The Impact of Corruption on Foreign Direct Investment in Kenya: Trends and Legal Solutions

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ABSTRACT

Corruption significantly hampers foreign direct investment (FDI) in Kenya, despite the government's attempts to address it. This paper examines the impact of corruption on FDI in Kenya, highlighting the trends, legal framework, and effectiveness of anti-corruption strategies. The study finds that corruption has a negative impact on FDI, and that the legal framework in place is robust but ineffective due to political interference, inadequate resources, and lack of independence among anti-corruption bodies. Notably, corruption often originates within government structures and involves government officials, further complicating anti-corruption efforts. The paper recommends a multi-faceted approach to combating corruption, including securing independence for anti-corruption bodies, allocating adequate resources, building a culture of transparency, and increasing cooperation between stakeholders. By addressing corruption, Kenya can attract more FDI, promote economic growth, and achieve sustainable development

INTRODUCTION

Corruption remains a significant challenge in Kenya, as in Sub Saharan Africa. Despite various anti-corruption strategies over the years, the issue persists. It has negatively impacted various sectors including socio-economic transformation, freedom, fundamental rights and the national security.[1] Foreign Direct investment is among the sectors critically affected by corruption. International corporations often establish themselves through various means in Kenya including joint ventures, acquisition of Kenyan companies, creation of a new wholly owned subsidiary or the operation of a business in Kenya.[2] Such investments are essential in enhancing economic growth in developing countries such as Kenya. Improvements such as enhanced skills, better technology, trade efficiency, increased capital, linkages for small and medium enterprises and increasing markets for supply are some of the key benefits

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1 *Jayalo, Okore Jack*. Strengthening the Regulatory and Institutional Framework in Kenya to Curb Corruption in Foreign Direct Investment. MS thesis. University of Pretoria (South Africa), 2021.

2 *Moran, Theodore*. Foreign direct investment. The Wiley-Blackwell Encyclopedia of Globalization, 2012, pp. 1–9.

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of foreign direct investment.[3] Kenya has failed to harness these benefits to a great extent due to the incessant corrupt practices witnessed within the FDI. Corruption is a global challenge, however, for developing countries it has a colossal negative impact. Any gains from FDI crucial for national development projects often find their way to private pockets.[4]

While corruption generally impedes reaping the benefits of FDI, some studies such as Quazi, Vemuri & Soliman (2014) through the *helping hand hypothesis* suggests that corruption enhances FDI inflows within the continent.[5] Since the regulatory framework on corruption in Africa is largely weak, it facilitates Foreign Direct Investment by greasing the wheels of commerce.[6] However, this should not be viewed in an isolated manner since other factors including economic freedom, infrastructure, effective governance, and market size among others also impact FDI.[7] Contrastingly, Guha et al., (2020) states that corruption in developing countries essentially muddles implementing policies instituted to attract FDI.[8] Such disruption of policies is likely to lower FDI inflows. However, countries that had an annual GDP growth of more than 6 % experienced an increased inflow of FDI even where there was corruption. International companies were willing to turn a blind eye to corruption where there was a high economic growth rate.[9]

Shakib H. (2016) diagnoses trends outside and within the continent and concludes that with a 1 % decrease in corruption, countries increase FDI inflows by up to 12 %.[10] Apart from this, Thede & Karpaty (2023) find that foreign investors who had operated in corrupt systems often find it easy to mitigate the effects of corruption in a new corrupt environment.[11] As such, corruption will not hinder the entry of multinational companies having past corruption experiences.[12] The above variances, however, have little impact on the over-

3 *Ateng, Benson, and Robert Arunga*. "Constraints to Foreign Direct Investment Inflows To Kenya: Stakeholders'perspective." International Journal Of Education And Research 5, No. 10 (2017): 1–10.

4 Jayalo (n1).

5 *Cheung, Yan-Leung, Raghavendra Rau, and Aris Stouraitis*. "The Helping Hand, The Lazy Hand, Or The Grabbing Hand? Government Shareholders in Publicly Listed Firms In China." (2007).

6 *Quazi, Rahim, Vijay Vemuri, and Mostafa Soliman*. "Impact of corruption on foreign direct investment in Africa." *International Business Research* 7, no. 4 (2014): 1.

7 Ibid.

8 *Guha, Sanjib, Niazur Rahim, Bhagaban Panigrahi, and Anh D. Ngo*. "Does corruption act as a deterrent to foreign direct investment in developing countries?" Organizations and Markets in Emerging Economies 11, no. 1 (2020): 18–34.

9 Ibid.

10 *Hossain, Shakib*. "Foreign direct investment (FDI) and corruption: Is it a major hindrance for encouraging inward FDI?" African Journal of Business Management 10, no. 10 (2016): 256–269.

11 *Thede, Susanna, and Patrik Karpaty*. "Effects of corruption on foreign direct investment: Evidence from Swedish multinational enterprises." Journal of Comparative Economics 51, no. 1 (2023): 348–371.

12 Ibid.

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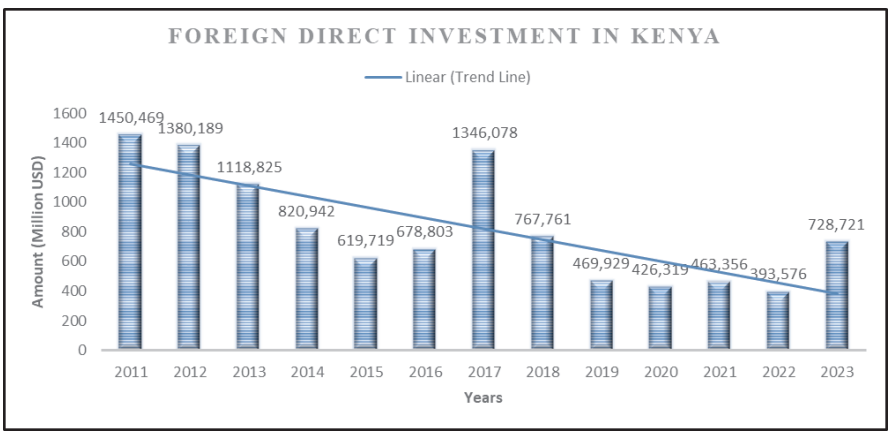
all impact of corruption. As a general rule, which is the argument established in this paper, corruption hinders inflows of foreign direct investment.

TRENDS IN FOREIGN DIRECT INVESTMENT IN KENYA.

Despite varying perspectives in the literature, it is true to state, that the high levels of corruption essentially discourage investment in any country, and Kenya is not immune. Investors coming to Kenya constantly worry that they will have to bribe authorities to invest.[13] In 2023, Kenya was ranked at number 126 out of 180 countries on corruption by Transparency International and behind Tanzania and Rwanda, which were at number 49 and 87 respectively.[14] Foreign Direct Investment has steadily reduced in Kenya over the years from 1450 million dollars in 2011 to 393 million dollars in 2022.[15] The only positive trend was in 2017 when FDI incrased to 1346 million dollars.[16] Part of this trend is due to corruption in the country.



Foreign Direct Investment in Kenya, Source: (www.CEICdata.com, CEIC 2024)

13 *Njiriani Margaret*. 'Foreign Investors cite Corruption as Major Roadblock to the Region Markets' The East African, Business, East Africa, 2019. Available at: https://www.theeastafrican.co.ke/tea/business/foreign-investors-cite-corruption-as-major-roadblock-to-theregion-markets-1413274. (Accessed 17 June 2024).

14 *Transparency International*. Corruption Perceptions Index: Explore the Results. Transparency.org. 2024. Available at: https://www.transparency.org/en/cpi/2023 (Accessed 16 June 2024).

15 *CEICdata.com*. Kenya Foreign Direct Investment. CEIC. 2018 Available at: https://www.ceicdata.com/en/indicator/kenya/foreign-direct-investment.

16 Ibid.

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According to the World Investment Report, Kenya's FDI was 1.3 billion dollars in 2012.[17] This was a drop of 18 % from the previous year.[18] Surprisingly, this happened despite Kenya revising its taxation laws entailing exemptions for FDI and introduction of new information technology projects.[19]A survey undertaken by the World Bank from January 2013 to September 2017 found that nearly to 30 % of businesses in Kenya, including foreign investment businesses, were limited to issuing bribes to government officials if they needed things such as licenses and other services.[20]

Kenya has always been open to Foreign Direct Investment (FDI) and is often referred to as the business hub of East Africa. Numerous foreign companies which operate in Africa have a base in Nairobi. A research done in 2017 placed Kenya second to Morocco in terms of attracting foreign investors.[21] Several factors, including human development, economic diversification, logistics, infrastructure, business environment, market size and resilience within the macroeconomic environment were considered to arrive at these rankings.[22] According to the World Investment Report 2017 by the United Nations Conference on Trade and Development (UNCTAD), FDI inflows into Kenya were at about $ 672 million. This was attributed to the enhancement of the information, communications and technology within the country.[23] Most of these investment came from South Africa and the Netherlands.[24] Another data from Kenya National Bureau of Standards in 2015 indicates Kenya's highest sources of FDI included Mauritius, China, the United States, France and the United Kingdom.[25] These foreign investors were mainly placed in sectors such as tourism, oil and gas, horticulture and infrastructure among others.[26]

Kenya took various legal and policy measures to enhance Direct Foreign Investment inflows rate. In 2013 and 2015, it enacted the Public Private Partnerships Act and the Business Registration Services Act easing the registration process for foreign investments.

17 Ibid.

18 *UNCTAD* "World Investment Report, 2020: International Production beyond the Pandemic." UNCDTA, 2020. p.34. Available at: https://unctad.org/system/files/official document/wir2020_en.pdf (accessed 20 June 2024).

19 Ibid, p101.

20 *Shipley, Thomas*. Integrity risks for international businesses in Kenya. Transparency International. 2022.

21 *Ernst & Young*. Africa Attractiveness Index. 2017.

22 *Shipley* (n20).

23 Ibid, p7.

24 *Santander*. "Kenya: Foreign Investment." 2018 Available at: https://en.portal.santandertrade.com/establishoverseas/kenya/investing.

25 *Kenya National Bureau of Statistics*. Foreign Investment Survey 2016 Report. U4 Anti-Corruption Helpdesk Integrity risks for international businesses in Kenya 19, 2017 https://www.knbs.or.ke/foreign-investmentsurvey-2016-report/.

26 Ibid.

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Later, in 2017, more investment-friendly policies were enacted to improve FDI.[27]Despite these seemingly positive changes, Kenya's attraction for FDI slowly declined. The rate of FDI was comparatively lower than the country's GDP.[28] Particularly, in 2017, Kenyan rates of FDI came second in East Africa despite it being the biggest economy in the East African region.[29] Other factors such as violent electoral cycles and corruption still greatly deter investment.[30] The trend had not improved by 2023.

LEGAL FRAMEWORK ON CORRUPTION IN FOREIGN DIRECT INVESTMENT

Kenya's legal framework is robust on both corruption and how it affects FDI. The country has employed significant measures to reduce corruption and ensure that it does not affect the gains of FDI. The legality of the conduct of investors is receiving increased scrutiny. Kenya, like many host states holds the view that numerous cases of bribery and corruption often taint the lifetime of any FDI.[31] These include violation of good faith, international investment protection, deceitful conduct and misuse of the policy system, among other practices.[32] These violations necessitate viewing corruption from an investment law perspective, despite the challenges in integrating anti-corruption policies from this investment-centered approach.[33] Over the years, a multidisciplinary and multi-agency approach has been employed to tackle this challenge. Kenya has ratified numerous international and regional conventions whose objectives seek to eradicate corruption including the United Nations Convention against Transnational Organized Crimes[34], the United Nations Convention against Corruption,[35] the African Union Convention on Prevention and Combating

27 *Shipley Thomas*. Integrity risks for international businesses in Kenya. Transparency International. 2022.

28 *Santander*. "Kenya: Foreign Investment." 2018 Available at: https://en.portal.santandertrade.com/establishoverseas/kenya/investing.

29 Ibid.

30 *Shipley, T*. (n27) p. 7.

31 *Aloysius L. & Anthony S*. "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct", in Albert Jan van den Berg (eds) "Legitimacy: Myths, Realities, Challenges," ICCA Congress Series (2005) 18 Kluwer Law International at 451.

32 *Jayalo* (n1) p.14.

33 Ibid.

34 UN General Assembly, United Nations Convention against Transnational Organized Crime : resolution / adopted by the General Assembly, A/RES/55/25, 8 January 2001, https://www.refworld.org/legal/resolution/unga/2001/en/39663 [accessed 20 August 2024].

35 UN General Assembly, United Nations Convention Against Corruption, A/58/422, 31 October 2003, https://www.refworld.org/legal/agreements/unga/2003/en/21418 [accessed 28 August 2024].

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Corruption.[36] At the national level there exist the 2010 Kenyan Constitution, Anti-corruption and Economic Crimes Act 2003[37] and its regulations, the Anti-Bribery Act 2016 and its regulations,[38] and the Proceeds of Crime and Anti-Money Laundering Act (cap 59) and its regulations.[39] These are the major statutes that seek to reduce corruption in every sector including FDI sectors.[40]

Domestic Legislation in Kenya

The Constitution of Kenya 2010

The constitution as the supreme law of the land takes precedence above all other laws of the country.[41] *Article 10* of the constitution entails the principles of good governance and national values, while *Chapter 6* of the constitution advocates for good leadership and integrity. *Article 79* of the same constitution instructs the legislature to create an Ethic and Anti-Corruption Commission to fight corruption.[42]*Article 75* prohibits public officers from mixing public duties with individual interests. In case of such conflict the constitution prescribes the removal or dismissal of the officer.[43] Principles such as accountability and transparency are crucial for effective financial management.[44]

The Anti-Corruption and Economic Crimes Act

This Act under *Section 44* prohibits bid rigging. Under *Section 46*, the Act prohibits use of a public office for personal benefit. *Sections 61A, 62 and 64* speak to execution against, suspension and disqualification of corrupt officials.[45] *Section 54* speaks to the compensation orders against corrupt persons and officials. *Sections 51 and 52* of the Act provides for compensation to an aggrieved person by the corrupt person and liability for receiving improper benefits and proceeds of corruption respectively.[46] *Section 41* criminalizes deceiving the principal, *Section 42* shuns having a conflict of interest between private

36 African Union, African Union Convention on Preventing and Combating Corruption, 11 July 2003, https://www.refworld.org/legal/agreements/au/2003/en/63979 [accessed 28 August 2024].

37 Anti-corruption and Economic Crimes Act No 3 of 2003, Cap 65 [Revised 2023].

38 Anti-Bribery Act No 47 of 2016, Cap 79B [Revised 2023].

39 Proceeds of Crime and Anti-Money Laundering Act [Cap 59A].

40 *Jayalo* (n1) p.16.

41 Ibid.

42 The Constitution of Kenya 2010, Article 6, 10 & 29.

43 Ibid, Art 75.

44 *Jayalo* (n1) p17.

45 Anti-corruption and Economic Crimes Act No 3 of 2003, Cap 65 [Revised 2023], art 44, 46, 61A, 62, 64.

46 Anti-corruption and Economic Crimes Act No 3 of 2003, Cap 65 [Revised 2023], s. 51, 52, & 54.

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interest and role as an agent. *Section 47A and 48* seeks to punish attempts of corruption and conspiracies on the same, and the appropriate penalties which is a fine not exceeding one million Kenyan Shillings or a jail term of not more than 10 years.[47] These sections when applied to corruption within the FDI sector can contribute significantly towards enhancing FDI inflows into the country.[48]

The Proceeds of Crime and Anti-Money Laundering Act

The act under *section 3 and 4* prohibits money laundering and dealing on proceeds of crime. Misrepresentation of any sought is also prohibited under *section 9* of the act. *Section 44* requires that a reporting institution should monitor all forms of transactions and gives the obligation of due diligence on any business relationship under section 45 of the act.[49] Any persons liable for offences under the act shall have their property confiscated, seized, or appointment of a receiver on the proceeds in accordance with *Section 61, 71 and 77* of the Act.[50] Other tools such as production orders and search warrants can be used as indicated under *sections 103 and 107* of the Act. Under section 115, Kenya may make a request to other countries for help and cooperation in combating corruption, money laundering and other economic crimes.[51] These sections apply directly to FDI and can be used to tremendously reduce the extent of corruption within the sector. For increased FDI inflows there has to be a very robust implementation framework and institutions that work well.

The Anti-Bribery Act

The act under *section 5 and 6* criminalizes issuing or receiving of bribes for any financial advantage. *Section 8* of the Act is specific on criminalizing bribery on the part of public officials. *Section 10* prohibits bribery on the part of private entities. Any activity that would assist bribery is also prohibited under *section 13* of the Act.[52] *Part IV* of the Act further provides for additional provisions on offences including on the part of corporate bodies and partnerships.[53] *Part V* of the act focuses on the penalties which among others include jail term of less than 10 years and/or fine not exceeding five million shillings. Whistleblowers and witnesses are also protected under *section 21* of the Act.[54]

47 Anti-corruption and Economic Crimes Act No 3 of 2003, Cap 65 [Revised 2023] s. 41, 42, 47A & 48.

48 *Jayalo* (n1) p17.

49 Proceeds of Crime and Anti-Money Laundering Act [Cap 59A], s. 3, 4, 9 & 44.

50 Ibid, s. 61, 71, & 77.

51 Ibid, s. 103, 107 & 115.

52 Anti-Bribery Act 2016, Cap 79B [Revised 2023].

53 Ibid, Part IV.

54 Ibid, Part V; s 21.

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The Ethics and Anti-Corruption Commission Act

It establishes the Ethics and Anti-Corruption commission which is a statutory body mandated to promote and develop best practices and standards on integrity and anti-corruption as stipulated under section 11 of the Act. Under the same section, the commission is mandated to recommend and investigate to the DPP any economic crimes, bribery and acts of corruption and any violations of codes of ethics.[55]

The National Intelligence Service Act

The Act under *section 3* establishes the principle of preventing corruption and promoting accountability and transparency as a guiding principle.

Public Procurement and Asset Disposal Act

This Act under *Section 62* makes a declaration that any quotation, proposal and tender submitted shall entail a declaration for no fraud or corruption. If any is detected then they shall be excluded from the procurement proceedings.

Foreign Investments Protection Act

This Act under *section 8* protects foreign investments from compulsory acquisition by any authority except in accordance with the law. As a result, no public officer will be able to intimidate and compulsorily acquire such investment with intentions to defraud them.[56] The Act further provides protections to foreign investments against any other person or public authority. These provisions may be applied in case of unfair circumstances imposed by any party to the detriment of the investors.

Investment Promotion Act

This Act provides for the revocation of an investment certificate under *section 10* where such certificate is obtained through fraud.[57] Similarly, it creates the Kenya Investment Authority under *section 14* and a board or authority under *section 16*. The members of these bodies are removed in case they are found liable for corruption.[58]

55 Ethics and Anti-Corruption Commission Act [Cap 7H], Laws of Kenya, s 11.
56 Foreign Investment Protection Act [Cap 518], Laws of Kenya, s 8.
57 Investment Promotion Act [Cap 485], Laws of Kenya, s 10, 14 & 16.
58 Ibid.

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Foreign Judgements (Reciprocal Enforcement) Act

This Act allows for the enforcement of foreign judgements in Kenya. *Section 2* of the Act defines an original court to include an actual court, arbitral tribunal or an arbitrator. Similarly, designated courts refer to courts within the commonwealth, or those that are certified and approved by the cabinet secretary as such.[59] FDI involves foreign investors and the jurisdiction of court during dispute settlement might be in foreign countries. This Act gives such foreign judgements enforceability and execution capabilities in Kenya. The only exception to enforceability is where such judgements are obtained through fraud as stipulated under *section 10*.[60]

International Legal Instruments

Kenya is a signatory to several international and regional instruments. It, therefore, has to fulfill the obligations as indicated in the instruments especially on combating corruption which will in turn promote FDI within the country.

The United Nations Convention against Transnational Organized Crime (UNCTOC)

This convention seeks to enhance the combating and prevention of transnational organised crimes. States are obligated to put administrative and legislative measures in place to prohibit corruption on the part of public officials. Under *article 9* of the convention authorities should be granted adequate independence to ensure that they undertake to combat corruption.[61] The Convention does not essentially speak to the investment sector but speaks to the conduct of public officers. However, corruption within FDI is mostly manifested by undermining and compromising these public officers.[62] Further, the convention obligates states to attach civil, criminal or administrative liability to public officials who are found liable. *Articles 10 and 11* ensure that parties liable are sanctioned and judicial bodies appreciate the gravity of corruption related crimes.[63] *Article 12* of the convention advocates for measures for confiscation, seizure, freezing, tracing and identification of corruption proceeds.[64] *Article 13* espouses for cooperation between states to combat transnational corruption and organised crimes. Such cooperation includes the sharing of appropriate

59 Foreign Judgements (Reciprocal Enforcement) Act [Cap 43], Laws of Kenya, s 2.

60 Ibid, s10.

61 *Jayalo* (n1) p. 19.

62 Ibid.

63 UN General Assembly (44th sess. : 1989–1990), International co-operation in combating organized crime : resolution / adopted by the General Assembly, A/RES/44/71, UN General Assembly, 8 December 1989, https://www.refworld.org/legal/resolution/unga/1989/en/5990 [accessed 21 June 2024].

64 Ibid, Art 12.

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information and sharing of legal assistance. With the application of these provisions, Kenya would significantly reduce the rates of corruption in FDI sectors and increase the gains from the sector. The dwindling trends on FDI will eventually gain momentum and increase within the coming years.[65]

The United Nations Convention against Corruption (UNCAC)

The convention seeks to enhance measures that exist to prevent corruption. One of its objectives is to increase technical assistance and fortify corporation internationally in combating corruption.[66] It also addresses the prosecution, investigation and prevention of corruption. States are encouraged to promote policies and institutions that would enhance the rule of law and influence good governance.[67] The principles of transparency and accountability are emphasized in the convention as measures of combating corruption. Strengthening judicial integrity and good record keeping of public expenditure and revenues are other measures that complement the principles.[68] Under *Article 12 and 14* of the convention, states are required to have effective auditing of both private and public sectors, and effectively monitor the transfer of money within and beyond their territorial borders.[69]

Regional Legal Instruments

The African Union Convention on Prevention and Combating Corruption

This convention portrays corruption as a hindrance to realizing cultural, economic, and social development. *Article 2* of the convention encourages the principles of accountability, social justice and transparency.[70] Further *Article 4* of the convention prohibits corruption among public officials in the form of seeking advantages as a result of an act or omission. *Article 5* requires states to enact legislations that would aid in reducing and eradicating corruption. Strict adherence to the law is expected from foreign companies operating within partner states' territories.[71] Numerous initiatives have been established to facilitate anti-bribery and enhance business strategy in Africa. One such initiative is the joint initiative by the African Development Bank (AfDB) and the Organization for Economic Cooperation

65 Ibid.

66 *Jayalo*. Strengthening the Regulatory and Institutional Framework in Kenya to Curb Corruption in Foreign Direct Investment (Master's thesis, University of Pretoria (South Africa). 2021. p. 17.

67 Ibid.

68 *Jayalo* (n66) p.18.

69 UN General Assembly, United Nations Convention Against Corruption, A/58/422, 31 October 2003, https://www.refworld.org/legal/agreements/unga/2003/en/21418 [accessed 21 June 2024].

70 African Union, African Union Convention on Preventing and Combating Corruption, 11 July 2003, https://www.refworld.org/legal/agreements/au/2003/en/63979 [accessed 21 June 2024].

71 Ibid, art 5.

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and Development.[72] The partnership seeks to involve public officials in the fight against corruption and bribery which will have a ripple effect in creating a good environment for FDI.[73]

EFFECTIVENESS OF ANTI-CORRUPTION STRATEGIES FOR ENHANCING FOREIGN DIRECT INVESTMENT IN KENYA

The strategies in place have produced noticeable results but have also failed to fulfill their intended purposes. Kenya's legal framework created several institutions including the Office of the Director of Public Prosecutions (DPP), the Directorate of Criminal Investigations (DCI) and the Ethics and Anti-Corruption Commission (EACC). These institutions were to eliminate and check the sources of corruption through investigating, preventing and providing credible evidence on corrupt individuals within the FDI sector.[74] The reality is that most anti-corruption cases by the EACC and the ODPP have targeted the low-profile public officers. Hitherto, there is no high-profile anti-corruption case on Foreign Direct Investment that has been successfully handled. A major disconnect is visible in the sense that Kenya has experienced some of the biggest corruption scandals in the past two decades including the National Youth Service Scandal, the Chicken Gate and Anglo-leasing, among other scandals.[75]

On this basis, the strategies that put in place to combat corruption are very ineffective. The war against corruption is muddled with a lot of politics. Persons affiliated with the executive arm often manage to escape sanctions within the criminal justice system. Additionally, this means that the institutions fighting corruption are not independent.[76] They are politically compromised and, hence, unable to undertake prosecution and investigation without considering the social and political status of the accused. The institution which essentially enforces and implement the robust legal framework is utterly ineffective by any means.

Drawing from the Kenya's corruption index rankings, a lot of corruption still exists within the public sector.[77] More foreign investors are losing trust in the country and

72 *Jayalo* (2021). *Strengthening the Regulatory and Institutional Framework in Kenya to Curb Corruption in Foreign Direct Investment* (Master's thesis, University of Pretoria (South Africa). p. 21.

73 Ibid.

74 *Transparency International Kenya.* Voter Bribery as an Election Malpractice in Kenya. A Survey Report. December 2016. Konrad-Adenauer-Stiftung, 2016 https://www.kas.de/c/document_library/get_file?uuid=9c202a56-d8cb-759c-6acd-76faebe788af&groupId=252038.

75 *Tyce, Matthew*. "The Kenyan National Treasury: A 'pocket of effectiveness' curtailed." 2020.

76 *Tsao, Yao Chun, and Shun Jen Hsueh*. "Can the country's perception of corruption change? Evidence of corruption perception index." Public Integrity 25, no. 4.2023. pp 415–427.

77 *Transparency International*. Corruption Perceptions Index. 2023. https://www.transparency.org/en/cpi/2023.

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rethinking their decision to come to Kenya or relocate from the country. More must be done to ensure that these corruption cases are limited and eliminated.

Apart from these, procedures and rules within the public institutions have encouraged and facilitated corruption within these institutions.[78] Many foreign investors and local business people are able to issue bribe to quicken the bureaucratic processes of establishment and operation within the country. With these sophisticated bureaucratic processes it is often quite hard to detect any corrupt practices within the FDI sector unless the officers plainly do them.[79] These institutions will continue to fall short in the implementation and enforcement of the anti-corruption policies due to cultural acceptance, protracted cases, glaring drawbacks and political interference.[80]

KENYAN CASE STUDIES ON CORRUPTION IN FOREIGN DIRECT INVESTMENT

a) Alleged Extortion of Tatu City Foreign Investors by Kiambu County Governor

Tatu City is a project developed and owned by one of Africa's largest city builders whose shareholders include Norway, the United States, the United Kingdom and New Zealand. In early July 2024, the developers of the project, through the Chief Operating Officer and Kenya's project head Preston Mendenhall, released a press statement condemning the actions of the Kiambu Govenor Kimani Wamatangi and his advisor who sought to extort Ksh 4.3 Million (USD 33 million) in land.[81] The investors claim that the governor held the approval of the new master plan for more than one year and a half. He sought to seize about 40 acres of land which would also include a space for the governor's residence. This delay and extortion has destroyed the investment climate in the country and harmed job creation since it cost the country about 4500 new jobs and Ksh 16 billion.[82] In reply, the governor indicated that the proposed plan sought to reduce land reserved for public amenities to 103 acres from 406 acres violating the 10 % legal requirement under the Physical and Land Use Planning Act 2019 and its regulations.[83]

78 *Tsao, Yao Chun, and Shun Jen Hsueh*. "Can the country's perception of corruption change? Evidence of corruption perception index." Public Integrity 25, no. 4 (2023): 415–427.

79 Ibid.

80 *Kinyanjui, Lucy Wanjiku*. "Effect of corruption on social welfare issues in the Kenyan economy." 2021.

81 Reporter, KahawaTungu, and KahawaTungu Reporter. "Tatu City Condemns Kiambu County Governor Over Extortion Claims." *KahawaTungu*, 11 July 2024, kahawatungu.com/tatu-city-condemns-kiambu-county-governor-over-extortion-claims.

82 Ibid.

83 *Reporter*. Kiambu Governor Wamatangi refutes Tatu City's allegations in land use dispute. Citizen Digital. 2024 https://citizen.digital/news/kiambu-governor-wamatangi-refutes-tatu-citys-allegations-in-land-use-dispute-n345705.

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b) Anglo Leasing Scandal in Kenya

This is probably one of the biggest corruption scandals to ever hit Kenya in the past two decades. Charges were brought against 13 people including Deepak Kamani and other former government officials. Others accused were British and American citizens. This indictment came after a collaboration between the Kenya Ethics and Anti-Corruption Commission and the Swiss authorities in investigating the scandal. At the center of the scandal were 18 alleged overpriced state security contracts. All these were made by domestic and foreign companies to the tune of about 33 million dollars. The individuals charged were seeking to defraud the government of this money.[84] All the suspects in the case have now been acquitted. The anti-corruption court in Nairobi indicated that the suspects had no case to answer and discharged them from the case.[85]

c) Controversial Bid to Operate Jomo Kenyatta International Airport (JKIA) by Adani Group

Experts advised the government to issue a public tender for JKIA expansion, however, the government clandestinely allowed a proposal to be initiated privately to undertake the expansion.[86] The Organized Crime and Corruption Reporting Project stated that the proposal was green-flagged to the project development stage where more negotiations and consultations were expected. The nature of this procurement raises questions about how a private proposal was considered for such a sensitive project. Previously, the government had been advised to issue a public form of bidding since it would maximise the value-for-money. Such deals done in secrecy and clandestinely manner perpetuate and encourage corruption.

CONCLUSION AND RECOMMENDATIONS ON THE LEGAL FRAMEWORK ON FOREIGN DIRECT INVESTMENT.

Kenya needs to take a multi-faceted legal strategy that encompasses all sectors including establishing a culture of integrity, protecting and empowering whistleblowers, and enhancing legal safeguards.[87] With adequate efforts to combat corruption, more accountability and

84 *Financial Times*. Kenya targets architects of Anglo Leasing corruption scandal. (n.d.). Financial Times. https://www.ft.com/content/bf75a7ee-c7f9-11e4-8210-00144feab7de.

85 *Kiplagat, Sam*. "Court Acquits Kamani, Magari and Others in Sh3.5bn Anglo Leasing Case." Nation, 14 July 2023, nation.africa/kenya/news/court-acquits-kamani-magari-and-others-in-sh3–5bn-anglo-leasing-case-4303262.

86 *Georgia Gee.* "Documents Reveal Details of Adani Group's Controversial Bid to Run Kenya's Largest Airport." OCCRP, 24 July 2024, www.occrp.org/en/scoop/documents-reveal-details-of-adani-groups-controversial-bid-to-run-kenyas-largest-airport. Accessed 20 Aug, 2024.

87 *Budsaratragoon, Pornanong, and Boonlert Jitmaneeroj*. "A critique on the Corruption Perceptions Index: An interdisciplinary approach." Socio-Economic Planning Sciences 70 (2020): 100768.

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transparency will be witnessed in society. At the same time, judicial bodies will be truly independent in their task of ensuring that FDI actors who violate anti-corruption laws are punished. Most of the institutions established to combat corruption are an appendage of the executive arm of government. As a result they do not possess the required nature of independence. It is from this premise that the recommendations arise.[88] They include;

1) Securing Independence of the Anti-Corruption Bodies

The executive arm of the government should secure the appropriate independence required by the Anti-corruption bodies to operate autonomously. Without independence, higher public officers can compromise them and allow corruption in FDI practices which would decrease their inflows.[89] The appropriate legal mechanism which can increase independence is to substitute the word 'secretary' under *section 2* of the Anti-Corruption and Economic Crimes act with the 'commission'.[90] This will ensure that the commissioners of the EACC have a direct control over the functions of the commission. The inclusion of the secretary to the commission was a brainchild of the influential public officers who sought to have influence on the EACC through mischief. Previously, the act provided for a 'Director'. As it is, the commissioners are expendable and not necessarily independent since with the existence of a Secretary of the commission as provided for under *section 16* of the Ethics and Anti-Corruption Act, the functions of the commission can be undertaken even in the absence of the commissioners.[91]

2) Adequate Resources for the Anti-Corruption Bodies

Adequate resources should be allocated to the anti-corruption bodies in relation to material and human resource to ensure that they undertake their duties effectively. With such resources, they can be able to investigate and prosecute any corruption within the Kenyan FDI efficiently.[92] The commission had proposed an amendment to the anti-graft laws that some of the funds recovered from corruption cases they have successfully handled should be used to support the commission's activities in case there is a budget deficit.

88 *Gilman, Stuart*. "To understand and to misunderstand how corruption is measured: Academic research and the corruption perception index." Public Integrity 20, no. sup1 (2018): S74-S88.

89 Ibid.

90 Anti-corruption and Economic Crimes Act No 3 of 2003, Cap 65 [Revised 2023], s 2.

91 *Tanui*. "Why EACC Needs Commissioners to Realise Its Mandate." Business Daily, 31 Dec. 2020, www.businessdailyafrica.com/bd/opinion-analysis/ideas-debate/why-eacc-needs-commissioners-to-realise-its-mandate-2086174.

92 *Kireri, J*. Analysis of Factors Influencing Implementation of Anticorruption Strategies by Ethics and Anti-Corruption Commission in Kenya (Doctoral dissertation), KeMU. 2022.

https://doi.org/10.5771/2363-6262-2024-4-505 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC

This proposed law would ensure that Anti-corruption bodies are adequately resourced for optimum results.[93]

3) Building a culture of Transparency through Digitalization of Government Transactions.

Kenyan public officers should build a culture of ethical governance, accountability, and transparency in all sectors including when facilitating FDI arrangements. One of the key legal reforms in this sector includes the recommendation by the government to digitalize all forms of public payments and transactions. The Public Procurement and Asset Disposal Act among other Anti-Corruption laws should include a mandatory requirement for digital transactions in government transactions. Digitalization essentially reduces corruption by limiting human interactions, enabling accountability, increasing transparency and reducing discretion. Similarly, digitalization will often leave digital footprints which can be followed during investigations.[94]

4) Increasing legal protection for Whistle blowers and encouraging Investigative Journalism

There is little protection given to whistleblowers and investigative journalists under the anti-corruption and economic crimes laws. In most instances, investigations by the anti-corruption bodies begin after a whistleblower has exposed a corruption scandal or when media houses and independent journalists have exposed such corruption.[95] Persons who undertake to expose such scandals are often in danger from the suspects who might feel threatened. The law should be very clear on the protections that such people are guaranteed as well as any benefits that might be attached to such exposure. Only in this manner will more people be encouraged to come out and report any clandestine corruption plots in FDI.

References

African Union, African Union Convention on Preventing and Combating Corruption, 11 July 2003, https://www.refworld.org/legal/agreements/au/2003/en/63979 [accessed 28 August 2024]

93 *Munene, Danvictor*. "EACC Pushes for Law Change to Use Recovered Funds to Meet Budget Needs." The Star, 14 May 2024, www.the-star.co.ke/news/realtime/2024-05-14-eacc-pushes-for-law-change-to-use-recovered-funds-to-meet-budget-needs.

94 *Carlos Santiso* "Digitalisation as an Anti-corruption Strategy: What Are the Integrity Dividends of Going Digital?" *Development Matters*, 11 Apr. 2022, oecd-development-matters.org/2021/08/04/digitalisation-as-an-anti-corruption-strategy-what-are-the-integrity-dividends-of-going-digital.

95 *Cooper-Millar, Jolyon*. Investigative Journalists and the Fight to Unearth the Corrupt | Centre for the Study of Corruption. 9 Nov. 2017, blogs.sussex.ac.uk/centre-for-the-study-of-corruption/2017/11/09/investigative-journalists-and-the-fight-to-unearth-the-corrupt/#:~:text=Investigative%20journalism%20is%20essential%20to%20anti-corruption%2C%20and%20is,factor%20to%20the%20improvement%20of%20the%20democratic%20system.

https://doi.org/10.5771/2363-6262-2024-4-505 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ND

Aloysius L. & Anthony S. "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct", in Albert Jan van den Berg (eds) "Legitimacy: Myths, Realities, Challenges," ICCA Congress Series (2005) 18 Kluwer Law International at 451.

Anti-Bribery Act 2016, Cap 79B [Revised 2023].

Anti-corruption and Economic Crimes Act No 3 of 2003, Cap 65 [Revised 2023].

Ateng, Benson, and Robert Arunga. "Constraints to Foreign Direct Investment Inflows To Kenya: Stakeholders'perspective." International Journal Of Education And Research 5, No. 10 (2017): 1–10.

Budsaratragoon, Pornanong, and Boonlert Jitmaneeroj. "A critique on the Corruption Perceptions Index: An interdisciplinary approach." Socio-Economic Planning Sciences 70 (2020): 100768.

Carlos Santiso "Digitalisation as an Anti-corruption Strategy: What Are the Integrity Dividends of Going Digital?" *Development Matters*, 11 Apr. 2022, oecd-development-matters.org/2021/08/04/digitalisation-as-an-anti-corruption-strategy-what-are-the-integrity-dividends-of-going-digital.

CEICdata.com. Kenya Foreign Direct Investment. CEIC. 2018 Available at: https://www.ceicdata.com/en/indicator/kenya/foreign-direct-investment

Cheung, Yan-Leung, Raghavendra Rau, and Aris Stouraitis. "The Helping Hand, The Lazy Hand, Or The Grabbing Hand? Government Shareholders in Publicly Listed Firms In China." (2007).

Cooper-Millar, Jolyon. Investigative Journalists and the Fight to Unearth the Corrupt | Centre for the Study of Corruption. 9 Nov. 2017, blogs.sussex.ac.uk/centre-for-the-study-of-corruption/2017/11/09/investigative-journalists-and-the-fight-to-unearth-the-corrupt/#:~:text=Investigative%20journalism%20is%20essential%20to%20anti-corruption%2C%20and%20is,factor%20to%20the%20improvement%20of%20the%20democratic%20system.

Ernst & Young. Africa Attractiveness Index. 2017

Ethics and Anti-Corruption Commision Act [Cap 7H], Laws of Kenya.

Financial Times. Kenya targets architects of Anglo Leasing corruption scandal. (n.d.). Financial Times. https://www.ft.com/content/bf75a7ee-c7f9-11e4-8210-00144feab7de

Foreign Investment Protection Act [Cap 518], Laws of Kenya

Foreign Judgements (Reciprocal Enforcement) Act [Cap 43]

Georgia Gee. "Documents Reveal Details of Adani Group's Controversial Bid to Run Kenya's Largest Airport." OCCRP, 24 July 2024, www.occrp.org/en/scoop/documents-reveal-details-of-adani-groups-controversial-bid-to-run-kenyas-largest-airport. Accessed 20 Aug, 2024.

Gilman, Stuart. "To understand and to misunderstand how corruption is measured: Academic research and the corruption perception index." Public Integrity 20, no. sup1 (2018): S74-S88..

Guha, Sanjib, Niazur Rahim, Bhagaban Panigrahi, and Anh D. Ngo. "Does corruption act as a deterrent to foreign direct investment in developing countries?" Organizations and Markets in Emerging Economies 11, no. 1 (2020): 18–34.

Hossain, Shakib. "Foreign direct investment (FDI) and corruption: Is it a major hindrance for encouraging inward FDI?" African Journal of Business Management 10, no. 10 (2016): 256–269.

https://doi.org/10.5771/2363-6262-2024-4-505 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC

Investment Promotion Act [Cap 485], Laws of Kenya

Jayalo, Okore Jack. Strengthening the Regulatory and Institutional Framework in Kenya to Curb Corruption in Foreign Direct Investment. MS thesis. University of Pretoria (South Africa), 2021.

Kenya National Bureau of Statistics. Foreign Investment Survey 2016 Report. U4 Anti-Corruption Helpdesk Integrity risks for international businesses in Kenya 19, 2017 https://www.knbs.or.ke/foreign-investmentsurvey-2016-report/

Kinyanjui, Lucy Wanjiku. "Effect of corruption on social welfare issues in the Kenyan economy." 2021.

Kiplagat, Sam. "Court Acquits Kamani, Magari and Others in Sh3.5bn Anglo Leasing Case." Nation, 14 July 2023, nation.africa/kenya/news/court-acquits-kamani-magari-and-others-in-sh3–5bn-anglo-leasing-case-4303262.

Kireri, J. Analysis of Factors Influencing Implementation of Anticorruption Strategies by Ethics and Anti-Corruption Commission in Kenya (Doctoral dissertation), KeMU. 2022

Moran, Theodore. Foreign direct investment. The Wiley-Blackwell Encyclopedia of Globalization, 2012, pp. 1–9.

Munene, Danvictor. "EACC Pushes for Law Change to Use Recovered Funds to Meet Budget Needs." The Star, 14 May 2024, www.the-star.co.ke/news/realtime/2024-05-14-eacc-pushes-for-law-change-to-use-recovered-funds-to-meet-budget-needs.

Njiriani Margaret. 'Foreign Investors cite Corruption as Major Roadblock to the Region Markets' The East African, Business, East Africa, 2019. Available at: https://www.theeastafrican.co.ke/tea/business/foreign-investors-cite-corruption-as-major-roadblock-to-theregion-markets-1413274. (Accessed 17 June 2024).

Proceeds of Crime and Anti-Money Laundering Act [Cap 59A].

Quazi, Rahim, Vijay Vemuri, and Mostafa Soliman. "Impact of corruption on foreign direct investment in Africa." *International Business Research* 7, no. 4 (2014): 1.

Reporter, KahawaTungu, and KahawaTungu Reporter. "Tatu City Condemns Kiambu County Governor Over Extortion Claims." KahawaTungu, 11 July 2024, kahawatungu.com/tatu-city-condemns-kiambu-county-governor-over-extortion-claims.

Reporter. Kiambu Governor Wamatangi refutes Tatu City's allegations in land use dispute. Citizen Digital. 2024 https://citizen.digital/news/kiambu-governor-wamatangi-refutes-tatu-citys-allegations-in-land-use-dispute-n345705.

Santander. "Kenya: Foreign Investment." 2018 Available at: https://en.portal.santandertrade.com/establishoverseas/kenya/investing

Shipley Thomas. Integrity risks for international businesses in Kenya. Transparency International. 2022.

Tanui. "Why EACC Needs Commissioners to Realise Its Mandate." Business Daily, 31 Dec. 2020, www.businessdailyafrica.com/bd/opinion-analysis/ideas-debate/why-eacc-needs-commissioners-to-realise-its-mandate-2086174.

The Constitution of Kenya 2010.

Thede, Susanna, and Patrik Karpaty. "Effects of corruption on foreign direct investment: Evidence from Swedish multinational enterprises." Journal of Comparative Economics 51, no. 1 (2023): 348–371.

https://doi.org/10.5771/2363-6262-2024-4-505 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC

Transparency International Kenya. Voter Bribery as an Election Malpractice in Kenya. A Survey Report. December 2016. Konrad-Adenauer-Stiftung, 2016 https://www.kas.de/c/document_library/get_file?uuid=9c202a56-d8cb-759c-6acd-76faebe788af&groupId=252038

Transparency International. Corruption Perceptions Index. 2023. https://www.transparency.org/en/cpi/2023

Transparency International. Corruption Perceptions Index: Explore the Results. Transparency.org. 2024. Available at: https://www.transparency.org/en/cpi/2023 (Accessed 16 June 2024).

Tsao, Yao Chun, and Shun Jen Hsueh. "Can the country's perception of corruption change? Evidence of corruption perception index." Public Integrity 25, no. 4.2023. pp 415–427.

Tyce, Matthew. "The Kenyan National Treasury: A 'pocket of effectiveness' curtailed." 2020.

UN General Assembly (44th sess. : 1989–1990), International co-operation in combating organized crime : resolution / adopted by the General Assembly, A/RES/44/71, UN General Assembly, 8 December 1989, https://www.refworld.org/legal/resolution/unga/1989/en/5990 [accessed 21 June 2024]

UN General Assembly, United Nations Convention Against Corruption, A/58/422, 31 October 2003, https://www.refworld.org/legal/agreements/unga/2003/en/21418 [accessed 21 June 2024]

UN General Assembly, United Nations Convention against Transnational Organized Crime: resolution / adopted by the General Assembly, A/RES/55/25, 8 January 2001, https://www.refworld.org/legal/resolution/unga/2001/en/39663 [accessed 20 August 2024]

UNCTAD "World Investment Report, 2020: International Production beyond the Pandemic." UNCD-TA, 2020. p. 34. Available at: https://unctad.org/system/files/official document/wir2020_en.pdf (accessed 20 June 2024).

https://doi.org/10.5771/2363-6262-2024-4-505 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-NC