

**MULTINATIONAL CORPORATIONS AND
THE VIOLATION OF HUMAN RIGHTS IN
KENYA: A CASE STUDY OF CIRIO DEL
MONTE IN KENYA //**

**BY
KIRIMI, ESTHER KANYUA**

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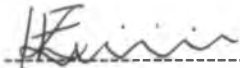
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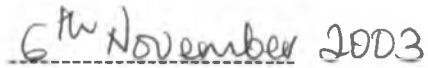
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DECLARATION

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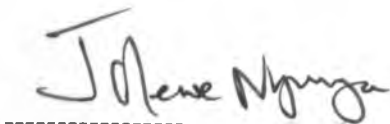


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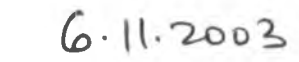


DATE

This dissertation has been submitted for examination with my approval as a university supervisor.



PROF. OLEWE NYUNYA



DATE

To my parents, Joe and Andy

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LIST OF ABBREVIATIONS

CNMS	Centro Nuovo Modello di Sviluppo
COTU	Central Organization of Trade Unions
DMKL	Del Monte Kenya Limited
FDI	Foreign Direct Investment
FKE	Federation of Kenya Employers
ICSID	International Center for the Settlement of Investment Disputes
ILO	International Labour Organization
KHRC	Kenya Human Rights Commission
MAI	Multilateral Agreement on Investment
MNCs	Multinational Corporations
OECD	Organization for Economic Cooperation and Development
UNCTAD	United Nations Conference on Trade and Development

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ABSTRACT

This study investigates the extent to which foreign direct investment inhibits the Kenyan State's capacity to check human rights abuse and the implications of Kenya's liberal investment policy on human rights issues. In addressing these questions the study focuses on the violations of human rights by Cirio Del Monte Kenya Limited, a pineapple growing multinational subsidiary located in Thika.

The main arguments for the extension of human rights duties to MNCs, the effectiveness of international and Kenyan legislative and institutional mechanisms in ensuring human rights compliance by MNCs explored.

The case put forth is that the state, irrespective of its development and economic capacity, is capable of holding MNCs accountable for human rights excesses. Moreover, the state has an non-delegable duty to ensure that all natural or legal entities within its jurisdiction uphold and respect human rights including MNCs.

The study finds that the existing Kenyan legislative and institutional framework as well as enforcement mechanisms are grossly inadequate and ineffective in ensuring compliance of human rights by MNCs; that the government's deliberate policy of non-interference in investors' affairs has become counterproductive in that some errant corporate entities have a freehand to abuse human rights with impunity and without fear of reproach.

The study comes to the conclusion that a delicate balance between foreign investment and human rights compliance by MNCs must be found. To this end a combination of corporate self-regulation and state regulations, backed by political will for selective vetting of investment are considered as viable alternatives.

CHAPTER ONE

AN INTRODUCTION TO THE STUDY OF MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS VIOLATIONS IN KENYA

The growth and expansion of the size and activities of the multinational corporations (MNCs) is a global phenomenon. Today the global economy is converging and there exist few barriers to international commerce. Economic deregulation, globalization and minimization of governmental responsibilities in the public domain has led to the increase of private corporate activity within the State. The MNC exercises considerable influence and some power over the direction of economic and social policies of the home and host countries and hence the MNC is no longer an isolated private commercial undertaking but has evolved into a powerful policy institution.

Having in mind the importance of direct foreign investment in the Kenyan economy and Kenya's peripheral position in the global economy, the MNC plays a strategic role in the economy. A considerable proportion of capital formation in Kenya arises from the activities of foreign private enterprise. These corporations tend to be concentrated in the key sectors of the economy that provide an important source of foreign exchange. Since direct foreign investment accounts for a substantial portion of net capital formation in the economy, the explicit policy of the government is to encourage foreign investment.

The role of the MNCs in the Kenya has been the subject of controversy partly due to the fact that MNCs are foreign but mainly due to their domination of local economic activity, stifling domestic investment initiatives and their influence over the economic and

political independence of the State.

Recently MNCs have been accused of perpetrating gross human rights injustices upon their workers and the local community, which take the form of subjecting workers to inhumane working conditions, poor pay, and denial of rights to form or join trade unions. Due to their increasing influence in society there have been numerous calls for the delimitation of the responsibilities of these corporations. Although there is consensus among some scholars and civil society on the need to define and delimit the responsibilities of MNCs, there is no agreement as to what the responsibilities ought to be and moreover uncertainty remains on the most effective approach to achieve this.

This research is an attempt to examine the impact of the MNC enterprise on human rights in Kenya, the effectiveness of the existing MNC regulatory framework and mechanisms in promoting human rights and the place of human rights in the economically dependent developing country. This paper shall focus on various MNCs in the horticultural sector.

Statement of the problem

The MNC due its size compared with other economic entities including the economies of many states is an important actor in the international scene as well as at the domestic level. MNCs bring substantial benefits to the host and home countries by controlling the efficient utilization of capital, technology and human resources. In the developing countries, these corporations often control key sectors of the economy and therefore possess significant influence over foreign trade and tend to contribute to the industrial

development of these countries through the transfer of technology, managerial expertise, the expansion of productive capacity and employment and the establishment of exports markets.

Foreign investment is crucial to the growth of the Kenyan economy and the Government has actively sought foreign investment in its economy through a liberal foreign investment policy, which has encouraged many MNCs to set up subsidiaries in the country. National development plans and policy statements emphasize the key role MNC investment play in Kenya's development efforts. For instance the 1989-1993 Development Plan¹ emphasized that development would rely to a great extent on growth initiatives and foreign capital flows from the MNCs. To this end the Government pledged to take measures to provide a favourable environment for foreign direct investment (FDI) and to enhance the level of MNC participation in the Kenyan economy. The 2002-2008 Development Plan shows that the government intends to pursue all macroeconomic stabilization options in order to attract direct investment.²

State actions have been crucial in encouraging and permitting the penetration of MNCs in Kenya. The State has even been prepared to provide MNCs with extensive protection from competition and scrutiny by lobby groups, which protection MNCs almost invariably make their priority demand when deciding whether to invest in a country. Research on MNC-State relations in Kenya shows close and intimate relations between the two entities. MNCs have been able to effectively bargain for regulatory advantages for their subsidiaries including protection over locally owned Kenyan firms and

¹ Government of Kenya, *National Development Plan 1989-1993*.

² Government of Kenya, *National Development Plan 2002-2008*.

avoidance of heavy tax revenues.

Further research indicates that the tendency to rely on MNCs for growth in some of the vital sectors of the economy has enabled MNCs to carve out a prominent role for themselves. The presence of informal and illicit flow of financial favors to State personnel, widespread State shareholding in MNC subsidiaries often being negotiated on the initiative of the subsidiaries and intimate and informal channels through which MNC executives can approach State officials in the face of competition or regulation.³ Further, the MNC sector also has a close interest in cooperative relations with the State because of the various ways in which the State provides the subsidiaries with advantages in the local economy.

Due to its heavy dependence on foreign investment, Kenya has been careful to avoid pushing any conflicts with MNCs over the edge into economically costly confrontations. Conflict between the MNC and the State has been at a minimal and the Kenya Government has been cautious about attempting to transform the terms of investment in its favour for fear of withdrawal of investment. Divestment is a great concern for the host state and a particularly sensitive political issue in the developing country. The withdrawal of investment creates concerns over trade balances and lost jobs. The highly dynamic character of the MNC accentuates this fear because MNCs are particularly prone to take extreme action by withdrawing from locations that fail to meet the ultimate goal of profit maximization by not yielding adequate returns.

³ Langdon Steven "Multinational Corporations in Kenya Political Economy" in Kaplinsky R., ed., *Reading on the Multinational Corporation in Kenya*, (Longman, Nairobi, 1978,)pp.170, 188; Nzomo Maria, " External Influence on the Political Economy of Kenya: The Case of Multinational Corporations" in Oyugi

In Kenya, the dominance of the MNC in the economic affairs especially in trade, agriculture, investment and financial services is extensive and the involvement of these corporations in the public domain and the impact of their activities and policies have brought them into sharper focus. This has drawn public attention to the question whether these corporations can be held accountable or be regulated.

Recently, evidence of human rights abuses by MNCs has emerged and has been the subject of concern and debate among scholars, civil society and human rights activists. These violations are directed at the labour force and the environment and take the form of unsafe and contaminated working conditions, dismal pay, outlawing of representation through trade unions and environmental degradation. Many accusations have been directed at the horticultural sector and the export processing zones. These sectors of the economy are largely controlled by MNCs, which exercise high degree of control over the production and export of key foreign exchange commodities⁴.

Every state has an obligation under international law to uphold the human rights of its own nationals. Although Kenya is a signatory of numerous International human rights Conventions including the International Labour Organization's Conventions that deal with the creation of favourable working conditions, the enforcement of the same has been dismal when dealing with MNCs.

The government has been unwilling to stir any confrontation with the MNCs involved

O. Walter, ed., *Politics and Administration in East Africa*, (Konrad Adeneur Foundation, Nairobi, 1992). pp. 456.

⁴ Kenya Human Rights Commission, *Exposing the Soft Belly of the Multinational Beast: The Struggle for Workers Rights at Del Monte Kenya*, (Nairobi, 2002); Kenya Human Rights Commission, *Beauty and Agony: An Advocacy Research on the Working Conditions in the Flower Plantations in Kenya*, (unpublished July 2001).

and has even denied the reports concerning the human rights situation in the MNC complexes. Various attempts to negotiate with the MNC have essentially been conducted by non- governmental organizations who have faced strong opposition from the Government, the MNCs involved and trade unions such as Federation of Kenya Employers and the Central Organization of Trade Unions. Although these organizations have succeeded in securing a few concessions, bargaining and negotiating with MNCs is a difficult and daunting task fraught with threats to withdraw investment.

Therefore having in mind Kenya's heavy dependence on foreign investment, this paper focuses on MNC-State relations, in particular the extent to which State economic interests inhibit its capacity to check human rights abuse by MNCs in Kenya.

Literature Review

The literature review looks at literature in two main areas, namely literature on multinational corporations and literature in the field of human rights.

According to Gilpin Robert an MNC is an oligopolistic corporation in which ownership, management, production and sales activities extend over several national jurisdictions.²⁶

⁵Vernon Raymond defines an MNC as a cluster of corporations of diverse nationality joined together by ties of common management strategy.⁶ Dunning regards the MNC as a corporation that owns (in part or in whole), controls and manages income generating assets in more than one country and in so doing it engages in international production,

⁵ Gilpin Robert, *The Political Economy of International Relations*, (Princeton, New Jersey, 1987).

⁶ Vernon Raymond, *Sovereignty at Bay: The Multinational Spread of the US Enterprise*, (Basic Books, New York, 1971).

namely production across national boundaries financed by foreign direct investment.⁷

Debate abounds among scholars on whether MNCs have exploited or benefited host countries. Due to their large economic power MNCs have been argued to interfere or at least influence the economic and political life of their host countries especially in the least developed countries⁸.

The main object of the MNC is to secure the least costly production of goods for the world markets and to this end the MNC must acquire the most efficient locations for production facilities. The choice of country to invest is partly dependent on favorable government policies the existence of pools of low-cost skilled labor and tax advantages are among the main incentives for investment.

Numerous studies have been done on MNCs in Kenya covering the impact of MNCs on the economy, the challenge of MNCs to the sovereignty of the nation-state and the impact of MNCs on the politics of the host country. The impact of MNCs over the Kenyan economy has also been extensively examined. Traditional studies on the activities of the MNCs in Kenya have concentrated on measuring the impact of the MNC activities on variables that have an effect on economic growth. Thus attention dwells on savings ratios, balance of payments and capital payment, impact on employment, income distribution and power relations.

⁷ Dunning H. John, *International Production and the Multinational Enterprise*, (George Allen Urwin, London, 1981). P. 3

⁸ Dougherty E. James and Pfaltzgraf L. Robert, *Contending Theories of International Relations: A Comprehensive Survey*, 4th edn, Addison Wesley Longman, New York, 1997, p. 245, Casson Mark, *Alternatives to the Multinational Enterprise*, (Macmillan, London, 1978).; Dunning H. John, *International Production and the Multinational Enterprise*,(George Allen Urwin, London, 1981); Sauvart P. Karl and Lavipour G. Farid, *Controlling Multinational Enterprises: Problems, Strategies and Counterstrategies* (eds),(Wilton House, London, 1976).

Kaplinsky examines whether the presence of extensive foreign investment in Kenya influences the economic independence of the state and whether state intervention increases the contribution that MNCs make to the economy.⁹

Langdon Steven looks at the role of the MNC in development through the transfer of technology and assesses the effect of this technology on African countries. In his analysis, he finds that structural dualism shapes class formation. He further suggests strategies that these countries can adopt toward MNC transfer of technology.¹⁰

Other studies explore the conflict between the State, local capital and MNC. Colin Leys examines the relationship between MNC subsidiaries and the local industrial capital and the emergence of an African industrial bourgeoisie who have a stake in MNCs and the extent to which the State can interfere with MNC activity.¹¹ Martin and Langdon examine the increase in the number and size of MNCs in Kenya, their role in import substituting industrialization and effect on the social structure, how MNCs have led to disintegration of the distribution of indigenous economic activities and the concentration of property and income and the resultant growth of an elite class.¹²

Several studies have examined the appropriateness of technology used by MNCs, the

⁹ Kaplinsky Richard, *Multinational Corporations in East Africa: Role, Policies and Problems*, (A paper presented at the East African Community Symposium, 1977).

¹⁰ Landon Steven, *Technology Transfer by Multinational Corporations in Africa: Effects on the Economy*, (Paper presented at the Eighteenth Annual Meeting of the African Studies Association, San Francisco, October 29- November 1975).

¹¹ Leys Colin, *Underdevelopment in Kenya: The Political Economy of Neo-Colonialism*, (London, Heinemann, 1975).

¹² Godfrey Martin and Langdon Steven, "Partners in Underdevelopment? The Transnationalization Thesis in a Kenyan Context" in Villamil J. Jose ed., *Transnational Capitalism and National Development: New Perspective on Development*, (Harvester, Sussex, 1979) p. 261.

choice of capital intensive techniques and their effect in aggravating unemployment and effect of the increase of MNC s in some sectors of the economy, the competition between local over foreign firms and the dominance of the latter.¹³

The effect of MNCs on State policy and bargaining has been extensively studied. Langdon points out the absence of any bargaining with MNCs¹⁴ due to the composition of the State apparatus, areas of common interest between the government and foreign firms and the presence of corrupt practices. Langdon suggests a low level of government constraint on the MNC sector, the conferment of privileges on the MNC by the government rather than imposition of constraints. In his view the government is in a weak bargaining position with the MNCs which almost always have the upper hand in the any negotiations which has resulted in the development of a symbiotic relationship between the MNC and the state-based bourgeoisie thereby strengthening the dominance of an African elite in the political economy and leaving the multinational sector unconstrained. Curry and Rothchild argue that developing countries can obtain favourable bargaining outcomes by expanding their alternatives by fully exploring the harmonization of policies through regional agreements.¹⁵

Jorgensen examines the role of the MNC in the de-indigenization of the Kenyan economy in the colonial period and subsequent post-independence, the continued influence and

¹³ Eglin Richard, *The Oligopolistic Structure and Competitive Characteristics of Direct Foreign Investment in Kenya's Manufacturing Sector* in Kaplinsky Richard, ed., *Readings on Multinational Corporations in Kenya*, (Oxford, Nairobi, 1978).

¹⁴ Langdon Steven, "The Multinational Corporation in Kenyan Political Economy" in Kaplinsky Richard, ed., *Readings on Multinational Corporations in Kenya*, Op Cit.

¹⁵ Curry L. Robert and Rothchild Donald, "On Economic Bargaining Between African Governments and Multinational Corporations", (A paper presented at the third International Congress of Africanists, Addis Ababa, Ethiopia, December 9-19 1973).

control of strategic sectors of the economy by MNCs and African elite.¹⁶ Murray examines the growth of Kenyan multinational corporations, the rise of an elite African capitalist class, the differentiation in the operating strategies between foreign multinationals and their role in the economy.¹⁷

Most of the research in the area has been carried within a legal framework. The thrust of their argument is that most effective way to compel states to observe human rights is through the enactment of laws and the creation of governmental institutions. The influence of MNCs on the political economy of Kenya has attracted research from various scholars. Nzomo examines the nature and extent of MNCs influence on the political economy, the extent to which the government has attempted to control MNCs and the institutional measures developed to control the negative effects of these corporations. The structural conditions that favour the operations of MNCs in Kenya and enable them to operate quite easily are also examined.¹⁸

It is quite evident from the foregoing literature review that the effects of MNCs on human rights is a neglected area of research in which there is a paucity of scholarly works. However, a substantial amount of research has been carried out within the legal discipline. The main thrust of the argument therein is that the most effective and fool proof way to hold MNCs accountable for human rights abuses is through the enactment

¹⁶ Jorgensen Jelmert Jan, "MNCs and the Indigenization of the Kenyan Economy" in Widstrand Carl ed., *Multinational Firms in Africa*, (Uppsala Offset Center AB, Uppsala, 1975). Pp.143-177.

¹⁷ Murray Robin, "The Chandarias: The Development of a Kenyan Multinational" in Kaplinsky Ricahrd, *Readings on Multinationals in Kenya* ed., (Oxford, Nairobi, 1979).pp. 284-307.

¹⁸ Nzomo, op. cit

of international and domestic legal frameworks, creation of human rights commissions and watchdogs and the strengthening of government supervisory bodies.

Addo argues that MNCs should implement their human rights their responsibilities fully with or without the support from governments of host states, because the responsibility to respect the rights of others is their own rather than that of the host State and furthermore the entitlement to have one's rights respected is inherent in all persons regardless of any enforcement procedures. Therefore, MNCs must not hide behind the obligations of States.¹⁹

Woodraff suggests the monitoring of Third world host states by industrialized countries that have a high regard for human rights, the freezing of development funds and loans to states that allow MNC excesses, the creation of social accountability standards and codes of ethics that are intended to ensure ethical production methods, the formation of human rights commissions and the strengthening of the already existing commissions and the creation of regional and international human rights monitoring groups.²⁰

At the International level various United Nations agencies have produced codes and conventions designed to limit human rights excesses by MNCs. These include the OECD Declaration on the International Investment and Multinational Enterprises (1976) and the ILO Tripartite Declaration of the Principles Concerning Multinational Enterprises and Social Policy (1977) which were developed due to pressure from the developing

¹⁹ Addo K. Michael ed., *Human Rights Standards and the Responsibility of Transnational Corporations*, (Martinus Nijhoff, London, 1999); Akinsaya A. Adeoye, *Multinationals in a Changing Environment- A Study of Business- Government Relations in the Third World*, (Praeger, New York, 1984).

²⁰ Woodraff Jessica, "Regulating Multinational Corporations in a World of Nation States" in Addo, op.cit.

countries after several sensational cases of corporate power. However these regulations have not been effective in ensuring accountability from multinational corporations as human rights abuses continue unabated²¹.

The literature on the human rights situation in Kenya is mainly in the form of reports from surveys carried out in the MNC complexes by non-governmental organizations. The Kenya Human Rights Commission in a survey on the Del Monte (now Cirio Del Monte) Corporation recommends a boycott of the corporation's products as a way to bring the MNC to create favourable working conditions.²² The impact of such extreme measure on the economy and its effectiveness in enhancing the human rights situation has not been considered in the report. A further report by the Kenya Human Rights Commission on the plight of workers in the flower industry takes a similar approach and attempts have been made to establish codes of conduct to regulate the activities of these MNCs.²³

These reports are descriptive and compile the nature and extent of workers' rights violations that have occurred. However, an effort to explain the reasons behind the government inaction in regulating MNCs is inadequately addressed. It is assumed that the viable solution to counter the undesirable effects of MNCs is to formulate stringent regulations and institute bargaining strategies.

²¹ The involvement of the American MNC International Telephone and Telegraph Corporation (ITT) in overthrowing the government of president Allende of Chile in 1973 sparked enormous suspicion about MNC activities among developing countries.

²² Kenya Human Rights Commission, *Exposing the Soft Belly of the Multinational Beast: The Struggle for Worker Rights at Del Monte Kenya*, (Kenya Human Rights Commission, 2002).

²³ Kenya Human Rights Commission, *Beauty and Agony- An Advocacy Research on the Working Conditions in the Flower Plantations in Kenya*, (Kenya Human Rights Commission, July 2001),(unpublished); Kenya Bureau of Standards; *The Kenya Standard Code of Practice for the Horticultural Industry*, Committee Draft, (unpublished)(August 2001)

The literature analyzed exposes areas for further research. Most of the research on MNCs does not pay attention to the impact of these corporations on their workers or the community at large as it is carried out in a strictly economic framework. Although the possibility of regulation and accountability of MNC has been studied by several scholars, their work has constrained itself primarily to regulation in respect of the repatriation of profits and transfer of technology.

On the other hand, research conducted within the legal discipline focuses on stringent regulations through creation of laws and rules that every corporation is bound to comply with. It is argued that human rights must be upheld simply for what they are and the MNC need not be pushed or compelled to obey the law. This approach is highly idealistic and there is a tendency to assume that MNCs violate human rights as a whim. The influence of international economic forces on the behaviour of developing countries and the effect of the close MNC-State relations that have a strong bearing on the enforcement of laws, do not inform the legalist arguments.

There is a need to adopt an interdisciplinary approach to the study of human rights by understanding how domestic and international economic factors influence State behaviour toward human rights. This paper shall endeavor to address these issues.

Theoretical framework

This research is informed by the dependency theory. This theory has its origins in the classical Marxist analysis of imperialism. The dependence thesis posits that in order to understand the situation of underdevelopment in the developing countries one must look at the role of ⁷ internal and external forces. The social structures in these countries are the product of foreign exploitation and hegemony and result in structural dependency. Dependency theory arose as a reaction to the failure of the modernization theories of economic development in explaining development in the Third World.²⁴ The dependency schools criticize the modernization theory as flawed as it hinges economic and political development as being determined solely by domestic forces and ignore the external environment.

In a nutshell the modernization theories regard the MNCs as powerful agents of modernization in the least developed countries and the vehicles for global economic development and world peace. It is argued that due to their economic capacity and know-how, MNCs treat the world as a single economic unit and are able to combine factors of production for maximum efficiency and productivity and are therefore able to produce more and better products at lower prices thereby satisfying the rising global demand for these products. MNCs contribute to the economic growth of developing countries by providing access to foreign markets required by these countries by providing the much needed capital resources, diffusing scarce technology and allocating management skills

²⁴ Cardozo Fernando Henrique and Enzo Falletto, *Dependency and Development in Latin America*, (Berkeley, University of California 1979); Lee T. J Franz, "Dependency and Revolutionary Theory in the African Situation" in Barongo Yolamu ed., *Political Science in Africa: A Critical Review*, (Zed Press, London, 1983).

thus increasing world production and employment. Thus they help to integrate the developing countries into the world economy and overcome the gap between the rich and the poor countries thereby contributing to a more equitable distribution of world resources and wealth. The consequences of MNC activity are therefore a contribution to world integration, peace and justice.²⁵ Since it is difficult to regulate MNCs what is required is loose international regulation and standardization of different national legal systems in order to permit the effective transfer of capital technology through international institutions such as the United Nations.

On the other hand, the dependency proponents argue that the domestic and economic structures within the least developed countries are primarily determined by the role these countries play in the world market. It is also imperative to understand the effect of foreign penetration of the LDC economies and politics and how that has shaped relations between the social classes within these countries. The peripheral economies are bound to the economies in the core and have little power to bargain with the capitalist or core countries upon which their economic existence is dependent. Dependency theorists such as Colin Leys link the penetration and economic distortion to the additional distortions in the social and political systems. Since foreign investment is concentrated in the dynamic sectors of the LDC economy this brings about uneven development by strengthening these sectors while ignoring others, increasing wages for a few privileged workers, repatriating profits back to the MNC home countries leading to the reduced and distorted

²⁵ Atkins Pope G., *Latin America in the International Political System*, (Free Press, New York, 1977). p.132.

economic growth if the LDCs.²⁶ MNCs therefore lead to manifest sociopolitical distortions.

The dependency approach also argues that foreign penetration and external dependence lead to large-scale distortions in the structure of the peripheral economies, which then results in intense social conflict and ultimately in harsh State repression. The State bureaucracy works in concert with foreign interests and domestic capitalists to deprive the population of basic political and economic rights and as a result violence occurs. Dependency theorists see violence as an inherent consequence of economics and politics in the periphery due to its linkages with the world economic and political system²⁷.

The dependency theory essentially views the MNCs as exploitative instruments that accentuate external dependency and control the internal instruments in the Third World economies and society primarily concerned with increasing profits and insensitive to working conditions. MNCs increase the technological and capital dependence, diffuse obsolete technologies, perpetuate environmental hazards, underpay and exploit their laborers and tend to be capital rather than labour intensive. It is argued that host countries of developing countries are unable to negate the impacts of MNCs in their countries and have resorted to fully embracing these corporations without any checks. Thus developing countries enter into unequal partnerships and agreements with MNCs that make it difficult to control the activities of these corporations.

²⁶ Leys Colin, *Underdevelopment in Kenya: The Political Economy of Neo-Colonialism*, (London, Heinmann, 1975).

²⁷ Russet Bruce and Starr Harvey, *World Politics- The Menu for Choice*, 3rd edn., W.H Freeman, New York, 1989. Pp.460.

This dependency theory recommends that the least developed countries adopt development strategies that entail a complete overhaul and restructuring of relations with the capitalist countries. It also prescribes the adoption of internally-oriented self-reliant development approaches by the Third World, strong national and regional regulation since regulation by the international bodies as useless.²⁸ This theory is useful in explaining MNCs behaviour in the developing countries and shall be utilized to guide this study.

Hypotheses

1. The pursuit of foreign direct investment leads to human rights violations in Kenya.
2. The pursuit of foreign direct investment does not result in human rights violations in Kenya.
3. The existence of regulatory mechanism does not in any way affect the promotion of human rights.

Operationalization of concepts

Multinational Corporations (MNCs)

For the purposes of this study shall be a corporation that owns in part or in whole, controls and manages income generating assets in more than one country. In operational terms, the horticulture based MNCs from the flower and fruit growing sectors shall be the subject of the research. The MNC may be solely privately owned or partly owned and managed by the home country government or alternatively it may have within its

²⁸ Tetreault May Ann and Abel Fredrick Charles (eds) *Dependency Theory and the Return of High Politics*, (Greenwood, New York , 1986).

subsidiaries a mixture of ownership patterns depending on the regulations imposed by the host country or commercial expediency.

Human Rights

Human rights for the purposes of this study refer to labour rights as defined in International Human Rights instruments primarily the International Labour Organization Conventions and the International Convention on Social and Cultural Rights. These rights consist of the right to representation and expression through formation of labour unions, the right to pay, right to safe working environment, right to proper health and educational facilities.

Foreign Direct Investment (FDI)

Foreign direct investment consists of funds invested directly abroad from the headquarters of the multinational corporation, reinvested earnings of a foreign affiliate, and funds borrowed by an affiliate from its parent.

Objectives of the Research

- ❖ To examine why the violation of human rights by MNCs continues unabated.
- ❖ To examine the adequacy of the policies and regulatory framework in place in regard to MNCs and the challenges faced in implementing a regulatory framework for MNCs.
- ❖ To examine whether the state can pursue a human rights policy while encouraging foreign investment and the viability of a regulatory framework for MNCs as far human rights are concerned and to propose an appropriate policy framework.

Methodology

1. Secondary Data Collection method

Secondary data will constitute the bulk of the data. This data will be key to understanding the historical context, describing the nature of the human rights violations and human rights trends. The data shall be collected from government documents, legal statutes, published and unpublished academic papers, journals, and electronic and print media.

2. Primary Data Collection Method

Focused personal interviews or non- schedule structured interviews shall be utilized. This form of interviews is preferred because although the interviewer shall ask a prescribed set of questions the respondents are at liberty to express their definition of the situation. Thus the interviewer shall have room to clarify questions and probe for additional information. The respondents shall consist of persons in organizations concerned with human rights issues such as the Kenya Human Rights Commission, Officials from the Central Organization of Trade Unions and Federation of Kenya Employers, officials from the Ministry of Labour and the Attorney- General's Office.

Justification for the Study

1. Policy Level

Many attempts have been made by the civil society to enter into agreements to protect the workers welfare with these MNCs. The resultant arrangements have lacked government input and have not been wholly effective in protecting the workers. Further, no official government polices to deal with this problem have been formulated. The research

findings herein shall enrich and inform the continuing human rights debates and campaigns and enlighten the lobbyists and government policy makers on the opportunities and constraints.

The study shall also contribute to the development and /or enhance the policy framework for the promotion of human rights. The study shall provide invaluable clarifications and shed light into the unclear areas in the ongoing debates.

2. Academic Level

There is a paucity of research on the effects of MNCs on human rights in Kenya. Although debate has been raging among scholars on the best way to hold MNC accountable for human rights abuses, this is a relatively unexplored area of research in Kenya. This research shall take an interdisciplinary approach to human rights issues by combining the discipline of international relations with that of the largely legally based human rights.

CHAPTER OUTLINE

Chapter One

An Introduction to the Study of the Multinational Corporations and Human Rights Violation in Kenya

This is the proposal.

Chapter Two

The nature of the Multinational Corporations and their involvement in the Kenyan economy

This chapter examines the nature and characteristics of the Multinational Corporation and gives a concise historical overview of the MNCs involvement in Kenya. The liberal

government policy on foreign investment and the role and extent of MNC influence on Kenya's economy is analyzed.

Chapter Three

The role of multinational corporations in the observance of human rights

This chapter examines the concept of human rights, the principal arguments used to deny and uphold the extension of human rights responsibilities to MNCs, the intellectual context in which the human rights and multinational debate is flowing and the relationship between the State and multinational in the observance of human rights. The international codes of conduct for multinational corporations are also discussed.

Chapter Four

A case study of the violation of human rights by Cirio Del Monte in Kenya

An examination of the reported and documented violations of human rights in the Thika based MNC subsidiary of Cirio Del Monte, which specializes in pineapple growing, manufacturing and exporting is conducted here. The government, workers and NGO initiatives taken to solve the problem are also discussed.

Chapter Five

An Analysis of the Cirio Del Monte case

This chapter looks at the government's reaction and the measures taken to control Cirio Del Monte's negative impacts, the institutional and policy measures adopted to ensure the MNC creates favorable conditions for their employees and the community at large. The

agreements and regulatory mechanisms concluded between the MNC and the government or civil society shall be evaluated to determine their effectiveness and adequacy in addressing the human rights issues. The structural and institutional problems that are likely to hinder the upholding of human rights and the adequacy of regulation in ensuring the observance of human rights are analyzed.

Chapter Six

Conclusion and Recommendations

A summary of the main arguments and suggestions for further areas of research is provided as well as the main conclusions from the study and policy recommendations.

CHAPTER TWO

THE NATURE OF MULTINATIONAL CORPORATIONS AND THEIR INVOLVEMENT IN THE KENYAN ECONOMY

The Place of MNCs in the Global Economy

The expansion and spread of multinational corporations (MNCs) is a global phenomenon. The scope of their operations is expansive and transcends national boundaries. These operations are carried out from a global perspective with the main aim of maximizing accumulation at the global level. MNCs are extremely powerful entities with resources exceeding those of many states and are among the most powerful economic institutions that have been the product of the capitalist system.

The changes in comparative advantage among various economies, technological advancement in the fields of communications, management techniques and transportation and conducive government policies have led to the global expansion of MNCs. Industrial production is becoming increasingly internationalized due to the activities of these corporations, which have integrated the world economy and led to economic interdependence and the formation of complex relationships between these corporations and States.

The effect of MNCs on the integration of the global economy and the political impact of their continuing expansion and spread have been the subject of great debate and controversy. MNCs proponents argue that these corporations are the saviours of developing countries and play a pivotal role in spurring global and domestic economic

growth through the transfer of technology and creation of jobs. On the other hand MNCs opponents argue that these corporations perpetrate economic and political dependence and stunt economic growth particularly in the Least Developed Countries (LDCs).

The size, geographical diversity, concentration in skill intensive industries, role in world trade, growth and profitability, dominance of the industrialized world as the base for MNCs make the MNC distinct and unique from any other business enterprise.

In 1996, the total revenues of the 500 largest MNCs were valued at \$11.4 trillion, total profits stood at \$ 404 billion, total assets were \$33.3 trillion while the total number of employees was 35,517,692. The top ten MNCs accounted for of the total revenues of the top 500, 15% of profits and 13.6% of employment.²⁹

The Nature and Characteristics of MNCs

The MNC is oligopolistic in nature and ownership, management, production and sales activities extend over several states. The head office is located in one country and subsidiaries are spread out in other countries. The main objective is the maximization of profit and this is achieved by obtaining the least costly production of goods for the global market.³⁰ In a nutshell an MNC may be defined as a parent company that engages in foreign production through its affiliates located in several countries, exercises direct control over the policies of its affiliates and implements business strategies in production, marketing, finance and staffing that transcend national boundaries.

²⁹ UNCTAD, World Investment Report 1996 (Geneva 1996).

MNCs are powerful and complex economic entities characterized by global spread, a sophisticated global strategy, centralized decision making and vast financial, managerial and technical resources. They are highly dynamic and operations change substantially within a short period of time. MNC distinctive behaviour is due to the fact that they control the deployment of resources in two or more countries and the distribution of the resulting output generated between these countries.³¹

MNCs operations are concentrated in industries dominated by advanced technology, product differentiation and intensive advertising. The foremost MNC activity has been in the manufacturing, extractive and financial services industries. Some MNC sales are greater than the Gross Domestic Product of some countries and as such these corporations have the potential to significantly influence global affairs and events in the host countries. The rich industrialized countries dominate ownership of these corporations and although there exist influential multinational corporations from developing countries, MNCs in the developed countries are wealthier and more established.

MNCs have three main expansion strategies namely the vertical, horizontal and conglomerate strategies. Horizontal expansion involves the manufacture of the same basic products in different countries; vertical expansion involves the location of different stages of the production or marketing processes of a corporation in different countries,

³⁰ Gilpin Robert, *The Political Economy of International Relations*, (Princeton University, New Jersey, 1987) p. 232.

³¹ Dunning H. John, *International Protection and the Multinational Enterprise*, (George Allen Urwin, London, 1981), p.13.

while conglomerate expansion involves the manufacture of diverse range of products by the same corporation.³²

Centralized decision making is another distinct feature of MNC operation, which entails obtaining of directions on policy, product or marketing choice from the headquarters. This makes it difficult for host countries to effectively bargain or negotiate with MNC subsidiaries, which insist on receiving instructions directly from the headquarters before entering into any consultations or agreements with the Host State. This strategy enables MNC affiliates to avoid responsibility for their negative effects in the Host State. Further, centralized decision making makes it difficult to control MNC activities such as intra-MNC company trade/ transfer pricing whereby subsidiaries trade with each other at prices that are geared at maximizing profit and minimizing government taxation which have a detrimental effect on the host country's economy. Generally, this form of decision making frustrates the Host country's efforts to try to effectively monitor MNC activity.

The vast geographical spread of MNCs gives them immense flexibility and presents them with a large range of options in areas such as sourcing and pricing. Thereby enabling them to take advantage of changes in the international economic environment. The widespread network of MNC affiliates offers possibilities of integrated global production and marketing thus giving rise to extensive intra-MNC trade. Various stages of the production process are located in different countries or the affiliates may specialize on a

³² Hood Neil and Young Steven, *The Economics of Multinational Enterprises*, (Longman, London, 1989) p.18.

particular part of the product line.³³

Since MNCs have the maximization of profit as their primary goal whenever a venture fails to yield adequate returns, the subsidiary is unhesitant to divest from the location by selling or liquidating their assets. The economic and political impact of divestment is particularly profound for developing countries that are left to grapple with higher unemployment and balance of payments deficits. Divestment is the MNCs main tool of leverage in negotiating and bargaining with the Host State and has been quite effective in securing favourable terms of investment for the MNC in the host country.

As regards the financing of MNC affiliates, these corporations have the ability to tap a wide range of alternative sources of funds to finance their foreign operations for instance affiliates can obtain funds from parent firms, home country, the host country, undistributed profits and depreciation provisions.

Foreign direct investment is an important role of MNCs. As a rule of the thumb investment flows from regions of low anticipated profits to those of high returns. There are various factors that motivate MNCs to invest in other countries. Firstly, a company may have satisfied domestic demand which is not growing and is therefore searching for new markets Secondly, a company may be seeking protection in the importing country since foreign direct investment is a way to bypass protective instruments in the importing country. For example when the European Community imposed common external tariffs against outsiders, US companies circumvented these barriers by setting up subsidiaries,

³³ Hood and Young, op.cit, p.21

while Japanese corporations located auto assembly plants in the US to bypass Voluntary Export Restraints (VERs). Thirdly, MNCs expand into other countries in search for cheap foreign labour in a bid to save on costs. Fourthly, MNCs acquire foreign business in order to prevent actual or potential competition.

Generally, MNCs operate in a country with the consent of the host government, each of them seeking to have their interests served and both tend to benefit from this relationship. For the government, the benefits accrue through taxation and indirectly through economic growth while the MNCs reaps profits. When deciding where to invest, MNCs look at various factors such as a favourable regulatory framework that protects MNC investments in the host country. MNCs are concerned about the host states prospects for financial stability especially rates of inflation and stable currency. MNCs also examine a country absorption capacity that is its capacity to put investments to productive use due to inter alia, a developed infrastructure and a skilled labour force. MNCs also prefer politically stable locations where the host country's economic growth can sustain demand for the goods it produces.³⁴

Conflicts between the MNCs and host country do arise on occasion. The conflicts are generally related to the distribution of generated wealth between these two entities, the breach of agreements by host country, and the variation of terms of taxes and regulations, the threat of nationalization.

³⁴ Goldstein Joshua, *International Relations*, 4th ed., (Longman, New York, 2001), p. 601

Governments are generally wary of breaching agreements with MNCs or compulsorily acquiring or nationalizing MNC assets as such action immediately brands that country as an unfavorable investment location prompting other MNCs keep away. Conflicts also arise over the trade policies that favour the host country's industries over the MNCs. The host country's monetary policy is another source of conflict. For instance the devaluation of currency makes imports more expensive thus MNCs selling products assembled from imports material are disappointed because this makes their products more costly and amount of sales lower.

Severe criticism has been directed at MNCs and the thrust of the argument is that MNCs have negative consequences on the economic, social and political development of LDCs and that MNCs by their very nature operate systematically to harm host countries. MNCs have been accused of spoiling the economy of the host country and jeopardizing the economic development of LDCs by causing economic stagnation and dependence; MNCs are blamed for the creation of local subsidiaries that are merely enclaves of the host economy and incapable of self-sustaining growth³⁵ due to their dependence on the home country branch for technology, managerial skill and corporate strategy. It is also argued that MNCs introduce inappropriate technology that stunts local technological advances while keeping the advanced technology to themselves and transfer substandard technology to developing countries at exorbitant prices. Further, utilization of capital intensive production techniques intensifies unemployment in the developing countries which have an abundance of labour.

³⁵Gilpin, p.249.

MNCs are accused of repatriating profits and obtaining privileged access to local finance, which practices deprive the host country of development and stunt indigenous domestic entrepreneurship. MNCs have been cited as interfering in the internal affairs of the Host State of propping up authoritarian regimes that favour capitalism and for cultural imperialism which erodes the cultural values and social tastes through advertising and creating a liking and preference for foreign products. MNC opponents argue that these actions tend to perpetuate political and cultural dependence.

On the other hand, Liberalist scholars argue that most negative consequences of foreign investment are the product of the policies pursued by developing countries. Gilpin argues that the pertinent issues worth considering when assessing the relations between MNCs and host countries, are the LDCs terms of investment since the major determinants of economic growth lie within these countries themselves not on external influences such as MNCs.³⁶

A History of MNC involvement in Kenya

MNC involvement in Kenya goes back to the late 19th Century colonial period. Before 1945, there was little manufacturing activity and the foremost sectors were agriculture and the mercantile industry. In agriculture, foreign investment was limited to production of commodities such as sisal, tea and coffee. Large-scale trading and commercial agriculture was carried out in foreign firms' lands and the settlers controlled local food processing while petty trade was carried out by Asian businessmen and the emerging

³⁶ *ibid.*

African elite class. Swainson estimates that during this period, there were at least fifteen foreign owned companies that concerned themselves primarily with trading, export processing and agriculture³⁷.

After the Second World War, the global and local patterns of direct foreign investment on the global and local levels changed. Swainson suggests several factors that may have led to this change. She argues that the intense competition facing merchant capital at the global level forced many firms into primary production in order to maintain their competitive position in the market. Further, the outward looking strategies adopted by the European and American industrial capitalists led to the aggressive search for new markets. The attainment of independence by many colonies that were anxious to receive foreign capital and to diversify their economies also led to the increased entry of MNCs into Kenya.³⁸

At independence, foreign investment had increased tremendously and the economy witnessed a great number of takeovers and mergers. MNC subsidiaries from Europe, West Germany, Japan and North America choose to invest in Kenya, which was considered a favourable location due to its high prospects of profitability and its geographically strategic position in relation to the East and Central African markets. Moreover, Kenya's liberal and open-door policy on foreign investment coupled with numerous investment guarantees such as easy repatriation of profits made it an ideal country to invest in.

³⁷ Swainson, p.33.

³⁸ Ibid.

After independence the Government fearing massive capital divestment took steps to reassure investors by putting into place legislative and institutional measures protect foreign investment ventures. The foremost piece of legislation was the Foreign Investments Protection Act enacted in 1964. This Act of Parliament provided for a system through which overseas investors applied for a Certificate of Approved Enterprise granted to enterprises that were seen as capable of furthering Kenya's economic development. A certificate holder was guaranteed the right to repatriate profits, loans, interest on loans and an approved proportion of the net proceeds of the enterprise. Moreover, approved enterprises were protected from compulsory acquisition or nationalization.³⁹ This statute is currently under revision to cater for the changes brought about by liberalization of the economy and changes in policy.

Among the institutional measures adopted was the establishment of the New Projects Committee in 1968 to review all applications for investment in Kenya and to conduct negotiations with MNCs on tax exemptions, levels of government shareholding and technical fees⁴⁰. This body was abolished in 1985. The Industrial Survey and Promotion Center/Industrial Promotion Department was set up in 1970 under the Ministry of Commerce and Industry and was charged with the responsibility of providing consultancy services in matters relating to industrial development. The Capital Issues Committee set up in 1971 within the Treasury played the role of vetting all issues of capital stock with a view of cutting down on capital outflow from Kenya, and to

³⁹ Cap 518 Laws of Kenya.

⁴⁰ Langdon, 'Multinational Corporations the Kenyan Political Economy', in Kaplinsky Richard, *Readings on MNCs in Kenya*, (Oxford, Nairobi), p.134.

encourage MNC subsidiaries in Kenya to issue a part of their share capital at the Stock Exchange in order to promote local ownership of the MNC dominated industrial sector. Currently, the Investment Promotion Center, set up in 1982 under the Ministry of Finance and established as a statutory body in 1986 is charged with promoting private investment in Kenya⁴¹. This body deals with the approval and licensing of foreign investors. Approved projects are issued with a Certificate of General Authority that authorizes the investors to begin implementation of their projects.⁴² The Investment Promotion Act was amended in 1992 to enable the agency to expeditiously process applications within a month

While encouraging foreign investment, the government tries to involve the indigenous Kenyans in economic development. For instance, in 1967 the government introduced a program of private sector Africanization, passed the Trade Licensing Act which specified areas and goods to be handled exclusively by Kenyan citizen traders and introduced a mandatory work permit system for non-Kenyans. The government also began to acquire shares in certain large MNC subsidiaries such as the East Africa Power and Lighting Company (now Kenya Power and Lighting Company) and National Grindleys Bank (now Kenya Commercial Bank). The Exchange Control Regulations were introduced and these required that non-resident controlled firms obtain permission for any local or overdrafts in excess of 20% of the non-resident investment in the business of the borrower for any public offer of shares, purchase of shares in resident companies, any foreign investments

⁴¹ Nzomo Maria, *External Influence on the Political Economy of Kenya: The Case of MNCs in 'Politics and Administration in East Africa'* (Konrad Adenauer Foundation, Nairobi, 1992), p.451

⁴² The Investment Promotion Center, [http:// www.ipckkenya.org](http://www.ipckkenya.org).

brought into new or existing enterprises and for any capitalization of reserves.⁴³

These measures were generally ineffective in promoting industrialization and curbing the country's dependence on MNCs for economic initiative. Langdon argues that these regulatory constraints on MNCs did not make a significant impact on MNC behaviour as they simply operated to establish MNC privileges in the Kenyan economy and to benefit a few Kenyans.⁴⁴

Due to the country's great need for economic growth, the government has adopted a liberal policy toward foreign investment. The heavy reliance on foreign investment is demonstrated in several National Development Plans and Sessional Papers.⁴⁵ Sessional Paper No. 10 of 1965 stressed the newly independent country's plans to rely on foreign capital inflow.

The 1989-1993 Development Plan emphasized that development during that period would rely to a great extent on foreign direct investment. The 1997 –2001 National Development Plan also great emphasis on the need to attract foreign direct investment. During this period, the government planned to actively seek private portfolio and foreign direct investment to supplement local resources and make incentive packages more competitive. The 2002-2008 National Development Plan underpins Kenya's need for foreign direct investment and outlines the government's plans to introduce policies geared at attracting foreign investment and to enact an investment code. Tax incentives

⁴³ *ibid.* p.165.

⁴⁴ Langdon, *Multinational Corporations in the Kenyan Economy*, *op.cit.*

such as tax holidays, investment allowance, low duties on intermediate capital goods and gradual reduction of corporate tax rates were encouraged. The Plan further recommends the enactment of an investment code, calls upon the Ministry of Finance to harmonize incentives given under the Export Processing Zones (EPZs) and the Manufacturing Under Bond (MUB) schemes in order to attract foreign investors. The government also planned to upgrade and restructure the Investment Promotion Center, to streamline the investment rules and procedures and to establish regional and international investment promotion offices.⁴⁶

Role of Direct Foreign Investment (FDI) in the Kenyan Economy

MNCs play a strategic role in Kenya's economy and have influenced the character and direction of the Kenyan economy. The economy is open and liberalized and direct foreign investment accounts for a substantial portion the Gross Domestic Product as indicated in Table 1 below. In 2002, Kenya hosted 114 foreign affiliates. FDI inflows have gradually increased over the past twelve years averaging less than 10 per cent growth per annum between 1986 and 2002. Between 1985 to 1995, FDI inflows to Kenya stood at \$26 million and this figure rose tremendously to \$127.4 million in 2000. FDI inflow rose by 43% from US\$ 42 million in 1999 to an estimated US\$ 60 million in 2000⁴⁷. The number of FDI stocks as a percentage of the GDP has been rising steadily over the years from 5.3% in 1980 to 9.6% in 2000. This is an indication of the increasing importance of FDI to the Kenyan economy.

⁴⁵ *Kenya National Development Plan 2002-2008*. p.12.

⁴⁶ *Kenya National Development Plan 1997-2001*, p. 196

⁴⁷ UNCTAD, *World Investment Report 2002: Transnational Corporations and Export Competitiveness* (Geneva, 2002).

The level of foreign direct investment stagnated in the 1980s due to unfavorable investment climate such as excessive government regulation, high taxation, deteriorating infrastructure and delays in profit and dividend repatriation. 1982 saw the beginning of a steady decline in MNC investment in Kenya and divestment of several American companies. This was partly attributed to growing security fears after an attempted coup that year. In the 1990s the government began to implement economic reforms, legislative and institutional and policy measures to improve the investment climate. Moreover, the years there has been a shift in emphasis from public investment to private sector led investment and the import substitution policy has been replaced with an export promotion policy. Joint ventures between MNCs and parastatals that were previously a common practice are now rare due to economic liberalization and privatization of the public sector. These economic reforms seem to have revived investor confidence as witness in the surge in FDI in 2000.

The role of MNCs in economic growth of the countries in which they operate may be analyzed from the macro and micro economic levels. For the home country, at the macro economic level, the impact of MNCs on the growth of the economy is assessed from the share of GNP from the foreign activities of domestically owned MNCs. At the micro economic level, MNC contribution is measured by the percentage of the sales, assets and profits of a company or industry generated by foreign production.

**TABLE I: KENYA FOREIGN DIRECT INVESTMENT (FDI) OVERVIEW FOR
SELECTED YEARS**

FDI FLOWS (millions of dollars)

	1985-1995	1997	1998	1999	2000	2001
	(Annual average)					
Inflow	26	40	42	42	127	50
outflow	6	5	14	30	40	77

FDI FLOWS as a percentage of gross fixed capital formation

	1985-1995	1997	1998	1999	2000
Inflow	1.7	2.1	2.2	2.6	10.3
Outflow	0.4	0.2	0.8	1.9	3.2

FDI STOCKS (millions of dollars)

	1980	1985	1990	1995	2000	2001
Inflow	386	476	668	731	995	1045
Outflow	18	60	99	117	231	308

FDI STOCKS as a percentage of gross domestic product

	1980	1985	1990	1995	2000
Inflow	5.3	7.8	7.8	8.1	9.6
Outflow	0.2	1.0	1.2	1.3	2.2

Source: UNCTAD, World Investment Report 2002: Transnational Corporations and Export Competitiveness

The country's high dependence on external resources is attributed to its low levels of domestic savings that are inadequate to spur meaningful economic growth.

Certain sectors of the Kenyan economy are shaped by MNC participation. Concentration of MNCs is in the export oriented sectors that are characterized by the production of primary commodities, skill intensive services and as oligopolistic market structure. Traditionally, MNCs have dominated the production in the manufacturing sectors, commerce, banking, oil distribution, agriculture and tourism and their contribution to the growth of these sectors is profound. In agriculture, MNCs have dominated the key export commodities sectors such as tea and coffee growing and horticulture. A study conducted by Langdon in the 1978 shows that a large MNC sector exists in Kenya and plays a crucial role in the manufacturing and petroleum operations. In the 1960s and 70s MNCs in the manufacturing sector concentrated on import substitution rather than production for export.⁴⁸

The 1990s saw the introduction of key economic reforms, which had a bearing on FDI. These include the repeal of the Exchange Control Act in 1995 thereby removing restrictions on conversion and transfer of funds associated with an investment, the removal of price controls, the unconditional liberalization of the Capital Market thereby enabling foreign companies to buy stocks to a maximum of 40% of the company's total quoted stocks while individuals can acquire up to 5%, the removal of restrictions on domestic borrowing by foreign-owned companies, the revocation of the blocked funds provision, the removal of all current account restrictions,

⁴⁸Langdon, p.163.

the reduction of import tariffs the abolishment of export and import licensing except for a few items specified in the Imports, Exports and Essential Supplies Act (Cap 502), the establishment of Export Processing Zones (EPZs).

Additional measures to induce direct foreign investment such as legal protection, tariff protection and investment incentives. Incentives for industrial development include initial investment allowances and cheap land on industrial estates. All investors whether foreign or local receive the same conditions in the initial vetting process when screening the private sector project in determining its viability and effects on economic development.

Export promotion programs do not discriminate between local and foreign owned manufactures and the government does not restrict investment to specified geographical locations. Foreign investment guarantees to investors include⁴⁹:

- The Repatriation of profits and capital: Capital repatriation and remittance of dividends are guaranteed to foreign investors under the Foreign Investment Act (Cap518). Investors can repatriate after tax profits, including retained profits that have not been capitalized, the proceeds of the investment after payment of the relevant taxes and the principal and interest associated with any loan.
- Investment Allowance: Investors in the manufacturing and hotel sectors are permitted to deduct from their taxes a large portion of the costs of buildings and capital machinery.
- The Manufacturing Under Bond (MUB) program enables investors to receive duty and values added tax exemption on imported plant, equipment, raw materials and intermediate inputs and are entitled to a 100 percent allowance on immovable fixed

⁴⁹ Investment Promotion Center, op cit.

assets.

- ❑ Investors in the Export Processing Zones (EPZs) are entitled duty and Value Added tax exemption on imported machinery and raw material inputs, a ten-year corporate tax holiday, exemption from certain industrial regulations and licensing.
- ❑ Liberal depreciation rates are granted
- ❑ Businesses that suffer losses can carry forward such losses to be offset against future taxable profits.
- ❑ The Customs Duties Remission Scheme administered by the Export Promotion Programs Office in the Ministry of Finance permits materials imported for use in manufacturing for export or for production of duty free items for domestic sale qualify. Large scale private investment projects whose expenditure on productive physical assets are in excess of US \$5 million within a two year period and that will generate net economic benefits for the country can recover the value of import duties paid on imported capital goods for the project against income tax liability. Duties on capital goods, plant and machinery are relatively low at a rate of 5%.
- ❑ Guarantee against expropriation: The Kenya Constitution provides guaranteed against expropriation of private property on security or public interest reasons. In the event of expropriation prompt and fair compensation is required.

Kenya is also a member of international bodies that seek to promote international investment such as the Multilateral Investment Guarantee Agency, a World Bank institution that offers political insurance or guarantees to investors against non-commercial risk; the International Center for Settlement of Disputes which is a judicial

body that settles disputes of a commercial and investment nature, and the Africa Trade Insurance Agency.

The extent and allocation of MNC investment in Kenya

By 2001 a total of 114 multinational corporations had invested in Kenya⁵⁰ mainly from the United Kingdom, Germany and the United States. Britain leads with about \$ 2.0 billion, while the book value of United States investment is about \$83 million. Investment from China and Japan is rising steadily⁵¹. There are approximately 60 British companies in Kenya, which operate in the finances, banking communications and manufacturing sectors. It is estimated that remittances from these companies to the United Kingdom are around \$150 million per annum.⁵² Since 1994 the government has actively sought foreign direct investment through overseas conferences and overseas trips by the Head of State. Kenya has signed bilateral investment treaties with several developed countries, with Italy in 1996, with Germany in 1996, in 1999 with Britain and 2001 with China. Further Kenya has concluded double taxation treaties with several industrialized countries such as France and Italy.⁵³

Since independence, MNCs and the Kenya government have had a close and cooperative relations. MNCs have ensured their survival and profitability through granting of favours to the political elite such as appointment to top executive positions within the Kenyan subsidiary. This has enabled the economically powerful corporation to gain privileges,

⁵⁰ UNCTAD, *World Investment Report 2002*, Kenya Country Fact Sheet.

⁵¹ United States Department of Commerce, *Investment Statistics-Kenya*, 1998.

⁵² Kenya British High Commission, Commerce Section, (2003).

⁵³ UNCTAD, *World Investment Report 2002*, Op. Cit.

tax exemptions, favourable policies, import protection and market protection.

A study on MNCs in Kenya conducted by Langdon reveals that the government is quite eager to confer privileges to MNCs due to the strategic role that they play in the economy since the government relies on these companies for economic initiative. The study conducted in the mid 1970s noted that the limited specialist manpower to gather information and analyze in detail the activities of MNCs led to the poor ability of the government to bargain with the MNCs.

In order to reinforce their bargaining power vis-a-vis the government and locally incorporated companies, MNCs have formed institutional alliances with strategically placed trade unions and government agencies to which these corporations can rely upon for support in the event of conflict with the government. Such allies include the National Chamber of Commerce, Federation of Kenya Employers and the Kenya Association of Manufacturers.

MNC participation is crucial for the sustained growth of the Kenyan economy and the input of these corporations by way of foreign investment greatly supplements local investment initiatives. As such MNCs are a need rather than a want for this country. The government realizes this and has since independence maintained an open door policy toward foreign investment and has removed whatever hitches that may prevent MNCs from investing in the country. To this end legislative, institutional and policy changes are in place to ensure that the investment climate remains quite liberal.

The role of MNCs in observing human rights of Kenyans is the focus of the next chapter.

CHAPTER THREE

THE ROLE OF MULTINATIONAL CORPORATIONS IN THE OBSERVANCE OF HUMAN RIGHTS

This chapter addresses the concept of human rights, the principal arguments used to deny and to uphold the extension of human rights responsibilities to MNCs, the intellectual context in which the human rights and MNC debate is conducted and the relationship between the state and MNCs in the observance of human rights

The concept of human rights

The modern human rights doctrine emerged historically from the struggle of the individual for the delineation of the powers of the autocratic monarchic State over citizens' rights to property, life and freedom of association. The concept of human rights has existed under various names over the centuries. In the eighteenth and nineteenth centuries, the concept of natural rights was espoused among several European scholars. These were rights that belonged to every individual by nature as a human being, not by virtue of his citizenship in a particular country, religious or ethnic affiliation. The American and French Revolutions of 1776 and 1789, respectively, relied on this concept as the basis of the uprisings against the despotic British and French monarchs. The term natural rights was discarded in favour of the concept of universal rights which was propagated by philosophers such as John Stuart Mill in his *Essay on Liberty*, Thomas Paine in his essay *The Rights of Man* and Henry Thoreau in his treatise *Civil Disobedience*.

International human rights law has established individual and group rights relating to the civil, cultural, political and social spheres with the sole purpose of ensuring that the individual enjoys a full and free life. All human rights whether of a civil, cultural, political or social nature are universal, indivisible, interdependent and interrelated and must be treated on an equal and fair manner with the same emphasis.⁵⁴ Civil and political rights have in many respects received more attention to a far greater degree than economic, social and cultural rights. It is therefore wrongly assumed that only civil and political rights can be subject to violation. Economic, social and cultural rights are often wrongly viewed as second-class rights, unenforceable, non-justiciable and only to be fulfilled progressively over time.

The International Bill of Rights comprising three texts namely the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966) and its two additional protocols, are the guiding texts in human rights discourse. These instruments enshrine global human rights standards and are the inspiration of numerous human rights conventions, declarations and universally recognized principles. The International Covenant on Economic, Social and Cultural Rights contains some of the most significant legal provisions establishing economic, social and cultural rights including rights relating to work in just and favourable conditions, to social protection, to an adequate standard of living, to education and to the enjoyment of the benefits of

⁵⁴ United Nations, *Vienna Declaration and Programme of Action*, U.N GAOR, World Conf. On Hum. Rts., 48th Sess., Sess., 22d plen. Mtg., 18 U.N Doc. A/CONF.157/24 (1993), adopted by the World Conference on Human Rights, Vienna, 25 June 1993.

cultural freedom and scientific progress. The International Covenant on Civil and Political Rights, on the other hand, espouses the rights to personal freedom, to a free and fair trial, to private property, to privacy, to the freedom of expression, association, conscience and religion.

The two Covenants are legally binding and thus when a State ratifies a Covenant and becomes a State Party to it, it willfully accepts a series of legal obligations to uphold the rights and provisions established under the text in question. Further, the State accepts a solemn responsibility to apply the obligations embodied therein and to ensure the compatibility of its national laws with its international duties. Through the ratification of human rights treaties it becomes accountable to the international community and to its own citizens and others resident within its territory.

Various international instruments such as the United Nations Charter recognize respect for human rights. Issues of human rights are no longer considered as within the exclusive domestic jurisdiction of individual States and this has brought about the internationalization of human rights. Gross human rights abuses such as genocide, crimes against humanity occurring in the jurisdiction of a particular country that perpetrates or condones such violations, are the concern of the international community and the abusing State cannot plead external interference in its domestic affairs. Governments individually and collectively have a responsibility to respect, protect and promote the human rights of all human beings.

The traditional conception of human rights takes a protective approach to the relationship between human rights and corporations. Some authors see this as a conceptual barrier to the extension of human rights obligations to corporations.

Multinational corporations and their effect on human rights

MNCs are powerful entities with enormous influence in the social, cultural and economic aspects of the host State. Of the 100 biggest concentrations of wealth in the world, 51% are owned by MNCs and 49% by States⁵⁵.

The impact of MNCs on human rights is threefold. Firstly, MNCs can be direct violators of human rights, for instance, through exposing their employees to unsafe working conditions, use of forced labour and the emission of toxic substances into the environment. Secondly, MNCs can indirectly violate human rights by supporting regimes that violate human rights. For example, the intended investment by a subsidiary of the Dutch MNC IHC Caland in Myanmar (a country whose human rights record is dismal) in the early 1990s; and, in the 1990s Shell provided technical assistance to the Nigeria's military government which was used to torture demonstrators demanding that Shell cease from damaging the environment of the Ogoni lands. Thirdly, MNCs can raise the standard of living and improve respect for economic, social and cultural rights within the host and home country. Many MNCs have installed infrastructure such as roads, electricity and health facilities in the areas of operation and in so doing contribute to the economic and social development of these areas. Due to their great influence MNCs are

⁵⁵ United Nations Sub –Commission on Human Rights, *The Realization of Economic, Social and Cultural Rights: The Question of Transnational Corporations, Working Document on the impact of the activities of Transnational Corporations on the realization of economic, social and cultural rights*, prepared by El Hadji Guisse, E/CN.4/Sub2/1998.6, 10 June 1998, p.2.

also capable of promoting human rights especially in countries where state participation is low or non-existent.

Generally, MNCs have a profound impact on the enjoyment of economic, social and cultural rights. They influence the right to work,⁵⁶ the rights to just and favourable conditions of work,⁵⁷ and the rights to form trade unions⁵⁸. They also affect civil and political rights, for example, the prohibition of discrimination⁵⁹, and the rights to life.⁶⁰

Traditionally, international law has been concerned with protecting MNC investment rather than imposing duties and obligations on MNCs. Before World War Two and thereafter, international organizations were preoccupied with protecting investors and emphasis was placed on issues such as expropriation and compensation. In the 1970s, the focus shifted due to pressure from the recently decolonized states, which demanded to have autonomy in running their economic and political affairs with little or no interference from MNCs. Moreover, the sensational cases of abuse of corporate power also prompted many developing countries to find ways of limiting MNC power. The 1973 International Telephone and Telegraph (ITT), an American MNC, involvement in ousting Chilean president Salvador Allende, and in conjunction with the CIA, helping Pinochet to power, sparked international outrage and suspicion about the activities of MNCs. Due to this and several similar incidents, international codes of conduct for MNCs were enacted. Among them included the OECD Declaration on International

⁵⁶ Article 6, *United Nations International Covenant on Economic, Social and Cultural Rights*.

⁵⁷ *Ibid.*, Article 7.

⁵⁸ *Ibid.*, Article 8.

⁵⁹ Article 2(1), 3, 4(1), 20(2), 24(1) and 26, *United Nations International Convention on Civil and Political Rights*.

⁶⁰ *Ibid.*, Article 6.

Investments and Multinational Enterprises and Social Policy (1977).⁶¹ In the 1980's and 1990's there was a shift back to the emphasis on the promotion of free trade and a renewed emphasis on the rights of MNCs rather than their duties.

International law rarely directly addresses the duties of MNCs. Most instruments such as the codes of conduct are non-binding in nature and MNCs duties are instead deducted or inferred from instruments that were originally directed at states through the international law doctrine of horizontal effect. This doctrine stipulates that certain rights do not only apply to the vertical relationship between governments and individuals but also in horizontal relationship between individuals and corporations. Thus certain human rights given their nature and content are arguably applicable in the legal relations between non-state entities.

The relationship between human rights and MNCs has been that of victim and beneficiary. The MNC is protected from intrusions into its private rights on the part of the state. However, in reference to human rights standards, the argument is that corporations unlike states cannot be held accountable for human rights abuses under international law because they lack international legal personality.

International law, which is a state-based system, has privileged MNCs through the doctrines of state responsibility and diplomatic protection whereby international wrongs committed by corporations are actionable by their home state against another state that committed the wrong. This ensures that MNCs enjoy the protection of their home state.

⁶¹ Addo, op.cit p.12.

However, wrongs committed by MNCs do not generally give rise to State Responsibility for the home or host State, unless it can be established that the State was complicit in the wrongful act or willfully neglected its international law obligations or failed to exercise due diligence. Moreover, the failed negotiations of the Multilateral Agreement on Investment (MAI) that took place under the auspices of the Organization for Economic Cooperation and Development (OECD) clearly illustrate the desire of States to protect investment and MNCs. This proposed treaty guarantees investors and MNCs privileges under international law but no additional responsibilities. Furthermore, investors are able to sue States for any discriminatory acts in international fora but States cannot sue MNCs for discriminatory practices or any other criminal act.⁶²

Increasingly international law is protecting investors particularly those from the developed countries as opposed to protecting the concerns of the developing world. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States established an International Center for the Settlement of Investment Disputes (ICSID) which in effect is a forum in which investors can seek redress in the event of breach of their investment contracts. Awards obtained from this body are enforced through the national courts of the High Contracting Parties to the Convention.

There is mounting evidence that several MNCs are transgressing human rights by abusing workers rights, causing them bodily harm, promoting harmful products to consumers, destroying lands and breaking national laws. Some MNCs move to third world countries

⁶²Calpham Andrew and Danailov, *Whither the State of Human Rights Protection? New Ways to hold non-State actors accountable*, Draft Paper presented to The International Council on Human Rights Policy, June, 1998. p13.

because they can get away with abuses that cannot be tolerated in their home States. In some cases, governments have lowered their standards so as to compete for foreign investment. Some home governments deny responsibility for the actions of their third world based subsidiaries. Further due to the complex chain of subcontractors who supply manufacturing MNCs it is difficult to establish that the head office is responsible for abuses in the subsidiaries thus many violations in the Host State go virtually unpunished.

Since MNCs have a substantial impact on human rights, the question arises whether MNCs should be held accountable or be expected to play an active part in promoting human rights. The extent of the responsibility of MNCs is difficult to establish. Do MNCs only have an obligation regarding the human rights situation of their employees or should they also influence other activities outside their factories?

At the international level, MNCs cannot be held accountable for human rights violations because there are no international mechanisms equipped to do this. International regulation of MNCs regarding human rights is dependent on national enforcement. Despite the lack of duties for MNCs at the international level, in certain jurisdictions such as the United States and United Kingdom, lawsuits have been filed against MNCs before national courts for human rights violations abroad. The enabling statute in the United States is the Alien Torts Claim Act of 1789 under which federal law courts in the United States have jurisdiction to try cases of torts committed anywhere in the world by State organs and non-State actors against aliens in violation of international law.

Numerous international treaties, conventions and declarations identify human rights which governments should uphold. International organizations such as the International Labour Organization (ILO), the Organization for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD) have identified human rights obligations that are directed at private companies. However, these are not widely used by companies because they do not meet the varied and complex needs of the world of commerce where businesses try to meet customer demands and remain globally competitive against the human needs of their employees.

Rights and duties as regards the observance of human rights under international law are gradually being extended to non-state actors and individuals. The Universal Declaration of Human Rights (UDHR) states in its preamble:

‘The General Assembly, Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all people and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance,’⁶³

⁶³ Preamble, *Universal Declaration of Human Rights*, U.N.G.A Res. 217 (III), 1948.

It is argued that this Declaration applies to all natural and juridical persons and every organ of society includes companies too which should be held morally, socially and legally responsible for human rights abuses and found liable as 'organs of society'.

It is also argued that since the basis of international human rights law is to protect the less powerful from the more powerful, then individuals must be protected from MNCs abuse through the enactment of law and regulations that hold these powerful corporations directly accountable for human rights abuse. With globalization, non-state actors such as MNCs have a moral, social and legal duty to protect and respect the human rights of the people whom their activities impact upon⁶⁴. Many human rights activists and defenders are lobbying for the formulation of international and national regulatory framework. However, MNCs are also actively and relentlessly lobbying to ensure that the international system protects their rights and interests and to ensure that no responsibilities are imposed upon them. The recent World Summit on Sustainable Development in South Africa in 2003 is illustrative of this.

Addo posits that the responsibilities of MNCs in human rights law involve two main duties namely, the duty to respect the rights of others and the duty not to impede the respect and protection of human rights⁶⁵.

The duty to respect the rights of others requires anyone who has the power to affect the rights of others do so without violating or undermining them. This duty is imposed on all natural and juridical persons namely government, public officials, companies,

⁶⁴ Muchlinski Peter, *Human Rights and Multinationals: Is there a Problem?* International Affairs vol.no.77 2000.

⁶⁵ Addo, op. cit p. 23

corporations to corporations, corporations to the individual and corporation to the society. The duty to respect the rights of others is applicable across all categories of human rights that is civil and political rights, economic, social and cultural rights and third generation solidarity rights. MNCs are also bound not to impede protection of human rights which is the corresponding obligation to the duty to respect the rights of others.

It is worthy noting that most corporations have policies and activities whose essence is to respect the rights of others but these corporations may not conceptualize these policies as human rights. The implementation of international human rights depends on national governments through their supervisory roles under human rights treaties. However, due to the lack of political commitment to human rights and the enormous economic power of these corporations many States are reluctant to interfere with the activities of MNCs. Furthermore, MNCs of violating human rights have usually hidden behind governments claiming that it is the duty of the government to follow up on violators. The responsibility to respect human rights is for all rather than the host government alone. The entitlement to have one's rights respected is inherent in all persons regardless of enforcement procedure.

Arguments for and against the extension of human rights responsibilities to MNCs

The traditional notion that only states and state agents can be held accountable for human rights violations is now being challenged as the economic and social power of MNCs seems to broaden in the wake of the increasing integration of the global economy that these corporations have helped bring about.

The main arguments against the extension of human rights against MNCs are mainly

based on a liberal market society ideology that is characterized by a clear distinction between the private and public spheres. First, opponents against the extension of human rights to corporations argue that MNCs are in business with the primary responsibility of making profits and protecting the commercial interests of their shareholders. They are not charged with any moral obligation towards the communities in which they carry on their business. Indeed, to do so would be to interfere in the internal affairs of these communities.⁶⁶

Second, MNCs as private non-state actors do not have a duty under international law to observe human rights. Their only duty is to obey the law while the regulation of matters of a social nature is left to the state.

Third, the question arises as to which human rights are MNCs to observe. There is no specifically delineated set of rights directed at MNCs, where do their rights begin and where do they end? Since MNCs largely impinge on social and economic rights, to what extent, if any, are MNCs to protect civil and political rights?

Fourth, it is argued that the extension of human rights obligations to MNCs will push the human rights-conscious MNCs out of business⁶⁷. MNCs that choose not to invest in lucrative but human rights abusing countries are bound to lose out in the competition for markets to other MNCs. In view of this, many have posed the question as to what financial benefit human rights protective MNCs stand to gain for promoting human rights of their employees and communities affected by their activities.

⁶⁶ Muchlinski, *op.cit.*

⁶⁷ Ray Vernon, *Business and Human Rights*, (Cambridge, MA Harvard Law School, Human Rights Program 1999). P. 49

Finally, it is argued that there is a danger of MNCs becoming targets of unfair treatment by politically minded NGOs whose primary aim is to gain political mileage and public approval rather than creating better human rights conditions.

On the other hand, the arguments for extending human rights obligations are several. First, MNCs have a social responsibility. The MNC is a social organization with a social responsibility to its workers and the community. With the increasing integration of the global economy the MNC is one of the driving forces of globalization and its activities impact on the persons and environment in which they operate. Thus these corporations ought to observe certain socially responsible standards of behaviour. There are several codes of conduct relating to these corporations such as the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977). And the OECD Guidelines for Multinational Enterprises (1977) which have been revised. Although these codes are not binding it is indicative that there are expectations from these MNCs on their behaviour. The recently revised OECD Guidelines for Multinational Enterprises state that enterprises should respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments. Further, MNCs are required to respect the rights of their employees by allowing them to participate in trade unions, to eliminate the use of child labour, forced labour and not to discriminate against any employee on the grounds of race, sex, colour, political opinion or social origin.⁶⁸

⁶⁸ *OECD Guidelines for Multinational Enterprises*, 27th June 2000,(OECD, Paris, 2000).

Second, the observance of human rights is good for business. Former United Nations Human Rights Commissioner, Mary Robinson argues that human rights must be a crucial concern for business for two main reasons. Firstly, business cannot flourish were human rights are not respected and secondly, corporations that do not themselves observe the fundamental human rights of their employees or of the individuals or communities in which they operate risk having their reputation tarnished⁶⁹. Several global initiatives such as the United Nations Global Compact Initiative are urging major MNCs to observe fundamental human rights and workers rights as well as environmental standards⁷⁰ and the efforts being made by the UN Sub- Commission on the Promotion and Protection of Human Rights to come up with a human rights code of conduct for companies. Clearly, Human rights are also essential for the reputation of a business and most MNCs can adopt fairly good working standards with relative ease and low cost. Many companies, at the urging of NGOs are beginning to develop codes of conduct by themselves or in conjunction with labour associations which make a commitment to promote and protect human rights as outlined by international laws and treaties. Companies such as Levi Strauss developed a code of conduct in 1991 for all of its overseas contractors most of whom are based in developing countries. The code outlines standards and practices contractors must follow relating to wages, working hours and employment.

Third, the private legal status of MNCs is irrelevant. Since private entities can violate human rights the legal status of MNCs as private non state entities with no international

⁶⁹ Mary Robinson, The Business Case for Human Rights, in Financial Times Management, *Visions of Ethical Business*, (Financial Times Management, London, 1998). p.14.

⁷⁰ UNCTAD, *Social Responsibility*, p.15; www.unglobalcompact.org.

legal personality need not be changed in order to hold them accountable for human rights abuses. Today the theoretical and technical aspects on the traditional boundaries between the private and public sphere are being reconsidered such that now the MNC can be held to account for human rights abuses.⁷¹

At the national level, there are attempts to hold MNCs directly responsible for human rights violations. In the United States, in the case of MNC Unocal the District Court for the first time ever, ruled in June 2002, that the MNC could stand trial for human rights violations under the Alien Tort Claims Act. Unocal had been charged for using forced labour to build a pipeline in Burma⁷². The MNC was however absolved of blame, as the plaintiffs could not prove the MNC played a direct role in the human rights abuses. The plaintiffs appealed and the case is yet to be finalized. In another case, the United States courts in an action brought by a Nigerian activist Ken SaroWiwa against the MNC Royal Dutch Shell supply of money, weapons and logistical support to the Nigerian military to enable it perpetrate human rights abuses against the Ogoni peoples, held that the suit could be heard in the American courts. In England 7,500 South African workers sued Cape PLC, a building material firm headquartered in Britain, after they contracted asbestos-related illnesses while working in the company's South African subsidiary. The British courts agreed to hear the case, but the company reached settlement with the workers before the case went for trial. From the foregoing cases, direct liability only

⁷¹ Menno T. Kamminga, Holding Multinational Corporations accountable for Human Rights: A Challenge for the EC, in Phillip Alston, ed., *The EU and Human Rights* (Oxford University Press, Oxford, 1993. P.49.

⁷² *Doe -v- Unocal*, 963 F. Supp.880 US Dist Ct, C.D.Cal,25 March 1997, noted in American Journal of International Law 92, 1998,PP.309, See also *Wiwa-v- Royal Dutch Petroleum Company*, 96 Civ 8389 SDNY).

attaches only if it can be established that the corporation in question played a direct role in perpetrating the crime complained of.

Fourth, MNCs can observe human rights. MNCs have an impact on the economic and social rights of the peoples among whom they operate. They can set standards for their workers and also get involved in the human rights situation outside their firms even though they may not have a direct influence on those activities. Other ways in which MNCs can promote human rights include refusing to invest in countries with abusive regimes and develop human rights policies and corporate codes of conduct.

It is important to note that generally MNCs do not as a policy violate human rights. There is a need to be regulated in order to ensure that they conduct themselves in a socially responsible manner. States should put into place effective regulatory mechanisms to protect and promote the observance of human rights. Since the socially responsible state has a duty to adopt policies that enhance the well being of its citizens, the state must be at the forefront in protecting human rights. Moreover, the state if involved in the abuses in conjunction with the MNC should also be held by the international community to account for such a collusion. A number of European governments and Australia have passed legislation that requires companies to report on labour and environmental impacts of their overseas activities.

International codes of conduct for multinational corporations

Codes of conduct for multinationals are essentially recommendations and do not have any legal status under international law. They impose moral but not legal obligations on MNCs and are therefore not capable of enforcement by the application of sanctions. For

MNCs, their commitment to the codes is voluntary, however some organizations have placed the acceptance of their code as a condition to their membership or licensing agreements. Besides government and intergovernmental organizations, codes have been introduced by trade union organizations, employers' organizations, environmental, consumer, investor, religious and ethical organizations.

Generally, codes address a variety of issues including relations between MNCs in the world market with regard to, for instance, marketing and competition and labour matters (i.e. terms and conditions of work: environmental standards and health and safety issues related to manufactured products).⁷³

The credibility of such codes depends mainly on the size, number and internationality of the governments and companies that have adopted them; the nature of the substantive provisions of the code and any related monitoring mechanisms such as investigation methods, reporting of investigation reports and dissemination of reports.

In the 1970s, MNCs faced fierce criticism and condemnation from governments on the grounds their activities were incompatible with the political, economic and social policies of, particularly, the developing and newly independent countries. In 1976, the OECD adopted its Declaration on International Investment and Multinational Enterprises. The Declaration contains the OECD Guidelines for Multinational Enterprises, which covers a wide range of MNC activities such as industrial relations, employment, financing and taxation. In 1977, the ILO Tripartite Declaration of Principles Concerning Multinational

⁷³ International Labour Organization Bureau for Workers Activities, *Codes of Conduct for Multinationals*, (International Labour Organization, Geneva, 2003.)

Enterprises was adopted. The OECD and ILO codes are the most universal and comprehensive international codes of conduct for multinationals.

The OECD Guidelines for MNCs are recommendations to enterprises made by governments of the Organization for Economic Cooperation and Development member countries with the aim of ensuring that MNCs operate in harmony with the policies of the countries where they operate. These standards are backed up by follow-up procedures in the twenty-nine OECD member countries and four non-member countries (Argentina, Brazil, Chile and the Slovak Republic). These guidelines are not legally binding. They are a part of the Declaration of International Investment and Multinational Enterprises adopted in 1976 with the main objective of facilitating direct investment among OECD members, providing national treatment to foreign owned enterprises, promoting cooperation among governments in relation to investment incentives and disincentives and minimizing the imposition of conflicting requirements on MNCs by governments of different countries. The intention behind the guidelines is that internationally agreed guidelines can help prevent misunderstandings and create confidence between business, labour and governments.

The nearest code of conduct to creating binding obligations on MNCs was the UN Draft Code of Conduct on Transnational Corporations⁷⁴ which provided that MNCs “shall respect human rights and fundamental freedoms”⁷⁵. However, this code was discarded after the closure of the Commission on Transnational Corporations.

⁷⁴ *Draft Code of Conduct on Transnational Corporations*, U.N. Doc.E/1990/24.

⁷⁵ *Ibid*, at p. 7.

In the 1980s the focus changed from the disparities between the developed and developing countries to the role of market forces which have accelerated due to privatization and deregulation. MNCs have now taken up roles that were previously in the domain of governments especially in the provision of essential public amenities such as water and health facilities. Thus their impact is greater and more pronounced.

In the 1990s there was an increase in the number of codes of conduct. The codes of employers became more broadly oriented in social terms and cover more issues beyond mere business or labour matters. Industry specific codes have emerged mainly in the consumer goods industries and in industries that are by their nature labour intensive, located in developing countries and involve low skill workers. These codes have been initiated by developed countries and are meant to appeal to consumers. For example, in 1997, the ILO formed a partnership with the Siatkol Chamber of Commerce and UNICEF to eliminate child labour in the soccer ball industry in Sailkot, Pakistan; in Britain the British Toy and Hobby Association Code of Practice adopted in 1996 forbids the use of forced labour in the toy industry; in the United States the Department of Labour has adopted sector specific initiatives such as the White House Textile and Apparel Partnership on Sweatshops and Child labour between NGOs, companies and trade unions whose code of practice adopted in 1997 has provisions on worker safety and health, collective bargaining, wages, benefits, discrimination and freedom of association. In Europe, the Code of Labour Practices for the Apparel Industry and the Fair Trade Charter for Garments were adopted in 1997 to seek an end to the exploitation and abuse of workers sports and garment industries. These were the product of the Clean Clothes Campaign launched in Holland in 1990 that sought to bring together trade unions,

consumers and other organizations to condemn the abusive practices of certain MNCs against their employees. The areas covered include wages, working hours, the employment relationship and working conditions. The European Apparel and Textile Organization and the European Trade Union Federation of Textiles also adopted a Charter in 1997. The codes are directed at retailers and manufacturers and are based on the ILO's core labour standards.

Several other codes of conduct have been adopted by international organizations. Some focus on certain products such as the International Code of Marketing of Breast Milk Substitutes adopted in 1981 by the World Health Organization

Existing regulatory mechanisms fail to protect the rights of individuals and communities from actions of MNCs in an increasingly globalized economy. It is the core role of governments to protect rights of their citizens however due to the fact that economic activity is globalized then one must find a way in which to protect human rights recognizing the international nature of corporations and strengthening the legal force of the nation State.

Under the present international human rights regime, MNCs are generally unaccountable to persons and groups threatened by their activities and are under no obligation to finance the realization of rights. Although there is no finding of direct responsibility for human rights in law, there are convincing reasons for extending such responsibility to these corporations as discussed above. Recent judicial proclamations and the increased

formulation of codes of conduct by corporations and states indicate that MNCs can be accountable for human rights abuses, though indirectly.

The state has an obligation to protect human rights and can take measures to prosecute and obtain compensation from errant corporations. The Charter of Economic Rights and Duties of States in Article 2(2) requires that states cooperate in the exercise of the right of every state to regulate and supervise the activities of MNCs within its jurisdiction. However, the influence and power that these corporations wield usually leaves this option unavailable or unused because many countries especially those from the developing world are reluctant to antagonize MNCs for fear of losing much needed foreign direct investment or divestment. As a result, many countries have, instead, chosen to forfeit human rights standards for investment.⁷⁶

With the progression of globalization and the gradual erosion of the state's control over essential services through privatization, the citizen is coming in closer touch with the MNCs and their effect on the lives of the citizen is enormous. In several developing countries, disinterest and laxity on the part of the State and the MNC itself in regard to regulation of MNCs, has resulted in gross violations of human rights.

The states should, in accordance with its obligations under international law contain the activities of MNCs through legal standards and should not hide itself from human rights responsibility by merely pointing to the MNCs.

⁷⁶ U.N.G.A Res 3281 (XXIX).

CHAPTER FOUR

CASE STUDY: HUMAN RIGHTS ABUSES AT CIRIO DEL MONTE, KENYA

About Cirio Del Monte

The origins of Del Monte Corporation can be traced to 1890 in California, in the United States of America. The Del Monte Brand was introduced into the market in 1892. Del Monte Corporation based in the United States is the owner and licensor of the Del Monte brand name and trademarks. Del Monte Corporation has granted a number of perpetual, exclusive and royalty-free licenses for the use of the Del Monte name outside the United States. The licensees include Cirio Del Monte which has a license to use the Del Monte name and trademark for beverages and processed foods in Europe, the Middle East and Africa; the Del Monte Pacific Limited uses the trademark and name in the Philippines and the Indian subcontinent; Kikkoman uses the trademark in the Far East and Pacific Rim while Del Monte Fresh Produce is a subsidiary of the licensee of the Del Monte name and trademarks for fresh fruit, vegetables and produce all over the world. The company specializes in preparing and marketing canned fruits, fruit beverages, tomato and specialty products.

In February 2001, Cirio Alimentaire S.P.A acquired Del Monte Food International from Imerman, a South African company. The acquisition made Cirio Del Monte the sixth largest Food Company in Europe. Cirio Del Monte produces and distributes a range of

canned tomatoes, tomato based products and canned vegetables. The combined group is one of the largest global producers of canned fruit and owns plantations and canneries through out the world. Cirio Del Monte has an annual turn over of \$400 million.

Del Monte began its operations in Kenya in 1965 after acquiring a pineapple plantation from the Kenya Cannery Limited and subsequently approached the government of Kenya for more land. Cirio Del Monte is Kenya's largest exporter of pineapple products and processes over 250,000-300,000 tons annually, exporting 10 million cartons of packed pineapple products thereby generating over Ksh. 4 billion in foreign exchange annually. Most of the fruit is exported to Europe, America and Japan. Cirio Del Monte, Kenya has total assets of Ksh10 billion and employs some 6,000 people⁷⁶. The area planted with pineapples has increased to 5,500 hectares from the original 450 hectares in 1965. Not all the pineapples leaving the Thika factory carry the Del Monte label. Tins are also labeled with the brand name of the company, which finally markets them. These companies include Coop Italic, Mission, Soleando and Tesori dell'Arca

The nature of human rights abuses at Cirio Del Monte, Kenya

The abuse of human rights and the subjection of workers to inhumane working conditions were part of the Del Monte practice for many decades. DMKL has drawn criticism from activists in Kenya since the 1970's. Further studies were conducted in January 1998, by an Italian-based human rights group Centro Nuovo Modello di Sviluppo (CNMS/Center for New Model Development) and an Italian Priest Father Zanotelli on the working

⁷⁶ Cirio Del Monte, *Another Step for Kenya SA 8000*, Daily Nation May 27, 2003.

conditions at Del Monte plantations and factories in Thika. The studies showed the existence of gross human rights abuses against the workers by the corporation. These reports were confirmed by two independent bodies namely the Societe General de Surveillance (SGS-ICS) and the Bureau Veritas Qualite International (BVQI) which carried out inspections on the Del Monte plantations and factory in November 1999. The working conditions were as summarized below:

▪ **Inappropriate handling of pesticides**

Workers at Del Monte were exposed to dangerous and toxic pesticides, some of which are classified as Extremely Dangerous and Highly Hazardous by the World Health Organization. These chemicals are known to cause cancer, sterility and acute poisoning that leads to damage of the liver, kidney and nervous system. The pesticides include Namacur(organophosphate), Temik(carbonate) and Vydate(carbonate). The chemicals were not only harmful to human health, a concentration of these substances was harmful to the productivity of the land.

A study conducted by the CNMS established that DMKL did not inform the workers on the toxic nature of the pesticides and did not provide protective appliances for the workers. Although no research has been carried out among the workers at the corporation into the incidence of tumors, congenital malformation or other health defects related to exposure to pesticides, the CNMS reported that four employees had died of throat cancer.⁷⁷ The said persons worked in the maintenance department where contaminated vehicles used to spray pesticides were serviced and where plant health

⁷⁷ Ouma Steve, *The Benevolent Condominium: Del Monte and the Working Conditions in its Plantations and Industry*,(Centro Nuovo Modello di Sviluppo, July 1998).

chemo-controls were carried out. Del Monte denied the claims of illness and fatalities.

An audit carried out by an independent certification company, SGS found that at the Thika plant training records for the use of protective clothing and information about health hazards of pesticides were not available for all personnel involved. Records on personnel training on health and safety hazards were also unavailable and the pesticide store signs and labels were in English only-a language that most workers at the plant did not understand. Inside the cannery inspectors carrying out the audit found women without any form of protective equipment against high levels of noise, some were not wearing shoes while welders working on machinery had no protective equipment.⁷⁸

▪ **Displacement of local communities**

The land upon which the corporation's plantations stand is leased from the Kenya government at a nominal rent of Ksh. 1.50 per acre per annum based on a 1930 agreement between the colonial government and the corporation. Del Monte's consistent use of chemicals for agricultural purposes led to the deterioration of the quality of the soil thereby resulting in the need for fresh land. This entailed expanding into the neighboring lands occupied by local communities thereby forcing many people living around the corporation to seek refuge elsewhere. In 1990, fifty families lost their land in this way and many fell prey to fraudulent government officials who promised to acquire pieces of land for the displaced persons but never delivered the land to these people.

⁷⁸SGS ICS S.R.L International Certification Services, *Audit Report on Del Monte Kenya Limited*, dated 9th December 1999.

- **Exploitative wages**

The workers at Del Monte were also subjected to poor and exploitative wages lower than those stipulated in the union contract and long working hours without adequate remuneration. The workers were grouped into three main categories: permanent staff, seasonal workers and casual laborers. Full time workers worked 45 hours per week for an open-ended period of time. Seasonal workers worked full time, had an open-ended contract but were subject to dismissal whenever there was no work while permanent employees were entitled to a contract, sick leave, holidays and severance pay. Casual workers were taken for a day or a week, had no contract and no benefits whatsoever.

The minimum hourly wage in accordance with the law, at the time of the Campaign was Ksh.14.40 per hour and employers were required to provide medical assistance to all workers.⁷⁹ The Kenya Human Rights Commission suggests that workers need Ksh.306 a day to cover the basic needs including food, rent for a family of six in Thika.⁸⁰ Casual workers at the corporation earned Ksh 12 per hour. Seasonal plantation workers earned a little more in their first year- Ksh 14.40 per hour: seasonal factory workers earned a higher rate of Ksh. 32.22 per hour but were not entitled to medical assistance and pension scheme.

In 1998, the Corporation, through the 'seasonalisation programme' sacked 200 workers who had previously been working as permanent staff, only to take them back again as seasonal workers. Their pay was decreased by 45% and were no longer entitled to

⁷⁹ Workers Compensation Act (cap 236) –Legislative Supplement No. 23 of 28/05/99, Regulation of age and Conditions of Employment Act (cap 229).

⁸⁰ Kenya Human Rights Commission, *Exposing the Soft Belly of The Multinational Beast, The Struggle for Workers Rights at Del Monte Kenya*, (Kenya Human Rights Commission, 2002) pp. 16-17.

severance pay.

In the harvesting months of March, April, May, June, July, November and December a total of 7,000 workers were hired, 2,500 of which were casual workers. 70% of the workers in the factories were women while 60% of the plantation workers were women.

The use of casual and seasonal workers in permanent posts and the assigning of workers tasks at a lower level than the appropriate levels of work carried out in order to justify low wages was a common occurrence at the corporation.

As regards working hours, Kenyan legislation the Workers Compensation Act (Cap 236) requires 46 hours as the weekly maximum number of working hours and a day off a week. The overtime must be remunerated 1.5 times the normal salary and twice the normal salary during the holidays. However, for instance, the security guards at the factory worked 60 hours per week while overtime for permanent workers was paid after the 9th working hour per day. Overtime was not always carried out in a voluntary manner and workers were at times not paid for it. Several cases are in court over the corporation's treatment of workers, wages and compensation, however these have only dragged in court even after judgement is entered against the corporation which is slow and reluctant to settle the claims.

TABLE II. Structure of Regular Workers at Del Monte (September 1999)

Type of contract	Canning factory	Plantation	Total	%
Permanent	323	1,686	2,009	31.2
Seasonal	1,695(1)	1,025(2)	2,720	42.1
Casual (3)		1,727	1,727	26.7
Total	2,018	4,438	6,456	100.0

Source: Del Monte Management Report 2001

▪ **Freedom of expression and association**

The Del Monte management was for a long time in the practice of intimidating trade union leaders and repressing trade union activity. In April 1977, the company sacked 1,700 workers who had taken part in a strike, in 1994, 17 drivers who had joined a trade union were sacked. This intimidation of trade union leaders by the Del Monte management heightened during the campaign with specific trade shop stewards being earmarked for summary dismissal for inciting the workers to participate in street demonstrations.

▪ **Poor living conditions and inadequate health care**

Del Monte's policy was that medical assistance was not to be provided to seasonal workers and other employees outside their working hours. This draconian policy was proved counterproductive upon the death of an employee in August 1999. The said employee died within the company's grounds after having been denied treatment at the company clinic on the grounds that company policy did not allow treatment to be given to seasonal workers.

Living conditions at the staff quarters for the casual workers were in a dismal state. The houses in the Kinyingi village where a large proportion of the workers lived were squalid one-roomed huts measuring approximately 3x3m for a family of six to eight people without water and toilets while several did not have windows.

The Del Monte campaign

-Action by the civil society

Civil society organizations were at the forefront in investigating the claims of human rights abuse at the corporation. Several fact-finding missions and studies were conducted in 1998 by an Italian non-governmental organization known as Centro Nuovo Modello di Sviluppo (CNMS/ Center for Model Development) and an Italian Priest Father Zanotelli on the working conditions at Del Monte.

The seriousness of the violations at the company forced the workers to seek several avenues to address their plight. In June 1999, the workers sought the intervention of Kenya Human Rights Commission since communication had broken down between the workers and the Del Monte management.

There were three trade unions represented at Del Monte, namely the Kenya Plantation and Agricultural Workers Union, the Kenya Union of Domestic, Hotel, Educational Institutions, Hospitals and Allied Workers and the Kenya Union of Commercial and Allied Workers Union. It is the Shop Stewards (workers representatives) from the latter union who spearheaded the struggle for better working conditions, while the other two

trade unions kept off.

In response to the reports of human rights violations from the workers and other independent observers, a coalition of civil society organizations led by the Kenya Human Rights Commission called the Solidarity Committee was formed in 1999 to find a solution to the problem and to augment the efforts of the trade union at Del Monte. The Solidarity Committee launched a campaign in November 1999. The coalition consisted of the following international and local civil society organizations: Centro Nuovo Modello di Sviluppo (CNMS), the Kenya Human Rights Movement, Kituo Cha Sheria, the Labour Caucus, The Green Belt Movement, the Kenya Women Workers Organization, the Kimathi Movement, the Chemichemi ya Ukweli, the Release Political Prisoners Pressure Group, the Labour Awareness and Research program and the New People Future Services.

The coalition demanded equal pay for equal work, respect of Del Monte's contractual obligations to its workers, an end to the seasonalisation program, improved working and housing conditions, provision of educational facilities, that the company compensate the workers and the neighborhood communities when it is found at fault and a joint meeting be convened between the workers leaders, Del Monte and other key players in order to come up with a settlement to the problem.

In order to obtain the true picture of what was happening at Del Monte Kenya the CNMS commissioned SGS Italy, an independent SA 8000 certification company, to conduct an

inspection at the plant. The certification company toured the factory on November 22 and 23 1999. Another company BVGI also inspected the factory at the same time as the SGS team. The BVGI report revealed that the company had not established healthy and safe conditions of work, discrimination against pregnant women by subjecting them to a pregnancy test, requiring workers to work over time or risk losing their jobs, and that no safe drinking water for the employees was provided. A further inspection report prepared by SGS, a certification company confirmed the BVGI report and revealed that the workers were underpaid, did not received medical benefit and were unprotected from exposure to dangerous and toxic substances while at work

-The Italian and Kenyan consumer boycott

On 1 November 1999, the Kenya Human Rights Commission in conjunction with the CNMS, Italian trade unions, non-governmental organizations and representatives of the Catholic church launched a boycott campaign of Del Monte's products in Italy one of the company's key export markets, dubbed "Say No to the Del Monte Man"

CNMS requested Coop Italia, one of Del Monte's marketing companies and the largest supermarket chain in Italy, to apply pressure on Del Monte to improve working conditions by refusing to stock its products in its outlets all over Italy until the working conditions at the corporation's Thika subsidiary were improved. Coop Italia had obtained the SA 8000 certification -a certification granted to companies that demonstrate respect for the rights of their workers requires such companies to demand the same human rights standards of respect from their suppliers. SA 8000 is registered under the council on Economic Priorities Accreditation Agency (CEPAA). In order to solidify pressure

locally, a boycott of Del Monte products targeted at Kenyan consumers was also launched by the Solidarity Committee. As a result of the campaign, Del Monte lost about 10% of its sales in 1999. The boycott prompted Del Monte management to change its approach and to be more sensitive to its mode of operation.

In December 1999, hundreds of workers marched to the nearby town of Thika in protest at poor working conditions, breach of contract and sexual harassment by senior employees. The workers demanded equal pay for equal work; an end to the 'seasonalisation' programme; the introduction of a health policy for all workers; the provision of humane working and housing conditions and that Del Monte respect the contracts between the workers and itself. The workers also demanded audience with the management at the company.⁸¹ Under the tutelage of a committed and powerful trade union leadership of shop stewards, the workers protests continued into 2000 with many of them participating in campaigns and rallies and speaking openly to the press. Letters of protest from the civil society to the Del Monte offices in London demanding the resignation of the then managing director of Del Monte, Kenya, one Barry Twite prompted the senior management officials from the London office to visit Kenya in late 2000.

Cirio Del Monte's response

Initially the Del Monte management categorically denied the allegations of human rights abuse leveled against it by the civil society and workers. The corporation claimed that the actors in the campaign were being used by external agents to destroy its reputation and to

⁸¹ *The Plight of Del Monte Workers, Del Monte Shop Stewards and the Kenya Union of Commercial, Food and Allied Workers.*

ruin the Kenyan economy⁸² and further claimed that it was a victim of sabotage by rival enterprises⁸³.

The campaign against Del Monte heightened such that on December 27, 1999, Del Monte Italy admitted that violations of human rights were occurring in its Thika plant. To counter the negative publicity that had already caused low sales of Del Monte products in Italy, a series of meetings were organized between Del Monte, Coop Italia and CNMS representatives in Italy. The Kenyan subsidiary, however, disregarded and shunned consultations with the Solidarity Committee and trade union representatives. Intimidation of the trade union representatives by the Del Monte management and senior government officials increased and conditions at the factory and plantations worsened. Two chemical accidents were reported to have occurred at the factory in May 2000 and security guards at the company continued to terrorize the neighboring communities and in May 20th 2000 the company's dogs attacked two men who had allegedly trespassed into the corporation's property.

Del Monte response to the allegations of human rights violations seesawed. On several occasions in 2000, the corporation went back on its promises to improve working conditions and at one time on July 2000, Del Monte International rejected any proposals to develop an agreement on the improvement of working conditions.

⁸² Del Monte Royal Foods Limited, *Del Monte refutes defamatory allegations regarding its Kenyan Operation*, Press Release, London November 24, 1999.

⁸³ *Del Monte Kenya Limited Refutes allegations surrounding Thika Plant, "False and Baseless" accusations disturb company officials*, Daily Nation, Friday, December 10, 1999.

Del Monte, Kenya officials refused to negotiate with workers representatives citing the tripartite agreement between the government, Central Organization of Trade Unions (COTU) and Federation of Kenya Employers (FKE). In Kenya, the welfare of workers has been the traditional domain of their trade unions, their collective employers and the State.

The appointment of Dr. Bertolli, as the new chief executive officer at Del Monte replacing Barry Twite, an uncompromising and highhanded officer, brought forth the campaign into a new phase. Bertolli sought a pacific settlement of the dispute through negotiation and conciliation. To this end, in December 2000 negotiations between Del Monte, the workers, trade unions and the Solidarity Committee began. Several concessions were reached and on December 14, 2000 the Solidarity Committee called off the boycott in order to pave way for further negotiations.⁸⁴

A series of meetings between the corporation, the workers and the Solidarity Committee culminated in the signing of an Improvement Plan in March 2001. The following concessions were made: that Del Monte transform the casual workers into seasonal ones, construct new houses, organize training for all workers on safety at work, increase the wages to meet the basic needs of workers, that the workers be guaranteed the right to organize and to establish structures to monitor the implementation of the agreement by the workers, the neighboring community, the Solidarity Committee and the Del Monte workers. Del Monte also agreed to work with the neighboring Ndula Community by providing basic amenities such as water and schools.

⁸⁴ *Joint Statement to call off the Boycott Campaign on Del Monte Limited Products*, (Kenya Human Rights Commission, 3rd March 2001).

Government and trade union response

There were dissenting voices to the negotiations and eventual agreement between the Del Monte, the Solidarity Committee and the workers. Fierce opposition emanated from the government, the Federation of Kenya Employers (FKE), the Central Organization of Trade Unions (COTU) and the national leaders of the Kenyan trade union movement who refused to negotiate with Solidarity Committee which they considered an intruder in the employer-employee relationship since the negotiations between workers, employers in Kenya are considered as the exclusive domain of trade unions and the government.

In November, 1999, the Permanent Secretary in the Ministry of Labour, Human Resources and Development condemned the Kenya Human Rights Commission for getting involved in the campaign as it was none of its business alleging that the Del Monte workers were tarnishing the company's good name by demonstrating on the streets.

The national trade union movement through the Secretary General of COTU extended its support to Del Monte and downplayed the views of local trade unions at the corporation. . COTU also opposed the involvement of the Solidarity Committee citing the tripartite agreement and went a step further in November 2000 to write to the Minister of Labour and Human Resources Development complaining about the presence of civil society representatives at the Del Monte Talks. The Kenya Plantations and Agricultural Workers Union Deputy Secretary-General denounced the role of civil society in the negotiations and emphasized that such an agreement could only be signed by the workers and employers trade unions.

The Federation of Kenya Employers (FKE) also opposed the participation of the Solidarity Committee in any talks between the workers unions and Del Monte and considered the participation of civil society organizations a grave violation of the tripartite agreement between the State, workers trade unions and employers' trade union. According to the FKE, the KHRC and the Labour Caucus should have been charged with purporting to act as trade unions which is an offence under the Trade Unions Act⁸⁵

Opposition also came from the Registrar of Trade Unions who considered the work of the Solidarity Committee as an invasion of the labour movement by busy bodies and interlopers. Despite opposition from the government and national trade union leadership, the local COTU Thika branch, the District Commissioner and Members of Parliament welcomed the Del Monte improvement plan.

Outcome of the Del Monte campaign

Del Monte incurred negative publicity and poor sales in Europe during 2000, the period of the campaign, thus prompting the corporation to reassess its policies toward its workers and the neighboring communities. It was clear that the non-governmental organizations were unrelenting and determined to get Del Monte to negotiate on improving the working conditions in its factories and plantations.

Del Monte has since 2000 to date adhered to its commitments as spelt out in the Improvement Plan. Significant changes to working conditions have been effected and the employer-employee relationship has considerably improved. The corporation has

⁸⁵ Section 29 (Cap 233), Laws of Kenya.

installed water lines to the neighboring community, worked closely with the Kenya Human Rights Commission in conducting several workshops and seminars for its management on improving relations with their workers. The corporation also provided an office for the shop stewards, converted 1,500 casuals workers in the plantations into seasonal staff, donated policing booths to the Kenya Police in Thika, provided a medical policy to cover all seasonal workers and has compensated workers who were previously being underpaid. Periodic assessments of all employees' performance and job evaluations are also being carried out and an improved relationship between the management and the Shop Stewards is being witnessed. The workers have formed the Workers Rights Watch, an association of shop stewards whose role is to protect and promote the rights of workers at Del Monte.

Several visits by the Solidarity Committee in May 2002 and the Kenya Human Rights Commission show an improvement in working conditions at the corporation. Due to its commitment to upholding the welfare of its workers and the community Del Monte was awarded the Social Accountability 8000 (SA 8000) Certification in 2002.

The Del Monte campaign is now in its Third phase that involves monitoring of the commitments that the corporation made to its workers and the neighboring Ndola community. The Thika Rights Watch, which is an initiative of the workers and the Solidarity Committee, is carrying out the implementation of the improvement plan.

A human rights problem was evident at Del Monte Kenya. The workers' health and lives were being abused by the corporation's reckless attitude toward the welfare and

conditions of work in its factories and plantations. The management quickly stamped out dissent by the workers or their representatives and the relationship between the two had been severely damaged. Moreover, the corporation's relations with the neighboring community were sour. Despite the fact that the trade union representatives at the corporation and the local communities had lodged complaints with the relevant authorities, the trade unions and the government adopted a hostile stance to the civil society initiative and even denied the existence of human rights violations at the corporation. It took the intervention of civil society groups whose weapon of choice was to wage a media campaign against Del Monte products that the corporation began to pay serious attention to the conditions of work at its factories and plantations.

CHAPTER FIVE

AN ANALYSIS OF THE DEL MONTE CASE

The case of human rights violations at Del Monte Kenya illustrates the difficult dilemma that a developing country faces in deciding on how to enforce human rights and at the same time maintain foreign investment flows. Being heavily reliant on foreign investment, such country is reluctant to establish mechanisms or institutions to restrict or regulate the MNC conduct for the fear of divestment. Several important issues came to the fore in the Del Monte case. This case brings into focus the effectiveness of the State's human rights enforcement mechanisms, State regulation of MNC conduct, and the role of the State, MNCs, the trade union movement and civil society groups in the realization of human rights. The challenge faced by the Kenya government in enforcing human rights of persons affected by MNCs was also illustrated in this case.

Del Monte Kenya is an economically powerful and influential multinational subsidiary. The corporation specializes in pineapple growing, an important horticultural commodity, that makes up 11% of the temporary industrial crops that Kenya exports⁸⁶. This indeed makes Del Monte a significant contributor to Kenya's horticultural sector.

The human rights violations at the corporation were a stark illustration of the prime priorities of MNCs i.e. the maximization of profit in the most cost-effective manner. To this end, the utilization of cheap labour and exploitative working conditions was the norm, as it was quite evident that human rights concerns were missing from the

corporation's agenda. Numerous complaints emanating from the workers and the neighboring Ndula community highlighting the abuses being perpetrated by the corporation remained unattended to for several decades and the corporation's policy was one of non-negotiation and hostility towards workers' calls for improvement of the pay, health, working and living conditions. This stance was finally broken when the campaign against Del Monte products in Europe began to take a toll on the corporation's profits.

There has been a growing appreciation of human rights in the Kenyan society over the past decade, which can be partly attributed to the expanded space for political expression. This has seen the emergence of several bold civil society groups that act as watchdogs for the censure and exposure of human rights abuses mainly by the State. Among the areas of particular attention by these groups has been the plight of workers in industries and plantations. The activities of these groups have led to the dissemination of human rights awareness among the labour workforce. The participation of the Del Monte workers in the protests and demonstrations is an indication that a human rights culture is slowly taking root in the Kenyan labour movement.

The persistent ignorance of the workers' concerns at Del Monte by the relevant trade unions and government resulted in the creation of a huge rift between these parties. The gaping human rights problem at the corporation dictated that a solution be found. The failure of the already existing governmental and trade union machinery in alleviating the problem prompted civil society groups to join forces with the workers. A coalition of Kenyan and Italian civil society groups played a pivotal role in finding solutions to the

⁸⁶ *The Kenya Economic Survey 2001*, p.117.

problem. This coalition proved to be the propelling power and a formidable force throughout the entire campaign as was evidenced by the group's extensive groundbreaking research that exposed the cruel conditions that the workers were exposed to at Del Monte, the organization of an intensive boycott against Del Monte products in Europe, the mobilization of Del Monte workers, the inception of negotiations with the corporation's management and eventual agreement on an Improvement Plan in 2001.

Civil society involvement cannot be ignored or underestimated in human rights issues as the capabilities of this actor are immense and far-reaching. Moreover, the participation of civil society illustrates that in the event of government failure to respond civil society groups are more often willing to step in at the risk of usually resulting in conflict with the already established institutional structures and government policy.

The human rights movement in Kenya is growing stronger and the expansive network of international civil society groups usually augments their efforts. This in effect means that a local problem can be brought to the attention of other international actors and offer support to the local civil society group. This was quite evident in the Del Monte case wherein the success of the local civil society groups emanated from the support that they received from the European consumers.

In the wake of the Del Monte campaign, the Ministry of Labour was faced with a difficult decision whether to condemn the human rights situation at the MNC or to deny or ignore the allegations of human rights abuse. Noting that Del Monte brings in Ksh. 4 billion in

foreign exchange into Kenya's economy every year it is argued that the government's dilemma emanated from the poor economic growth the country was facing and the dire need for direct foreign investment to boost its economic growth. Kenya being a developing country that relies heavily on foreign investment was hard at task to reprimand Del Monte for its behavior despite the negative publicity that the corporation was receiving both locally and internationally. This outlook sparked outrage from various government officials towards the civil society groups involved in the campaign. The fear of losing future investment to other neighboring countries and the fear that Del Monte was going to divest from Kenya resulted in the subjugation of human rights to maintenance of the status quo.

The current structure of the industrial relations played a significant part in ensuring that Del Monte remained unscathed by the allegations of human rights. Industrial relations practice and policy is guided by the Industrial Relations Charter which was introduced in 1962 and has been reviewed four times since then. This is a voluntary agreement formulated and signed exclusively by the three social partners namely the government, employer trade unions and the workers trade unions This Charter was incorporated into the Labour Code, which is currently under review by a task force appointed in May 2001 to review the all the labour laws. All collective bargaining, dispute settlement is carried out within this tripartite arrangement.⁸⁷

The Del Monte case clearly brings out the role of these unions in protecting government

⁸⁷ Tayo Fashoyin, *Social Dialogue and Socio-economic development in Kenya*, (Geneva, I.L.O, In Focus Programme on Strengthening Social Dialogue, 2001), pp.15.

interest. The trade union umbrella organization, COTU to which the Kenya Plantation and Agricultural Workers' Union (the trade union representing workers at Del Monte) is affiliated, sided with the Del Monte management and the government in condemning the civil society organizations involved in the campaign and accusing them of meddling in the tripartite arrangement. The thrust of their argument was that all matters touching on the welfare of workers must be handled exclusively by the representative trade unions and more specifically the tripartite arrangement had no place for other entities namely the civil society groups.

Indeed throughout the campaign the national trade union leadership focus shifted from protecting the workers to siding with the State to condemn these groups. This is a poignant illustration of the politicization of the trade union movement and the extent to which the government has a strong say in trade union matters. This hostility towards the workers and civil society organizations continues to fester to-date.

There is no specific statute intended for MNC regulation in Kenya. On the other hand, the Foreign Investment Protection Act provides favorable and attractive investment conditions for these corporations. The existing industrial relations laws and practices are considered to be equally applicable to MNCs and local enterprises. MNCs are subject to conditions of employment and minimum working standards established in the following eight legislative statutes: The Employment Act (Cap 226); the Regulation of Wages and Industrial Relations Act (Cap 236); the Factories and other Places of Work Act (Cap 514); the

National Hospital Insurance Act (Cap 225) and the National Social Security Fund Act (Cap 258).⁸⁸

The Foreign Investment Protection Act has inherent weaknesses in that it does not require potential foreign investors to have a track record of sound corporate responsibility or human rights conscious worker-employer relations. All that the prospective investor is required of is to establish an interest in investing in Kenya. Further, the implementation of the existing legal framework is weak and ineffective when dealing with MNCs thus there is a need to formulate regulations specifically dealing with MNC conduct and activity.

The government has encouraged collective bargaining as a policy in industrial relations and to this end several collective agreements have been entered into between MNCs, trade unions and sectoral employers in a bid to complement the existing legislation. Many MNCs are members of organized employer groups affiliated to the Federation of Kenya Employers (FKE), which negotiate with trade unions on the terms and conditions of work. The role of the FKE is to advocate, promote and defend the Kenyan employers on matters relating to their interests.

At the international level, there has been an increased attempt to find ways to formulate regulation for MNC. However in Kenya, MNC regulation is seen by lawmakers as unattractive and any attempts to establish regulatory mechanism as a catalyst for divestment by MNCs. MNCs are therefore left to run their own activities in accordance

⁸⁸ *ILO Working Paper No 91*, (International Labour Organization, Geneva 2002).

with their own company policies and the existing legislation and it may therefore be argued that the existing legislation does not adequately address the unique effects of MNCs. Human rights issues in this sense have been subjugated to the economic concerns; and issues concerning economic development have taken precedence over human rights concerns.

Government commitment to protect human rights was equivocal throughout the campaign. State organs such as the Registrar of Societies and Permanent Secretaries in the Ministry of Labour were utilized to condemn the involvement of civil society groups in the campaign and arguments were put forth that these groups were bent on causing economic destruction. No real commitment was seen from the government quarters in providing solutions to the Del Monte problem. In effect the State abandoned its international obligations to uphold, protect and promote the human rights of its workers and citizens.

The government's disinterest and apathy towards human rights issues generally aggravates the human rights problems created by MNCs. The campaign at Del Monte was prompted by this indifference by the concerned government agencies that opted to condemn the workers instead of finding solutions to the problem. The lack of an effective regulatory framework is clearly not the only factor that causes violations by MNCs; government commitment to human rights issues is also a key factor.

Kenya as a member of the International Labour Organization has agreed to respect the principles underlying these fundamental rights. Kenya has ratified seven of the eight core

labour standards conventions namely the Convention no. 89, 29 105,100,111,138 and 182. The country is yet to ratify convention no. 87 on freedom of association and protection of the right to organize⁸⁹.

MNCs are under intense scrutiny from the human rights activists around the world and due to the expansion of communications and technology it is unlikely that an MNC violating human rights or a state that cooperates with such corporations will go unnoticed. The state therefore needs to take the lead in ensuring that human rights standards are observed so as to block any loopholes that may be acted upon by NGOs leading to a flight of foreign investors as it is in government's interest that MNCs continue to invest.

That Kenya is a developing country in dire need for foreign investment has resulted in an outrageously open policy to all forms of foreign investment without any stringent restrictions. This has created leeway to the investors to carry on their business in a manner they please without fear of prosecution for any wrongdoing including human rights violations. Moreover the government has distanced itself from the activities of these corporations and totally ignores the allegations and evidence of human rights violations and as such the government fails in its international human rights obligations.

It must be noted that MNCs are not the only violators of human rights. It is worth noting that there are local enterprises that subject their workforce to worse working conditions. The government in a report to the ILO on the 1996-99 period submitted that MNCs

⁸⁹ International Labour Organization, *Ratification of the Fundamental Human Rights Conventions*, (International Labour Organization, Geneva, 2001)

observed standards of industrial relations that were not any less favorable than those applied by local employers and an ILO report showed that conditions in MNCs were generally better than those in local enterprises⁹⁰.

The Del Monte case illustrates that the power of corporations brings with it social responsibilities. It underlies the fact that issues of corporate social responsibility relate to the way in which companies interact with their employees and the local communities. Although Del Monte did in fact pay wages higher than local enterprises, these were still too low and could have made the conditions better. Eventually the corporation incurred hefty expenses and unexpected capital outlay that harmed its productivity. Although the campaign came to an end and conditions at the corporation have improved, profits remain low. This shows that corporate social responsibility is a necessity for any corporation that is determined to remain in business. Developing responsible corporate behaviour strategies limits expenses, maintains and improves employee and community relations, controls risk and promotes reputation which is a key component to the success of any corporation.

Due to the process of globalization, the protection and promotion of human rights from violation by influential and powerful non-state actors is in jeopardy. The growing presence and pressures of these global forces are gradually challenging the state's role in protecting human rights. The interdependent and joint powers of transnational enterprises are gaining strength and influence at the expense of the state such that these are weakening the role of the state in overseeing social rights and social welfare. Therefore there is need to find ways to bolster the role of the state and the participation of

⁹⁰ ILO Working Paper No 91, op cit.

governments in human rights discourse in relation to these powerful entities. Moreover there must be found ways to extend the borders of human rights in order for it to encompass MNCs.

The challenge of globalization brings with it new threats and new forms of human rights violations such as the increasing presence of MNCs which is challenging labour rights. Globalization has also generated new forms of advocacy such as transnational NGO campaigns that in the present case were successful in bringing Del Monte to the negotiating table.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

The power of MNCs has increased rapidly over the past two decades and has grown contemporaneously with the global expansion of the free market system. MNCs are purveyors of the contemporary world economy and the globalization of production is organized largely by these actors. Their participation in world output, trade, investment, technology transfer is unprecedented. Approximately 53,000 MNCs account for at least 20%-30% of global output and up to 70% of world trade. MNCs business networks have linked the developed and developing economies and have played a major role in organizing extensive and intensive transnational networks of coordinated production and distribution that are unique. MNCs are therefore key actors in the organization and distribution of productive power in the contemporary global economy.

The pressure from international multilateral institutions such as the International Monetary Fund and the World Bank have led developing countries to deregulate markets thereby making it easier for MNCs to penetrate these economies. This international mobility has resulted in the so-called “race to the bottom” whereby MNCs invest in countries with the lowest cost of production and lenient regulatory standards in the areas of human rights and environmental standards.

In an increasingly globalized world economy, MNCs decisions and actions impact directly on governmental policies and the enjoyment of human rights. MNCs are powerful international agents capable of human rights abuse. The globalization of

economics has led to the increased growth of the power of MNCs that is augmented by the international trade laws that give MNCs more rights and no enforceable duties. Moreover, linkages between human rights, trade and the labour movement and activities of MNCs are more evident. However, the absence of regulation of investment has led to the undermining of human rights and exacerbation of conflict between MNCs and developing countries.

MNCs have both a legal and moral responsibility to respect human rights and to use their influence to promote the respect of human rights. This clearly neither amounts to an interference of domestic politics nor is it offensive to the values of the particular culture or society. Several international covenants and agreements testify that the promotion of human rights transcends national boundaries. Kenya being a signatory to various human rights treaties and conventions has an obligation under international law to ensure that human rights are upheld within its territorial jurisdiction. Thus the issues for the government's consideration are; firstly, how to ensure that MNC activity is consistent with human rights and secondly, how to ensure accountability for human rights from these corporations.

In principle, human rights obligations are imposed on all states requiring them to use all available means to ensure that actors subject to their jurisdiction comply with national legislation that prescribes respect for human rights. However, in practice as evidenced from the Kenya government's reaction to the violations by Cirio Del Monte, governments are reluctant to take measures to ensure compliance by MNCs especially on labour issues.

The implementation and enforcement of such measures is costly and beyond the capabilities of most developing countries. Competition among potential host countries for foreign investment discourages any move that may result in high labour costs thus making country less attractive than those with lower regulatory standards. Furthermore, it is difficult to establish who is responsible for what activities and where due to the complex MNC structure of manufacture and production. Another contentious issue relates to what the minimum acceptable standards are especially in labour issues.

The challenges the government faced in Del Monte are typical of those experienced by developing countries when dealing with MNCs. The government reaction seesawed from inaction and denial to utter condemnation of groups that attempted to find a solution to the problem. Clearly the government has no coherent policy on the regulation of MNC conduct. The government has serious conflicting interests if it tried to act on behalf of victims or to develop laws that hold MNCs accountable while at the same time trying to attract foreign investment. Since the regulation of MNCs has enormous economic and political implications such as condemnation from the developed countries and foreign investor flight.

In the liberalized global system self-sufficiency is difficult to achieve and developing countries have difficulty in developing their economies without some kind of inward investment. Kenya needs to attract foreign investment that supports domestic development and it is therefore argued that national regulation must play a key role if investment is to bring tangible benefits to the country. Therefore the challenge for the

government is to design a mechanism that can deal with the MNC operations without undermining foreign direct investment which is key to economic development. This paper recommends that the government adopt a combination of corporate self-regulation and State regulation as a way to keep MNC activity within acceptable human rights standards.

Self-regulation: Corporate codes of conduct

It is proposed that the Kenya government encourages self-regulation where corporations come up with corporate and industry-based codes of conduct. Corporate codes are essentially individual corporation policy statements that define a company's own ethical standards. There ought to be minimum core standards for corporate behaviour and these standards would cover the areas of basic human rights, working conditions, equality in employment, the environment, consumer protection, local communities, business practice and sovereignty. These codes merely create a moral obligation but can be given legal force through enactment into contracts.

Self-regulation is a trend that developed since the early 1990s when many companies chose to adopt their own voluntary codes of conduct. Since then numerous codes have been adopted in the wake of consumer criticism in the developed countries thus being an indication that corporations are beginning to take human rights issues seriously. Self-regulation is a recent and rare practice in developed countries.

In developing codes of conduct the government must ensure that these codes contain at a minimum the core ILO standards and national laws and must contain commitments to recognition of rights to organize and collective bargaining.

Principles that guide the formulation of codes of conduct should emphasize that MNCs should take responsibility for promoting and upholding human rights standards and be responsible for their own activities and those of all third parties that act on their behalf. In fulfilling this role MNCs need to develop company policy on human rights, provide training to their management in association of non-governmental organizations, establish a framework for assessing potential impact on human rights of all their subsidiaries and sub-contractor operations. As regards implementation and monitoring MNCs should establish credible monitoring system and independent verification of reports and procedure. NGOs, local community groups and trade unions need to be involved in monitoring human rights compliance.

Agreements between companies in a particular industry could be encouraged. Such agreements would contain workplace codes of conduct addressing key areas such as child labour, forced labour, discrimination, harassment, hours of work, overtime, pay, wages, health, safety and freedom of association. Principles of monitoring include an internal monitoring system that includes establishing workplace standards, creating programs to train company monitors, dissemination of standards within the workplace, conducting periodic audits to ensure compliance, developing relationships with local community religious groups and mode of redress.

Corporate codes of conduct cannot be deemed as a substitute for national legislation enacted and effectively implemented by the government. Furthermore, corporate codes are not substitutes for the right of workers to organize or bargain collectively with their employers.

Human rights compliance is good for business. Long term benefits accruing to human rights compliant corporations include effective risk management, efficiency, avoidance of litigation, shareholder confidence, enhanced reputation and public goodwill. Enormous financial losses can be incurred when unethical operations result in labour strikes, bad publicity and community uprising as witnessed at Del Monte.

The pitfall of corporate codes lies in the fact that their effect may become counterproductive such that it harms those it was intended to assist. Most codes of conduct are a public relations exercise as no actual action is taken and majority are not effectively policed and lack an effective enforcement and independent monitoring mechanism. By their very nature codes of conduct only bind corporations that implemented them and therefore cannot bind other corporations in the same industry. Thus codes cannot adequately ensure actual MNC accountability.

Due to the foregoing shortcomings, the government cannot rely upon self-regulation entirely as a primary means of ensuring that MNCs respect human rights. Although minimum standards may prevent abuse they do not address or solve the fundamental problem of the power imbalance between the corporations and developing countries. However one should hope that the adoption of codes of conduct will act as a catalyst in

pressurizing the government to examine new mechanisms for human rights enforcement

Regulation by host country

Some corporations may prove to be incapable of governing themselves thus a framework of rules is required at the national level. A legislative framework to check abusive MNC activity is required. A revision of Kenyan labour laws to incorporate human rights responsibilities for local and foreign companies will go along way in creating an appropriate regulatory mechanism.

It is necessary to acknowledge that MNCs are often more powerful than developing states and may use their economic muscle to restrict domestic sanction such a termination of business or threats to divest from a particular state. In this way, MNCs tend to abuse their economic power by dissuading vulnerable states from establishing regulatory regimes.

Moreover, many developing countries lack technical expertise to monitor and regulate corporate activities for example to decide whether a corporation's safety precautions at a manufacturing plant are satisfactory. The lack of a suitable legal machinery for example; resources to undergo a complex discovery of documents to unravel the corporate veil that may shield a powerful parent company behind an asset-poor local subsidiary. Since MNCs have potential to translate their economic power into potentially huge political power thus it is unrealistic to expect MNCs human rights accountability to emanate exclusively from states. Regulation by home states is probably the more effective mode of regulation as home states are developed countries that are able to match MNC power.

Informal monitoring

NGO pressure has produced tangible positive results in making MNCs change their behaviour as witnessed at Del Monte Kenya and is one of the best ways to encourage respect for human rights. However monitoring systems by NGOs should not be allowed to negate the role of the democratically elected union structures in the MNCs concerned and the role of the state in human rights enforcement.

International regulation of MNCs

Given the global nature of MNCs, global regulation is necessary. MNCs are bypassing national laws by relocating to countries that have lower human rights standards or that have lowered restrictions in order to attract investment. Imposing direct obligations in international law on MNCs would therefore be an effective mode of ensuring human rights observance. Extending horizontal obligations to home states in order to hold them liable for offshore activities of their MNCs would immensely improve MNC accountability.

However, so far international negotiations have failed to produce a binding code at the United Nations in favour of moves for a global market. The existing international codes of conduct for MNCs are the ILO guidelines on multinational enterprises and social policy and the OECD guidelines. These have been grossly ineffective in deterring MNC abuse as they are non-binding. Moreover, these codes are inherently defective in that they envisage the primacy of national laws which is not workable when host state regulation is in itself deficient. Recent trends in the global economy indicate that the world is moving

to deregulation and the breaking down of all legislative and regulatory barriers that serve to restrict the free flow of capital. This, coupled with the lack of political will to impose restrictions on the activities of MNCs especially by the developed states means that international regulation of MNC activity may not be forthcoming in the near future. This leaves the state with the primary responsibility of playing a leading role in regulating the MNCs.

Increased human rights awareness in Kenya has placed corporations under sharper public scrutiny such that some corporations such as Del Monte Kenya Limited have developed policies that address issues relating to environment and human rights. MNCs must be regulated in the interest of the local people so that they eventually become the servant, rather than masters of the people.

Further recommendations

- It is proposed that all investor agreements contain human rights and environmental clauses requiring the investor to observe specified standards in the conduct of its business operations in Kenya. These core standards shall be based on international standards and shall cover the areas of basic human rights, working conditions, equality in employment, consumer protection, the environment, and local communities, business practices and sovereignty. In effect these core standards shall augment the governments' efforts in pursuing its development strategies. A transgression of these conditions would be penalized through loss of privileges.
- Selective vetting of investors by the Investment Promotion Center should be exercised. The Center should register corporations with a sound record in employee, consumer and environmental safety such as SA 8000 accredited corporations. A

human rights criterion should be included in the vetting exercise.

- It is suggested that policymakers endeavor to ensure that National Development strategies target investment that meets local and national priorities and that provides research, training, development and technology transfer.
- The government must recognize the role of civil society and endeavor to work in conjunction with these groups. The involvement of civil society in advocacy and negotiations in instances of human rights problems is instrumental in exploring viable solutions.
- The scope of industrial relations tripartite arrangement ought to be expanded to include civil organizations representing affected groups such as local communities affected by MNC activity and inadequately represented workers, as was the case at Del Monte. The current arrangement is grossly inadequate as it considers workers welfare as the exclusive domain of trade unions, employers and the state.
- A strong and independent trade union movement is required.
- The promotion of local democracy ought to be encouraged as it augments the state's efforts to observe human rights. A vibrant electorate also keeps the government on its toes.
- Kenya must support the multilateral negotiations that seek to set up an international framework restricting the activities of MNCs. In demonstrating its commitment, Kenya ought to ratify International Labour Organization Convention No. 69 on freedom of association and collective bargaining.
- Human rights implementation measures must be strengthened.

Conclusion

This paper establishes that Kenya's increased clamour and rush for foreign direct investment has greatly inhibited its capacity to check human rights abuses by investors, particularly multinational corporations. Pursuant to the prevailing liberal investment policy, the government has completely kept away from controlling or regulating investor activity thereby creating a precarious scenario where MNCs are not accountable to the host state for their activities. Government inaction to establish any form of accountability mechanisms for MNCs has in certain instances had negative impact on the promotion of human rights as witnessed by the grave violations of human rights by Cirio Del Monte Kenya. Indeed, it is evident that multinational corporations if left to their whim are capable of gross human rights violations.

The Kenyan government's fear of divestment and foreign investor displeasure is overly exaggerated to an extent that it has become completely docile and indifferent to the negative effects of foreign investor activities. However, it has been argued that this fear is unfounded and the State can take proactive measures without necessarily leading to foreign investor flight to ensure that MNCs act responsibly.

Furthermore, despite the unequal power balance between multinational corporations and developing countries the government can adopt and encourage corporate self-regulations that ensure that certain minimum human rights standards are incorporated in the multinational corporations' agenda.

Strong political will is required to ensure that the state carries out its non-delegable duty

of promoting human rights compliance, keeping in mind that, in the long run, the observance of human rights may lead to a stable and conducive economic environment for trade and investment.

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