionary Change? An essay in _Multinational Firms in Africa,_ op.cit.p.29

84. Karl P. Sausant & Farid G. Lavipour, ed., _Controlling Multinational Enterprises-Problems, Strategies_ (Westview Press, 1976) p.ix.

85. See Picciotto's article, _supra_.

86. Samir Amin, "Towards a New Structural Crisis of the Capitalist system?" An essay in _Multinational Firms in Africa_, p.3

87. Such a feature of monopoly forms of capitalism is not inimical to the Marxist postulate that capitalism is the child of free competition and that monopoly capitalism does not signal the death knell of competition; capitalism in the concentrated form seeks to spread in areas where it can earn profit especially by using the technique of dividing up the market and of setting up market quotas.

88. Ernest Mandel, _An Introduction to Marxist Political Economy_)Pathfinder Printers,1970).

A reproduction was made for teaching purposes by Mr. W. Mutunga of the Faculty of Law, University of Nairobi, and the quotation in point appears on page 29 (Mutunga) 75/12.

89. V.I. Lenin, _Imperialism, the Highest State of Capitalism_ (Moscow Progress Press,1968) pp.14-27.

90. A contrast between the position in West African and Kenya as regarding the role of the multinational corporation under such circumstances underlines some differences of approach with regard to the role of the various sectors of production. This is illustrated by Jan J. Jorgensen in the article, "Multinational Corporations and the

Indigenization of the Kenyan Economy" an essay in Multinational Firms in Africa. supra p.153

"Whereas multinational firms in West Africa, such as the United Africa Company (VAC/Unilever) by G.B. Ollivant (now Unilever), John Holt (now Lornho)....Union Trading-Company (UTC) adapted themselves to an African peasant economy, buying African-produced cash crops and selling to the African manufacturing goods from Europe, the multinational firms in Kenya such as Gailey and Roberts (UAC/Unilever), Mackenzie (Inchape), Dalgety (now Inchape), Mitchell Cotts, Tancot (now Lornho), and African Explosives and Chemical Industries (Now Twiga Chemicals, jointly owned by ICI and de Beers) adapted themselves to a European settler economy, marketing crops from European farms and plantation and importing fertilizers and machinery for the European enterprises."

91. E.A. Brett, Colonialism and Underdevelopment in East Africa:Policies of Economic Change 1919-1939 (Heinemann 1973) pp.71-72

92. N. Swainson, "Company Formation in Kenya Before 1945 with Particular Reference to the Role of Foreign Capital". Essay appearing in Readings on the Multinational Corporation pp.32-43.

93. Ibid, p. 94.

94. Record of Proceedings of the Conference of African Governors held in Convocation Hall, Church House, London, November 1947. (H.M. Stationery Office, London 1947) pp.8-21

95. Legislative Council Debates 1947-8. p. 146

96. Essential Works of Lenin, Supra, p.203.

97. T. Hadden, Company Law and Capitalism, p.23

98. Hutton v. West Cork Ry. Co. (1883) 23 Ch.D. 654 (Court of Appeal, England) at pp.671-673.

99. Jorgensen, Multinational Firms in Africa,supra,p.170

100. Sessional Paper No. 10 of 1965, p.29.

101. Oginga Odinga, Not Yet Uhuru(Heinemann, 1967) p.

102. Suzanne Cronje, Margaret Lind & Gillian Cronje, Lonrho--A Portrait of a Multinational (Julian Friedmann Books 1976) p.241. (Quotation originally in Accountancy Age, May 25, 1973).

103. Excerpt of interview notes (Tony Hall's sections of Rothman's Press Conference - part of the interview was published in Daily Nation on October 26, 1966).

104. Carl A. Gerstacker, "Dow Chemical's Experience in Chile" in The Nation-State and Transnational Corporation in Conflict With Special Reference to Latin America ed. John P. Gunnemann,pp.14-15.

105. House of Representatives official Report (Foreign Investments Protection Bill) First Parliament, Second Session)Vol. III (October 21, 1964, Government Printer) p. 3719.

106. Kwame Nkrumah, Neo-Colonialism-The last Stage of Imperialism (Heinemann, 1968) p.47.

See also George Jackson's statement in his book Blood in My Eye (Penguin Books,1975)p.52

> "The ruling class in the US composed of million men and their families - the Rockefellers, Vanderbilts, Morgans, Mellows, Du ponts, Hunts and Gettys, Fords and their minions and dependents. They use the Ivy League universities and elite law schools as private shcools for their

offspring and as training grounds for their corporate hirelings. They rule with iron precision through the military, the CIA, the FBI, private foundations and financial institutions. Their control of all the media of education and communication comprises an extremely effective system of thought control."

107. Louis Turner, Multinational Companies and the Third World (Allen Lane, 1973) p. 26.

108. Ibid, p.26.

109. See excerpt in the story appearing in The Nairobi Times, July 29, 1979:

"Firestone sold nearly 24 million 500s in the US in the early Seventies before the US National Highway Traffic Safety Administration forced the company to recall the tyres. In May last year, a Congressional Committee found that the failure of the tyre was the major cause in a large number of road accidents. At least 41 deaths, 60 injury cases and hundreds of other incidents involving property damage were said to have been caused by the defective 500s radial tyres."

110. New Statesman, February 10, 1978.

111. Excerpt of the letter reproduced in New Statesman, February 10, 1978.

112. Lonrho-A Portrait of a Multinational, p.248 (Statement orginally quoted in Africa, London February, 1975).

113. Lonrho, op.cit. p.248

114. Ibid., p. 248

115. Banco Nacional de Cuba v. Sabbatino 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed. 2d. 804 (1964). (Reproduced in American International Law Cases, eds. Fo Deaka F.S. Ruddy. (1974 Oceana Publications, New York) p. 278.

The facts of the above quoted case are briefly as follows:

In 1960 an American company entered into a contract with a Cuban Corporation (whose shares were owned mainly by U.S. residents) for the purchase of sugar. Payments was to be made in the United States on presentation of the shipping documents and a sight draft. The ship was being loaded in a Cuban port when sugar was affected by a Cuban nationalisation decree which was in retaliation to an American regulation curtailing the sugar quota from Cuba. In the new circumstances, in order to secure the release of the sugar it became necessary for the American purchaser to enter into an identical contract with a Cuban instrumentality, which assigned the bills of lading to the petitioner, also a Cuban agency. When the petitioner presented the bills and the sight draft to the American company, the expropriated sugar producer claimed to be entitled to the purchase price and indemnified the purchaser against the petitioner's claim, which was then pursued in action in conversion against Sabbatino, the receiver of the expropriated company's assets. The District Court for the Southern District of New York held that the sugar was located in Cuba at the time of expropriation, and that at that time its ownership had not passed to the purchaser. The question here was fof course whether there had been transfer of ownership to the Cuban Government. The Court held that the act of State doctrine (by which the courts of the US were precluded from inquiring into the validity of the public acts taken by a sovereign power within its own territory) could not be given recognition since the Cuban action was "invalid" under international law.

The Supreme Court applied the act of State doctrine to reverse the decision of the court below on the promise that international law does not prohibit the application of the doctrine in the particular circumstances, for

even though international law is applied by US courts as part of US law,"public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders." The Court held that "the Judicial Branch will not examine the validity of taking of property within its own territory by a foreign government, extant and recognized by this country at the time of the suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principle, even if the complaint alleges that the taking violates customary international law". It pointed out that if it were to treat a foreign act as violative of international law this might be an affront to the State concerned, making diplomatic settlements of the question more difficult.

Following the Sabbatino case, the US Congress passed a law that no Court should decline on the ground of the Federal act of State doctrine to make a determination on the merits giving effect to the principles of international law in a case which a claim of title or other right is asserted by any party including a foreign State based upon an act of confiscation which is repugnant to international law.

116. Daily Nation, October 8, 1977.

117. At 1975 Current Prices.

118. Sandbrook, Proletarians and African Capitalism - The Kenyan Case 1960-1972 p.13, supra.

119. Daily Nation October 4, 1978.

120. Cases of impracticable and futile declarations continue to mushroom. For example, at the recent UNCTAD (United Nations Conference on Trade and Development) the African caucus pressed a resolution which stipulates that there should be a code for the transfer of technology which would be universally applicable in the form of a legally binding instrument. (See article, "A fair Deal" in New African July, 1979) p. 58. Such a legally binding instrument would be largely concerned with far reaching concessions by the industrialised nations as they are the major suppliers of technology. Herein lies the futility of the sought so-called code on transfer of technology for from experience it does not seem that poor nations have a very reliable form of leverage to counter breaches of the projected code.

121. Such compensation shall represent the equivalent of the investment expropriated; it shall be actually reliazable, transferable and shall be made without delay. Provision shall have been made in an appropriate manner at or prior to the time of expropriation for the determination and the giving of such compensation. The legality of any such expropriation and the amount of compensation and the time during which it should be paid shall be subject to review by due process of law. (For more details see Treaty between West Germany and Kenya concerning the Reciprocal Protection of Investments signed on December 4, 1964;1LW 11;4B-3;

122. Chapter 518. Laws of Kenya,Revised Edition 1978.

123. C.G. Lubai, "Government Protection of Foreign Investment in East Africa", East African Law Journal Vol.II No.2, June 1971 p. 109

124. For example, see Pre-Uhuru Kanu Manifesto titled What a Kanu Government Offers you in which it is stated inter alia :

"We shall welcome both governmental and private investment in Kenya from overseas. We shall

encourage investors to participate jointly in projects with our government. This will be a guarantee to the provider of the capital of the security of his investment and to the people of Kenya that the undertaking is being directed according to our national policy and needs.

While we intend following a liberal policy with regard to foreign capital, investment must be made in accordance with Kenya's interest. To the extent that they serve our needs we shall protect them.

In order to boost industrial expansion a system of Tax holidays for new investment will be considered. Infant industries will be protected.

...The institution of a Stock Exchange to facilitate investment will be considered. The possibility of extending the use of Bills and other issues to encourage saving and investment will also be investigated."

125. Mr. Odero-Jowi (then Parliamentary Secretary for Labour and Social Services), House of Representatives official Report, Vol. III, Part 2 1964, p. 3727.

126. Sandbrook, Proletarians and African Capitalism- The Kenyan Case 1960-1972, op. cit., p.6

127. Kenya Gazette Supplement No.27, Act. No.3, April 1979..

128. High Court Civil Case No.320 of 1960 (unreported). Quoted in D. Gachuki's recent paper, "Government Policy on Private Foreign Investment in Kenya: An Analysis"), p.18.

129. Mr. Bildad Kaggia, House of Representatives officia Report, Vol. III, Part 2, 1964, p. 3245.

130. Chapter 306, Laws of Kenya.

131. The Barcelona Traction, Light and Power Company Ltd. (New Application: 1962, Belgium v. Spain, Second Phase, International Court of Justice Reports' of Judgements, Advisory Opinions and

Orders, February 5, 1970, General List No.50, pp. 4-357.

132. Ibid., p. 45 and p. 48.

133. Customs Tariff Act, Chapter 472 was repealed by Act No. 10 of 1978, i.e. the Customs and Excise Act of 1978.

134. The Company (EAI) was first estabished during the World War II in order to manufacture a wide range of needed products. Known as the Kenya Industrial Management Board (KIMBO) with its factory in the Nairobi Industrial Area, a decision/made after the war for the Industrial /was Management Board to go into partnership with the then Colonial Development Corporation, which had been set up by an Act of/ British colonies, by investing in commercially viable projects and enterprises/Parliament to help in the process of industrial development in the
In 1949 an agreement was signed by which a new company, East African Industries Ltd. was formed which took over the assets, liabilities and business of the Industrial Management Board. The company was then involved in the manufacture of a number of unrelated products and it was necessary to further cut down on the number of product lines to increase profitability. The Government then decided to invite Unilever Ltd., to help run the company with its world-wide business know-how.

Unilever joined the venture in 1953. The Company's business initially concentrated on the development of edible oils such as Kimbo and later introduced other lines such as soaps and detergents making the company one of the most diversified industries in Kenya.

The Government, Unilever and the Commonwealth Development Corporation partnership ended in 1977 when the CDC sold all its shares to the Kenya Government thus leaving EAI a partnership between Unilever and the Government. Unilever Ltd. holds 55% of the shareholding and the Kenya Government the balance (of the shareholding).

135. *East African Standard* February 8, 1971.

136. For example, for some years now, Leyland Kenya Ltd. has over the years been enjoying overdraft facilities to the extent of shs. 25 million with Kenya Commercial Bank Ltd. providing shs.12.5 million and Barclays Bank International Ltd. (now Barclays Kenya Ltd.) providing the remainder. Kenya Shell Ltd. has substantial overdraft facility at Kenya Commercial Bank and so have Mowlen Construction Company Ltd., BAT and East African Industries (affiliated to Unilever).

137. *The Weekly Review*, May 9, 1977.

138. The Convention on the Settlement of Investment Disputes between States and Nationals of other States was established under th auspices of the International Bank for Reconstruction and Development (IBRD) in 1965.

139. See Bretton Woods Agreements Act, Chapter "64, Laws of Kenya, and International Monetary Fund, Chapter 467, Laws of Kenya, and International Monetary Fund (Amendment Articles), Chapter 468.

140. By the end of 1963, there were 1,269 patents on the register (860 of which were live*) and 9,186 registered Trade Marks. (Source: *Annual Report of the Register General, Ministry of Justice and Constitutional Affairs*, 1963, Government Printer.

And as at December 31, 1978, there were 2,909 registered patents 1,465 of which were live. The figure for Trade Marks stood at 16,187 (Source: Interview with officer-in-charge at the Patents Office, Attorney-General's Chambers, Kenya):

A total of 101 applications were received during the year 1978 all of them from non-residents. The applications were processed in the U.K.. Patents Office and the same year 105 patents were registered (the figure including some applications submitted in the previous years).

(It takes about 2 years to process an application for a patent.). The breakdown of the applications is interesting and is reproduced hereunder:

Australia 2, Belgium 1, France 1, Germany 26, Ireland 1, Italy 6, Japan 1, Netherlands 1, Norway 1, South Africa 2, Spain 1, Switzerland 15, UK 21, USA 21, and Sri Lanka 1.

And the breakdown of applications for Trade Marks in the same year, that is, 1978 was as follows:

367 by residents
658 by non-residents
Total 1025

The foreign countries with the highest number of applications were the USA and the UK with 168 and 167 applications respectively.

Every year, an annual report is submitted by the Attorney General's Chambers to the World Intellectual Property Organization in Switzerland and prompt quarterly reports are made by the same office to the Documentation Centre in Vienna.

It should be mentioned that there have been complaints by some foreign companies of non-British nationality who see no point in submitting their applications for patents to the UK Patent Office instead of the Kenya Patents Office. Indeed these companies have also expressed fears of the possibility of "smuggling" if applications are first submitted to an industrialized country like UK (Source: Interview with Office-in-charge, Patents Office, Attorney General's Chambers, Kenya).

With regard to the Trade marks, these are registered locally as per the Trade Mark Act, Chapter 506, Laws of Kenya. In the draft Annual Report of the Registrar General for the year, 1978 it is stated:

"Statistics of applications and registration (with regard to Trade Marks) still reveal the same lively interest in the classification of goods which relate to the patent medicine, cosmetic and domestic cleaning preparations, clothing industries and the the food manufacturing industries."

* A patent normally lapses at the expiration of 16 years unless an extension is granted.

141. Who Controls Industry in Kenya? op.cit.,p.131

142. Mandel, op. cit., page 8 as per Mr. Mutunga's cyclostyled reproduction (Mutunga 75/12, Faculty of Law, University of Nairobi.

143. Ibid., p.15

144. In 1979 a further legislation was enacted as the Trade Disputes (Amendment) Act (No. 3 of 1979).

145. Sec. 9 of the Trade Disputes Act of 1964.

146. Sec. 20 supra

147. Sec. 21, Trade Disputes Act, 1964.

148. R. Hayman, Industrial Conflict and the Political Economy:Trends of the Sixties and Prospects for the Seventies, Quoted essay in the Socialist Register, 1973, p. 121.

It is also interesting that even trade union leaders have joined the comprador class in appluding the role of the multinational corporations in the country. Thus the Secretary-General of the Kenya Chemical Workers' Union, Mr. Were Dibo Ogutu notes that his union is grateful to be associated with the growth of East African Industries (affiliated to Unilever):

"We have noted with interest and encouragement that

our dealings with East African Industries Management dates back to 1960 when the parties concerned first paved the way and established good industrial relations an atmosphere which continues to prevail up to now."

149. Daily Nation August 17, 1974.

150. Daily Nation February 10, 1979.

151. The Standard, March 30, 1978.

152. Federation of Kenya Employers Annual Report 1969.

153. Colin Leys, Underdevelopment in Kenya - Political Economy of Neo-Colonialism (Heinemann, 1975), p. 143.

154. Ibid., p. 143 .

155. Multinational Firms in Africa, p. 164

156. Ibid., p. 168

157. The company which is 100 per cent British Imperial Chemical Industries (I.C.I.) was formed in 1911. Between 90 per cent and 95 per cent of the soda ash produced at Magadi is exported mainly to the Far East, Singapore, Malaysia, the Phillipines and is used in making glasses. It produces 120, 000 tons of soda a year but is capable of producing between 200,000 and 250,000 tons a year.

158. The Weekly Review February 28, 1978. The Minsiter, Mr. S. Oloitipitip made the announcement at a baraza at Lake Magadi after touring the factory in February 1978.

159. Ibid.

160. The Weekly Review, October 6, 1978.

161. Foreign Ownership and the Structure of Canadian Industry, Privy Council Office, 1967, p. 339.

162. In 1962, the US Congress added the Hickenlooper amendment to the Foreign Assistance Act. The amendment required the US to automatically cut off all bilateral aid to any country that expropriated private US property without fair compensation or without taking the appropriate steps. In 1972, through the Gonzalez amendment, Congress applied the same principle to US support for soft loans from the Inter-American Development Bank, the allocation of import quotas for sugar, and all US contributions to the international lending institutions (World Bank, International Development Association, Inter-American Development Bank, Asian Development Bank).

However, it should be noted that in 1974 when Congress extended the possible scope of sanctions against expropriation, the President was free to designate countries against appropriation, if he should determine "that such designation will be in the national economic interest (88 stat. 2067-68).

163. See The Overseas Private Investment Corporation: A Critical Analysis, prepared by the Congressional Research Service for the House Committee on Foreign Affairs (Government Printing Office,1973).

164. Among the other countries (apart from the US) are Japan, Canada, Germany, United Kingdom, Denmark, Norway, Netherlands, Australia, Belgium and New Zealnd. For more details, see the comprehensively researched book, The American Multinationals and American Interests by C.F. Bergsten, T. Horst & T.H. Moran (The Brookings Institution,1978).

165. The US company had put very little capital into the undertaking and consequently when the locally incorporated company had liquidity problems, no more money was forthcoming from America and so ICDC decided to take over the company completely.

166. The charge was denied by the company, but Mr. Matu Wamae, then a director of the company, did concede that the emissions did affect the taste of the water and promised that the company would arrange to provide drinking water to the local people at points convenient to them. (See The Standard May 20, 1975).

The then Vice-President of Kenya (and now the country's President), however, discounted the claims of the company that the chemical wastes from the company's factories were harmless. Mr. Moi told Parliament (in 1975) that the polluted water of the Kerio Valley River had not only killed crocodiles but also 3,000 goats belonging to some of his constituents. He was particularly critical of the claim by Mr. Wamae that no cattle and other animals had died after drinking the polluted river water and pointed out that "it was no good making statements about certain things without first making on on-the-spot check."

167. See Kerio Valley Econology at the Threshhold of Radical Transformations : A Research Proposal by Dr. J.W. Ssennyonga (Institute of African Studies, University of Nairobi, Paper No.124)p.1

"Although Kerio Valley is, in both physical and human adaptational terms an ecological unit with a peculiar ecosystem, this phenomenon has been either altogether ignored or partially recognised by researchers in the region."

The newly established Kerio Valley Development Authority (through enactment in Parliament) is a further agent of disrupting the ecological balance in the area. The functions of the Authority are, *inter alia*,:

(a) to plan the development of Kerio area (and Turkwell catchment areas) and initiate project activities identified for such planning through the Government,

(b) to initiate such studies, and to carry out such surveys of the designated area as may be considered necessary by the Government or by the Authority and to assess alternative demands within the area on the resources thereof, including agriculture (both irrigated and rainfed) forestry, wildlife and tourism industries, electric power generation, mining, and fishing and to recommend economic priorities.

168. The Nairobi Times July 8, 1979.

169. S. Langdon, "The Multinational Corporation in the Kenya Political Economy", an essay in Readings on the Multinational Corporation in Kenya (Kaplinsky).

170. Multinational Firms in Africa, op.cit., p. 168.

171. Daily Nation, September 2 1978.

172. Ibid.

173. See booklet entitled The Kenya Shilling - Within and across the frontiers by D. Ndegwa, Governor, Central Bank of Kenya, p.21

174. J.O'Connor's statement is quite interesting:

"Indirect control of local capital in Asia Latin America and Africa is pervasive: the mobilization of capital control of sub-contractors and other suppliers,'management contracts' which afford foreign capital, day-to-day control of joint ventures, and licensing agreements which restrict and research' extend the sway of foreign capital still further and multiply the quantitative impact of the international corporations on the mobilization of resources abroad." The Corporations and the State-Essays of Capitalism and Imperialism

175. Report on the Colony and Protectorate of Kenya for the Year 1953, Colonial Reports (H.M. Stationery Office, London, 1954), p.85

176. Mohamed Jahazi (Second Reading of the Kenya Broadcasting Corporation Nationalization Bill, Kenya House of Representatives Official Report, First Parliament Vol. III, Part I, 1964) p.545.

177. Ibid., p.531

178. Ibid., p. 531

179. Ibid.,p.534

180. Ibid., p. 534

181. C.A. Gerstacker, op.cit., p.10

182. Another reason could be protection from total nationalization or as a method of getting Government assistance in matters related to engagement of expatriate personnel, import licences,etc.

183. "Africa: A new era in Banking" in The Times, July 21, 1970.

184. The Kenya Government also obtained a 40% shareholding in Grindlays Bank International (Kenya) Ltd. in which National &Grindlays Bank held the rest of equity portfolio.

185. Sir Cyril Hawker's statement, reproduced in The Times, July 21, 1970.

186. Ibid.

187. Kenya Commercial Bank still retains a management contract with Grindlays Bank International for the supply of expatriate bank staff who actually man the day-to-day policy trends and general banking procedural matters.

188. Daily Nation, October 13, 1971.

189. Kenya's Industrial and Commercial Development Corporation was set up in 1954 under the Industrial Development Ordinance (No.63 of 1954) as the Corporation was then known. Its present statutory form was created by the Industrial, Commercial Development (Amendment) Act(No. 7 of 1967) The Corporation, which falls under the Ministry of Commerce and Industry relies for its day-to-day operations on direct capital and injection loans from the Government and abroad, investments, and also from subscription of shares of other companies and participants in various other enterprises.

190. See C. Harvey's essay, "International Corporations and Economic Independence: A view from Zambia" in the book, Economic Independence in Africa, ed. D.P. Ghai (E.A. Literature Bureau 1962) pp.181-189.

191. Colin Leys, Underdevelopment in Kenya- The Political Economy of Neo-Colonialism, Supra p.123

192. Essay in Socialism in Tanzania Vol.2 Policies edited by L. Cliffe & J. Saul (E.A. Publishing House, 1973), p. 308.

193. See "Yugoslavia's New Investment Law," Scriven, Journal of World Trade Law, op.cit. p. 95.

194. Chapter 113, Laws of Kenya, Revised Edition 1967.

195. Sunday Nation, December 8, 1974.

196. Ibid.

197. Budget Speech for the fiscal Year 1974/75 (1st July-30June) by Mwai Kibaki, Delivered to the National Assembly on 12th June, 1974 (Government Printer) pp.9-10.

198. Employment, Incomes and Equality - A strategy for Increasing Productive Employment in Kenya - (International Labour Office, Geveva,1972) p.453.

199. Letter from Finance Manager, Kenya Shell Ltd. to Deputy Governor, Central Bank, dated March 27, 1975.

200. Letter from the Governor of the Central Bank of Kenya dated July 20, 1953.

201. _Ibid._,

202. ILO Report, _Employment, Incomes and Equality_, _supra_. p. 452.

203. _Readings on the Multinational Corporation in Kenya_, 166.

204. The UNCTAD Manufacturing Division, after their survey of transfer pricing practices estimated that perhaps one third of world trade was intra-firm trade. _Source:_ "Transfer Pricing and the State", Paper by Robin Murray presented at the Conference on Transfer Pricing, Institute of Development Studies University of Nairobi (March 6-10 1978.)

205. Chapter 497, Laws of Kenya, Revised Edition, 1972.

206. _Daily Nation_, January, 10, 1968.

207. _Daily Nation_, April 29, 1977.

208. _Daily Nation_, April 4, 1978.

209. Frantz Fanon, _The Wretched of the Earth_, (Penguin Books, 1967), p. 122

210. The Employment Act, No. 2 of 1976 (Effective on May 3, 1976 as per Legal Notice No. 69 of 1976).

211. Circular letter dated September 1, 1973. Reproduced in _Daily Nation_, September 1, 1973.

212. *The Standard*, June 28, 1976.

213. "East Africa Industries Supplement" - *The Standard*, March 30, 1978.

214. The purpose of the Act (Chapter 504, Laws of Kenya, Revised Edition 1972) is "to make provision for the control of prices and display of prices and for matters incidental thereto and connected therewith". The most important sections for purposes of this study are sections 5 to 9: Basically, the Minister for Finance has power to fix maximum prices as well as power to determine cost of goods or of any service. However, all orders made under the quoted sections are subject to approval by the National Assembly.

215. *Daily Nation*, December 8, 1974.

216. *Ibid.*

217. The purpose of the Act (Chapter 496, Laws of Kenya, Revised Edition, 1977) is "to promote the standardization of the specification of commodities and to provide for the standardization of commodities and commodities and codes of practice; to establish a Kenya Bureau of Standards, to define its functions and to provide for its management and control..."

218. *East African Standard*, December 3, 1973.

219. For the complete list, see *The Weekly Review*, December 15, 1978.

220. *The Standard*, December 15, 1978.

221. *The Weekly Review*, March 22, 1976.

222. Circular letter from the Governor of the Central Bank, Ref. G.M. 603 dated 14/8/74.

223. Letter from Local Director, Barclays Bank International Ltd. to the Governor, Central Bank of Kenya, dated September 2, 1974.

224. The Weekly Review July 21, 1978.

225. East African Standard, March 25, 1972.

226. According to a publication by the Ministry of Commerce and Industry (undated), the role of the Industrial Survey and Promotion Centre was established in 1971 in order"to enable the Kenya Government to take a more positive approach to industrial development through catalytic action involving initiation and evolution of ideas regarding potential investment opportunities in industry. The Centres' main function is to identify and promote projects by undertaking industrial surveys, pre-feasibility and feasibility studies in appropriate cases. The Centre also provides information and advisory services to prospective investors and conditions and procedures for establishing new enterprises."

In interviews with officials of the Centre,it was impressed upon the writer that the Centre is gradually becoming important in evaluating new projects and that accordingly no foreign major projects can be established without the recommendation of the Evaluation Section which is represented on the New Projects Committee.

227. R. Green in the essay, Political Independence and the National Economy: am essay on the political economy of decolonisation" in African Perspectives ed. C. Allen, R.W. Johnson (Cambridge University Press 1970) p. 303.

228. See Appendix II.

229. "The Times 1000 1970-71," Times Newspapers Ltd. n.d. 18,88.

230. Metal Box Annual Report 1971 ,pp.12,10.

231. W.J. Reader, Metal Box-A History (Heinemann Ltd. 1976) p.7.

232. Ibid., pp 213-4

233. Continental Can (now known as the Continental Group) is the world's largest packaging manufacturer. The cornerstone of Metal Box's business, whether at home or abroad, was the agreement signed with Continental Can in 1930. Continental Can in 1945 were holding 100,000 Metal Box shares, about 6½ per cent of the equity, and 25,217 shares, 12½ per cent of the equity, in Metal Box of South Africa. The agreement between Metal Box and Continental Can was renewed in 1945 on virtually the same terms as the original But the Antitrust legisltion in the United States of America did not favour the type of agreements being entered to by Continental Can(dealing mainly with patents and trade secrets) and Metal Box and toward the end of 1949, accordingly, the American Packaging Corporation was forced to choose the inevitable: to enter into new agreements designed to put the two manufacturers on a competitive footing in the sale of containers thus putting an end to the market-sharing hitherto practised. The new proposals also entrenched the co-operation between the two companies in respect to the sale of technical knowledge - Continental Can were to supply the required technical knowledge with in respect to can manufacturing. This was completed with a machinery agreement. There was an exclusive right afforded to Metal Box in their own factory, to buy Continental's machinery. (N.B. Metal Box territory, for containers,

and container machinery, was defined as the British Empire (except Canada, Australia, and New Zealand) and Israel, for crown caps and crown cap machinery, United Kingdom, Irish Republic, and South Africa). Within these areas Continental Can gave Metal Box an exclusive right to buy machinery at a 10 per cent discount (or at cost plus 10 per cent if no price were quoted) and agreed also to provide Metal Box with technical information.

The agreement between Continental Can and Metal Box was terminated in 1977 when it became evident that technology had changed and that the latter company had become only very remotely dependent on American technology. Metal Box is now free to pursue its separate way in can making and so of course is the Continental Group.

234. Metal-Box - A History, op.cit. p.189

(N.B. It was in 1948 that a new subsidiary was set up: The Metal Box Company Overseas Ltd. The initial idea was actually not to make it a holding company controlling Metal Box's expanding activities in foreign parts but rather in advance of nationalization. But nationalization did not take place as feared and accordingly the former factor later predominated and the Reading-based firm later became the nerve-centre of administrative control).

235. By late 1978, application was made by Metal Box Kenya Ltd. to the Treasury for the company to capitalise Kshs.13,426,670 of its unappropriated profits through the script issue mentioned in the text. Approval was granted in early 1979 and the shareholding structure became as follows:

	Shareholding Before the Scrip Issue	Scrip Issue	Total Sharehold ing
Metal Box Overseas	4,000,000	2,000,000	6,000,000
Industrial Commercial Development Corporation (ICDC)	773,333	386,666	1,159,99[illegible]
Industrial Development			

Bank (IDB)	266,668	133,334	400,002
Development Finance Comp.of Kenya (DFCK)	266,667	133,333	400,000
Industrial Promotion Building Ltd.	35,200	17,600	52,800
R.A. Panju	9,600	4,800	14,400
A.W. Investments Ltd.	9,600	4,800	14,400
Kenya Commercial Bank Nominees Ltd.	9,600	4,800	14,400
TOTAL	5,370,668	2,685,333	8,056,001

N.B. Fractional shares arose on ICDC and DFCK i.e. on half-each; DFCK surrendered its half share in favour of ICDC.

236. See Appendix III for the comprehensive list of the products manufactured by Metal Box Kenya Ltd.

237. Letter from ICDC Ref. PE/15/2/p16/p89 dated February 2, 1965. acknowledging receipt of letter from the German concern dated February 5, 1965.

238. ICDC Letter PE/15/2/p67/p90 dated February 15,1965.

The characteristics of the envisaged plant were: 500 to 1,000 pieces per day of ·4 gallons square ti similar to the standard kerosene container which has a filling hole in one top corner.

239. ICDC suggested two methods of valuing shares which smack of "bazaar-type of bargaining":

(i) splitting the difference between the par value of Kshs.20 and the market value of shs.23 to ICDC

(ii) a sliding scale as follows:
10,000 shares - shs.22 per share
10,000 shares - shs.23 per share
15,000 shares - shs.24 per share
25,000 shares - shs.25 per share
Total K£ 71,750

240. For many years, the company's total financial commitments by way of cash injection from own

resources towards increased investment has been less than Kshs.40, million whilst the return from the business through outflows overseas has been very ahead of that figure.

241. The Dividend cover ratios which ICDC took into account were as follows:

	1964/65	1965/66	1966/67	1967/68
Profits available for distribution	112	156	146	100
Dividends apaid	70	94	125	125
Retained	42	62	21	(25)
Dividend cover	1.6	1.7	1.2	0.8
Dividend %	7%	7.5%	10%	10%

242. Bushell v. Faith (1970) A.C. 1099, Hse of Lords, England.

243. Company Instruction No.18 was passed by the Board Meeting of January 11,1979 and set new limits thus cancelling the earlier company procedures in thi regard as per Company Instruction No. 11 dated 8, 1976 (cancelling Company Notice No. 133 of April 30, 1974.)

244. The Multinational Corporations in Africa - A Document prepared by the UN Economic Commission for Africa (Rex Collings, 1972), p.3.

245. The entire Agreement is reproduced in this study as Appendix IV.

246. Holmes, The Common Law (1923)

247. R. Pound, An Introduction to the Philosophy of Law Based on the Storrs Lectures delivered to the Law School of Yale University in the school Year 1921-22 (Yale University Press, 1922, 1954).

248. C.V. Vaitos, "Bargaining and the Distribution of Returns in the Purchase of Technology by Developing Countries", essay appearing in Underdevelopment and Development ed. H. Bernstein (Penguine Books, 1973) pp.317-8

249. See Appendix VI which illustrates the Personnel Structure in 1978.

250. Vaitos, op.cit., 133

It should be noted that the adaptation of imported machinery was carried out quite creatively:

"Perhaps the classic case , of growth through imitation of foreign technology is the Japanese. Originally the country earned a somewhat derisive reputation fo slavish copying, even duplicating, equipment the use of which was not understood. With time, however, and especially after World War II, Japanese imitation became highly adaptive to local conditions and ultimately gave way to an independent capacity to innovate. In such technical fields as photography after starting out to reproduce the German models the Japanese developed their own independent and highly - quality innovations."

C.P. Kindleberger, Economic Development (McGraw-Hill) 2nd Edition.

251. See V.T. Vittachi, "The Ideology of Foreign Aid", Newsweek August 27, 1979.

252. Vaitos, op.cit. , p.321

253. U.S. Senate, 85th Congress, 1st Session, study

on The International Patent System and Foreign Policy, Washington, 1957, p.3

254. Letter reproduced as Appendix ~~VI~~ V.

255. S. Amin, Imperialism and Unequal Development (the Harvester Press Ltd., Copyright: Monthly Review Press, 1977) p. 25.

256. Board Meeting, Metal Box Kenya Ltd., March 16, 1973, Minute 13/73.

257. This refers to Appendix ~~VI~~ V, supra.

258. Dividend Payments

Gross	73/74	74/75	75/76	76/77	77/78
Gross	2,200,00	4,000,000	3,000,000	5,000,000	4,000,000
Withholding Tax	330,000	600,000	450,000	750,000	600,000
Net	1,870,000	3,400,000	2,550,000	4,250,000	3,400,000

(Source: figures supplied by the Financial Controler, Metal Box Kenya Ltd.)

259. Apart from the loans granted by the Industrial Development Bank and the Development Finance Company of Kenya, the company has also been enjoying overdraft facilities from Barclays Bank Kenya Ltd. at levels ranging from Kshs.10 million to Kshs.30 million. The overdraft facility was increased recently after the Government decision that companies in priority areas like manufacturing could borrow up to 100 per cent of their equity. Also alternative arrangements have been made to replace the present Stg£ 1 million overdraft facility with Barclays Bank in London by arranging an initial Kshs.30 million

dollar finance through Citibank, Nairobi. Exchange control approval in this regard has been granted and the finance will be by the discounting of dollar Bankers Acceptances in New York market.

The cash projections period January 1979 to March 1979 are shown as Appendix VIII

260. The following company's forecast of Current Account borrowings gives a good idea of the type of the nexus between the local company and the parent company in the UK.

	Jan. 1979	Feb.1979	March 1979
UK £000's			
Excluding Betacans			
Current Account Balance b/f (Overdue Tinplate)	937 257	975	796
Charges	38	39	90
Overdue Tinplate Invoices	395	474	275
	1,627	1,488	1,161
Remittances ex Kenya	257	218	141
Remittances ex Barclays	395	474	275
	975	796	745
Betacans Ltd.			
Balance	8	8	8
Charges	-	-	-
	8	8	8
Remittances	-	-	-
Balance	8	8	8

261. Derrick Wyatt, "Choice of Law in Contract"

The Modern Law Review, Vol 37, 1974, p. 405.

262. International Licensing Agreements ed. G.M. Pollzien & G.B. Bronfen (The Robbs-Merill Co. Inc. 1965) p.5.

263. Wm.H. Muller & Co. v. Swedish American Line Ltd. 224 F. 2d 806 (2d Cir. 1955), Cert. denied, 350 U.S. 903 (1955).

264. Article 3, paragraph 2 of the Yugoslav Foreign Investment Law, 1978.

265. Metal Box- A History, p.181

266. Ibid., p. 181

267. Within the meaning of the Monopolies and Merger Acts, 1948 and 1965, a monopoly exists in any industry where any supplier controls one-third or more of the supplies.

268. That is, of the type used for packing processed foods such as fruit, vegetables and meat. These cans are made on high speed automatic equipment.

269. The European Commission has taken a very strict view of discounty systems granting fixed or aggregate rebates. They are considered violations of article 85(1) of the Treaty of Rome (European Economic Community).

270. Sec. 1 of Sherman Act in the US prohibits contracts, combination or companies in restraint of trade. Sec. 2 prohibits monopolization or attempts to monopolize any part of interstate trade or commerce or the foreign commerce of the U.S.

271. *Re European Sugar Cartel* (1973) C.M.L.R.,65

272. Report compiled by Mr. P.C. Harris in accordance with Minute 235 of the 15th Meeting of the DFCK Board (letter to chief executive officer by Mr. Harris dated June 26, 1965).

273. The projected company, African Can Corporation Ltd. had an initial authorised and issued capital of £70,000 consisting of 170,000 ordinary shares of shs.20/- each. The total capital cost was to be £42,500.

Sponsors included two local financial institutions, a firm of local merchants and two German firms as follows:

(1) East African Industrial Promotion Services (K) Ltd., the main sponsors and co-ordinators of the project.

(2) Transacandia Ltd. - a firm of local merchants, importers and exporters who had for some years been closely associated with the East African packaging industry;

(3) Bochumer Chemie Imhausen Co. m6H (BOCH) of Hamburg, a firm of industrial consultants;

(4) Karges - Hamma (KH) of Braunshwerg, Germany, a firm exclusively engaged in the manufacture of machinery for producing tin cans and allied products, who had designed, built, commissioned and operated such plants in many parts of the world.

(5) DFCK.

It was proposed that a technical co-operation was to be provided by the German company-Karges Hammmer for a fixed fee of up to £20,000 which was to be paid by issuing up to 20,000 ordinary shares in ACCL at par.

The setting up of the project was contigent upon Kenya Meat Commission and the Soroti Factory between them agreeing to take a total of 10 million meat cans per annum, and Kenya Co-Operative Creameries together with fruit and vegetable canners 4 million A 10 cans and 5 million round 6 oz cans per annum, a total of 19 million cans per annum.

274. Letter from Manager of DFCK dated July 9, 1965 to ICDC Executive Director Ref.6/3/12.

275. See Metal Box Kenya Ltd. Board Meeting Minutes of March 3, 1972.

276. Metal Box - A History p.194

277. Ibid. pp.203-4

278. This is a word in Kswahili meaning ordinary people, the common people or simply the bulk of the indigenous people whose common denominator seems to be lack of economic strength.

279. Production Report for June and July 1976 for the Board Meeting of Metal Box Kenya Ltd. held on September 10, 1976.

280. In 1974 Kenya Meat Commission put a claim of K£200,000 in respect of below-quality cans. Stocks at KMC had become hollow tops. These cans became hollow tops some three months after being packed. Such cans were admittedly in an unsatisfactory condition "but not necessarily dangerous." (Board Meeting Minutes, January 9,1975). About 12,000 to 15,000 cans manufactured during that period were in U.K. and between 17,000 and 20,000 cans were stock held by K.M.C. All K.M.C. stocks which were sent out between November 1973 and July 1974 were being withdrawn from markets in the U.K. Stocks of cans at K.M.C. at Athi River were not to be distributed. The actual K.M.C. claim was as follows:

(a) Local claim - Kshs.1,300.994.
(b) U.K. claim - Stg.£.132,860.

281. See Daily Nation, June 14. 1979.

282. Notes to Agenda for Board Meeting on March 5, 1976, Production Report for January 1976.

283. This is a novel by Upton Sinclair. Published in 1906 The Jungle describes the factory life in Chicago in the first years of the twentieth century.

284. I.Illich, "Outwitting the 'Developed' Countries" essay in Underdevelopment and Development, op.cit. , pp. 362-364.

285. Mahmood Mamdani, Politics and Class Formation in Uganda (Heinemann, 1976), p.267.

286. P. Jalee, The Pillage of the Third World (Translated from the French by Mary Klopper, Monthly Review Press, 1968) p. 79.

287. F Stewart, Technology and Underdevelopment (The Macmillan Press Ltd.) p. 123.

288. The Pillage of the Third World op.cit. p.73

289. Imperialism and Unequal Development, op.cit.,p.26

(N.B. "UNCTAD had made estimates of the direct costs involved in overt technology transfer. The estimated costs of payments for patents, licences, know-how, trademarks, management and technical fees were $1500 million in 1968, or nearly 0.5 of Gross Domestic Product, and 5 per cent of exports. These figures need revising upward to include underpayments through transfer pricing, and to

include the cost for technology transferred implicitly via foreign personnel, not involving overt technology contracts. Imports of machinery, equipment and chemicals cost Third world countries $18,420 million in 1968. Assuming one-tenth of this cost was a return on the technology involved in their production, this would more than double the cost of technology transfer, bringing it up to 10 per cent of exports.

UNCTAD has also estimated the likely rate of increase of overt technology payments:it is estimated that these payments will rise by around 20 per cent per annum to 1980, raising the total cost to $9000 at that date, or 15 per cent of total exports. Assuming that the non-overt costs rise in line, then by 1980 as such one-third of third world export receipts may be required as payments for technology." Steward, Technology and Underdevelopment, op.cit. pp.123-4

290. Technology and Underdevelopment, p. 124

291. Article 22 para 2 of the Foreign Investment Law of 1978. For more information see John G. Scriven, "Yugoslavia's New Investment Law", Journal of World Trade Law, Vol. 13 No. 2, March/April 1979.

292. Zenith Radio Corporation v. Hazeltine Research, Inc 395 U.S.100, 89 S.Ct.1562 (May 19, 1969.

293. In the UK, the Restrictive Trace Practices Act. 1956, provides for the exemption of certain agreements from registration.

294. Clause 14 of the Agreement between the UK company and its subsidiary in Kenya.

295. Imperialism and Unequal Development, op.cit. p.77

296. Some of the claims by the local subsidiary that profits have been reduced by low prices allowed by the Price Controller on its products do not carry much weight as the factor here might be inability to cope with the bargaining competition in the plastic sector. The company has asserted that if it is not allowed to increase its prices and the present rate of wages continues, "then there is not a great deal of future... in the plastic operation." However, the company's excuse for low sales performance has been questioned by one of the shareholders, the ICDC. At the Board Meeting of January 26,1973, the ICDC representative noted that there were other plastic companies in Kenya which were not continuing to show losses. He knew of one or two companies which made profits and re-invested the profits. He wondered whether the reasons given were contributory to the losses at Ruaraka, or whether there could be defects in management and marketing which also were responsible for the unsatisfactory situation.

297. Julius Nyerere, Freedom and After (Oxford University Press) 1968.

298. R. Blackburn, "The Unequal Society in the Incompatibles, pp.19,37.

299. Lall, "Medicines and Multinationals - Problems of Transfer of Pharmaceutical Technology to the Third World", Monthly Review/p. 25. /supra

Note, however, that advertising directly to consumer can create warranties to them. In 1932 American case Baxter v. Ford Motor Corporation the manufacturer was held to be liable because a windscreen advertised as shatterproof did in fact shatter when struck by a stone.

300. Mr. Joseph Kamotho, MP for Kangema constituency when contributing to the debate on the Medical Practioners and Dentists Bill in July 1977.

301. "Standard Doctor", The Standard, December 12, 1976.

302. The Times June 7, 1976.

303. Quoted in M. Muller in "Drug Companies and the Third World" New Scientist Vol.70, No. 998, April 1978 p. 216.

304. The following quotation from Harvey Teff's book, Thalidomide - the legal aftermath (Sexon House) 1976, p.10, is appropriate:

"Pursuing a personal injurious claim through litigation is not the happiest of experiences at the best of times. It need hardly be stressed how much more intimidating and distressing such a project must have been for parents pitted against a powerful company with the financial resources to withstand and unsuccessful outcome while needing all their innter strength to cope with the day to day needs of their children and survive intact as a family unit.

305. Unpublished LL.B.III Dissertation; available in the University of Nairobi, Main Library.

306. Harmondsworth Penguin (1968) p.53.

307. Ibid.

308. See the summary of the concessions by Stephen Langdon in "The Multinational Corporation in the Kenya Political Economy", an essay in Readings on the Multinational Corporation in Kenya op. cit., p. 172.

309. Richard Eglin, "The Oligopolistic Structure and Competitive Characteristics of Direct Foreign Investment in Kenya's Manufacturing Sector". essay in Readings on the Multinational Corporation, p. 119.

310. Ibid.

311. British American Tobacco, Annual Report, 1967.

312. With regard to price fixing, U.S. Trenton Potteries case (273. US 392) offers the established legal position. In this case, 82% of the market in pottery fixtures was controlled by 23 corporations who had conspired to fix prices. The issue was whether this action by the companies was in itself a violation of the Sherman Act or whether the effect on the public was good or bad. The Supreme Court held that this was a per se violation and went on to say:

"The aim and result of every price fixing agreement if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today made through economic and business changes becomes the unreasonable price of tomorrow.

Once it is established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, Without the necessity of minute inquiry whther or particular price is reasonable or unreasonable." .

313. See Appendix ~~VIII~~ IX

314. The Standard, May 17, 1979.

315. Government of Mexico, Law on the Transfer of Technology and the Use and Exploitation of Patents and Trade Marks (n.d.) forward, p.4

316. R. Kaplinsky, "Inappropriate Products and Techniques in UDC's: The Case of Breakfast Fords in Kenya "Working Paper" Supra

317. The Science and Technology Act, No. 3 of 1977 (Government Printer)

318. See a letter to Daily Nation, August 27, 1976 by Dr. Mugo on "Traditional Medicines and 'Poaching' by foreigners " Shown here as Appendix ~~VIII~~ VII

319. Transfer of Technology-Policies relating to technology of the countries of the Andean Pact : their foundations. A study by Junta del Aerde de Cactagena at the request of the UNCTAD Secretariate UNCTAD TD/107/107 9 1971) p.26.

320. The above figures are taken from an internal memorandum between Treasury officials dated 17th August 1978.

321. Hilary Ng'weno, "Juggling the Profits" World Paper, May 1979 p.7. For some solid and

comprehensive analysis, it is a must to read the article, "Export Oriented Growth: A large International Firm in a Small Developing Country" by R. Kaplinsky (December 1977) - unpublished. Here it is worthy quoting some points made by Kaplinsky regarding Del Monte (note that the author does not refer to the company by name but from the profile given, there is no mistaking that the company under discussion is Del Monte). "It would appear that the balance of the advantage lies with the company rather than with Kenya. This can be illustrated in a number of ways. The operation in Kenya has led to:

(1) A substantial loss of foreign exchange might be occuring due to the apparent underinvoicing of exports.

(2) A consequent loss of tax revenue (and foreign exchange) due to artificial 'unprofitability' of the subsidiary.

(3) Substantially reduced employment implications and increased imports due to the use of estate cultivation rather than smallholder cultivation of pineapple.

(4) Subsidised 'loans' to the company through accounts receivable.

(5) A situation in which tariff concessions designed to make exports from less developed countries more profitable have accrued to the company rather than to Kenya.

(6) Apparently high commission rates form management and technical services, given that subsidiary already pays the full costs of the recorded personnel and their families.

(7) Substantially reduced bargaining power in the future since the company has achieved a nearer monopoly for over thirty years / International Chamber of Commerce rather than in terms of Kenyan procedures, and

(8) A continuation of these trends since service layments have been timed to reduce future profits.

/ and all disputes are to be settled in terms of

322. Kaplinsky, "Export Oriented Growth: A Large International Firm in a Small Developing Country". p. 7

323. Application to the New Projects Committees for Approval for Industrial Project - Form A. See Appendix ~~IX~~ X

324. G.F.A. Sawyer, ed. , East African Law and Social Change (East African Publishing House, 1967) Introduction, p.9.

325. Girvan, Economic Nationalists v. Multinational Corporations: Revolutionary or Evolutionary Change?" in Multinational Firms in Africa op.cit. p. 52.

326. Pheroze Nowrojee, "Public Enterprises and Co-operatives in Kenya and Tanzania - Some Comparative Illustrations", East Africa Law Review , Vol. 5 Nos. 1 & 2, 1972 pp. 1[illegible]-160.

327. See George Goyda, "The future of Private Enterprise: A study in Responsibility (1951)" - article reproduced in Who Controls Industry in Kenya, op.cit., pp.240-41, and also reproduced in J.W. Katende , M.R. Chesterman, P.A. Thomas and S. Mann's, The Law of Business Organisations in East and Central Africa (E.A. Literature Bureau, 1976), p. 461.

328. Traditionally, English company law does not, with one or two minor exceptions, directly recognise the interest of corporate employees:

> "On the whole the employee, as far as English company law is concerned, might as well not exit : directors cannot, in exercising their powers, take direct account of the interests of the employees". (See Wedderburn, Company Law Reform, Fabian Tract 363(1965), p. 14.

Neverthe less, there has been a demand in the

UK for genuine Workers' participation in the running of industry. That is why a Committee of Inquiry on Industrial Democracy was appointed under the Chairmanship of Lord Bullock. The Bullock Report (Cmnd 6706 (1977) recommended the introduction by law of a system of industrial democracy in all companies employing more than 2,000 employees. Employees and shareholders should be given equal representation on the board and there should also be an independent co-opted third element on the board.

The Bullock Report has been said to constitute by far one of the most thorough and thoughtful examinations of the impact of employee participation on the customary rules of company law. Effective employee representation on the Board will undoubtedly bring fundamental changes in the ownership rights of shareholders. Company Law, as Lord Bullock points out, is presently "largely based on the concept of ownership" a situation, if structurally changed would bring about far-reaching interactions in the class structure in the capitalist edifice: (See D.D. Prentice, "Employees' Participation in Corporate Government - A Critique of the Bullock Report", Canadian Bar Review, Vol. LVI, p. 281).

The inability or unwillingness to change the economic structure to meet the intended reforms will make the whole exercise futile:

> "...A growing number of laws considers workers' representation as one of the outstanding points of legal reform. Nevertheless, terms like 'participation' 'co-determination' and 'workers representation' are used for concepts which lastly have nothing more in common than the wording. Furthermore, in spite of the widespread claim for co-determination, no law has up to now clearly defined its aims and consequences. On the contrary in order to facilitate compromise, preferences is given to a sometimes hopeless ambinguity of expression ingeniously concealing the real implications. In fact Workers' representation reflects the wish for co-determination in the true sense of the word. Hence no law

introducing participation will ultimately assist replacing its company law by an enterprise regulation dominated by radically changed decision-making procedures. Co-determination is however by no means only a problem of reorganizing enterprises. It also affects collective bargaining and strikes. Whoever supports the claim for participation should therefore openly state whether he is willing to accept these consequences and to what extent.

Source: An Article "Workers Participation in the Enterprise-Transcending the Company Law"- in Modern Law Review, Vol.38, Jan. 1975, No. 1 p. 21.

329. M. Mann, Consciousness and Action Among the Western Working Class.

330. Julius Nyerere, Presidential Circular No.1 dated January 10,1970.

331. M. Mwanda, NUTA: Its Organisation, Operation and Role in Post-Arusha Era, Examination Paper, University of Dar es Salaam 1972, p.30

332. H. Mapovu, The Organisation and Participation of Workers in Tanzania, Economic Research Bureau Paper no.72-1, University of Dar es Salaam, pp. 14-27.

333. Nowrojee, "Public Enterprises and Co-operatives in Kenya and Tanzania - Some Comparative Illustrations" p.

334. Samir Amin in his Introduction, "The Multinational Corporation in Africa:The International Capitalism" in Multinational Firms in Africa, supra, p.16

335. Quoted in New York Times, September 22,1973,p.37

336. Silvin Brucan, "Locking theChastity Belt", World Paper, May 1979, p.6

337. Girvan, "Economic Nationalists v. Multinational Corporations :Revolutionary or Evolutionary Change?" op.cit. p. 37

338. I. Shivji, "Tanzania : The Silent Class Struggle essay in Socialism in Tanzania supra, pp.313-4

339. Ibid., pp.317-8

340. See Christopher Mulei, "The Predicament of the Left in Tanzania" East Africa Journal, August, 1972 Vol. 9 No. 8.

341. Panaf Great Lives, Kwame Nkrumah, (Panaf Books Ltd. 1974) pp. 108-10.

342. Ras Makonnen, Pan-Africanism from Within (Oxford University Press 1973), p. 245.

343. Report of the Select Committee on Criminal Law relating to Capital Punishment in Felonies (Parliamentary Papers 1819 Vol. 8(1) no. 585,8)

344. Palmer, "Evils Merely Prohibited", article in British Journal of Law and Society, vol. 3 No.1, Summer 1976.

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347. Tom Hadden, Company Law and Capitalism, supra pp.xxiii and 477.

348. J.T. Winkler, Review of Company Law and Capitalism

(op.cit.), in The British Journal of Law and Society Vol. 1 No. 1 , Summer 1974.

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350. Ibid., p. 141

351. T. Szentes, "Status Quo and Socialism", Essay in Socialism in Tanzania Vol. 2, op.cit., p.346.

352. Letter to P.V. Annekov, Marx/Engels, Selected Works, Moscow 1962, Vol. II, p. 446.

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