UNIVERSITY OF PRETORIA
CENTER FOR HUMAN RIGHTS
INTERNATIONAL DEVELOPMENT LAW UNIT

MND 803: MINI-DISSERTATION

STRENGTHENING THE REGULATORY AND INSTITUTIONAL FRAMEWORK IN KENYA TO CURB CORRUPTION IN FOREIGN DIRECT INVESTMENT

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SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE MASTERS (LL.M) IN INTERNATIONAL TRADE AND INVESTMENT LAW IN AFRICA BY THE UNIVERSITY OF PRETORIA

To
Dr. Jonathan R. Kabre

2021

DECLARATION

I, OKORE J. JACK, do hereby declare that a Critical Analysis of the Effect of Corruption on Foreign Direct Investment in Kenya: Towards Strengthening the Regulatory and Institutional Framework is my original work and has not been submitted for any degree or examination in any other university or institution of higher learning. While I have relied on numerous sources and materials to develop the main argument presented in this dissertation, all the materials and sources used have been duly and properly acknowledged.

Supervisee:

Okore J. Jack

Signed.....

Date.....

Supervisor:

Dr. Jonathan R. Kabre

Signed.....

Date.....

DEDICATION

I dedicate this work to the people of Kenya who wish to see a corruption-free state.

ACKNOWLEDGEMENT

I acknowledge the Almighty God for giving me health and strength to toil and see this work to completion.

To my supervisor, Dr. Jonathan R. Kabre, I am thankful for your patience and sacrifice. You helped me panel beat my ideas into a researchable conception. God bless you.

To Prof. Tom Ojienda SC, Dr. Charles Chinedu Okeahalam and Eng. Owino Churchill, I remain forever grateful for your financial support. May you never lack.

To the might TILA Class of 2021, the struggle has been real but I remain grateful for the moments we shared. It was a pleasure to serve you. Go and conquer the World.

To my family, thank you for your prayers and financial support.

To my fiancée and support system, Lyra, thank you for your patience and perseverance during the tough moments. Thank for your support in all aspects.

Lastly, to all who helped me during the course of my study in one way or another and I have not mentioned them by name, I remain forever grateful.

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LIST OF ABBREVIATIONS

ACECA	Anti-Corruption and Economic Crimes Act
AFDB	African Development Bank
BIT	Bilateral Investment Treaty
EACC	Ethics and Anti-Corruption Commission
ECOWAS	Economic Community of West African States
ECOWIC	ECOWAS Common Investment Code
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
MFN	Most-Favored-Nation
NT	National Treatment
OECD	Organisation for Economic Co-operation and Development
PAIC	Pan African Investment Code
REC	Regional Economic Community
RTA	Regional Trade Agreement
UNCTAD	United Nations Conference on Trade and Development
UNCAC	United Nations Convention against Corruption
UNCTOC	United Nations Convention against Transnational Organized Crime
UNECA	United Nations Economic Commission for Africa
VCLT	Vienna Convention on the Law of Treaties

LIST OF CASES

Argentine Eng'r v British Co ICC Case No. 1110 (1963)

Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v Argentine Republic (ICSID Case No. ARB/97/3), Award of 20 August 2007

Desert Line Projects LLC v Yemen (ICSID Case No ARB/05/17), Award, 6 February 2008.

Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25

Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, 1 123 (June 18, 2010)

Hugh Glenister v President of the Republic of South Africa & Others [2011] ZACC

LESI SpA and Astaldi SpA v Algeria (ICSID Case No ARB/05/3), Decision on Jurisdiction, 12 July 2006.

Metal-Tech Ltd. v. the Republic of Uzbekistan, ICSID Case No.ARB/10/3. 22.

Roussalis v Romania, ICSID Case No. ARB/06/1, Award, 871 (Dec. 7, 2011)

Rumeli Telekom AS v Kazakhstan (ICSID Case No ARB/05/16), Award, 29 July 2008.

Saba Fakes v Turkey (ICSID Case No ARB/07/20), Award, 14 July 2010.

Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco [I], ICSID Case No. ARB/00/4

Siemens A.G. *v The Argentine Republic* (ICSID Case No. ARB/02/8), Decision on Jurisdiction of 3 August 2004

Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Decision on jurisdiction, (Apr. 29, 2004), 20 ICSID Rev. 205 (2005)

World Duty Free v. Republic of Kenya, ICSID Case No.Arb/00/7.

LIST OF INTERNATIONAL INSTRUMENTS

Multilateral

African Union Convention on Preventing and Combating Corruption

Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union

Council of Europe Civil Law Convention on Corruption

Council of Europe Criminal Law Convention on Corruption

ECOWAS Common Investment Code

ECOWAS Supplementary Investment Act

Inter-American Convention against Corruption

United Nations Convention against Corruption

United Nations Convention against Transnational Organized Crime

Vienna Convention on the Law of Treaties

Bilateral

Germany – Argentina BIT (1991)

Kenya-Japan BIT (2017)

Kenya-Kuwait BIT (2013)

Kenya-Switzerland BIT (2006)

Kenya-United Arab Emirates BIT

Morocco-Nigeria BIT (2016)

LIST OF DOMESTIC LEGISLATION

Constitution of Kenya, 2010

Anti-Corruption and Economic Crimes Act No 3 of 2003

Bribery Act No 47 of 2016

Ethics and Anti-Corruption Commission Act No 22 of 2011

ABSTRACT

Traditionally, BITs have been faulted for their imbalanced approach in apportioning rights and obligations on investors and the host state. This imbalance created dissatisfaction in capital-importing states necessitating the need for a decisive break from the past. This development fueled the urge for reform and progressively, BITs and IIAs with a more balanced approach became a priority wish by many capital-importing states. As a result of this, BITs and IIAs concluded post 2000 have strived to incorporate a balance between rights and obligations of the host state and the investors.

The devastating effects of corruption in governance cannot be overemphasized. The effects of corruption are inter-generational and the earlier the vice was dealt with, the better. Corruption has permeated investments by foreign investors making it a key concern for international investment law. The challenges of neutrality and difficulty in proving corruption have presented hurdles in tackling this problem and a nightmare in investment arbitration. The existence of corruption in investment and the extensive use of corruption as a defence in investor-state arbitration places corruption as a subject of direct address by international investment law.

This research examines whether BITs signed by Kenya have been responsive in dealing with corruption. This case study is relevant in Kenya being a hot-bed of corruption and consequently experiencing the adverse effects of corruption in FDI attraction. The study therefore bears the burden of advocating for a BIT regime that incorporates direct provisions on anti-corruption in Kenya following the experience of other BITs and IIAs which harbor strong and progressive anti-corruption provisions.

Key words: **Corruption, FDI, Investor, Host State**

CHAPTER ONE

INTRODUCTION

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.

Kofi Annan

1.1 Research Background

Corruption is a menace in Kenya.[1] There has been incessant calls on the government to declare the phenomenon a national disaster due to its rampant existence.[2] The President of Kenya in his State of the Nation address in 2015 noted that 'corruption poses a great threat to Kenya's security, fundamental rights, freedom and social-economic transformation.'[3] Such corruption has become widespread and deeply entrenched in the culture and norms in the Kenyan society and most officials in influential positions engage in corruption with impunity. This sad state of affairs led the President to establish a taskforce in 2015 to review the legal, institutional framework and policies for the onslaught on corruption.[4] The recommendations of the report are yet to fully see the light of day. Further, this vice in Kenya, though not unique to Kenya, has acquired international reputation. For instance, the Transparency International's 2020 Global Corruption Perception Index ranked Kenya 124 out of 180 countries.[5]

Corruption has affected among other sectors, economic growth and transformation in Kenya. The effects of corruption are widespread in the country. This research pinpoints the arena of Foreign Direct Investment (FDI) as one of the key areas that has suffered in the pangs of corruption. FDI is important in promoting economic growth in developing countries by

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[1] ILEPA Kenya 'The Corruption Menace in Kenya,' available at https://www.ilepa-kenya.org/publications/Citizens%20and%20Corruption.pdf (accessed 28 March 2021).

[2] *Shakeel Ahmed Khan & Another vs. Republic & 4 Others* (2019) eKLR.

[3] The Presidency 'Speech By His Excellency Hon. Uhuru Kenyatta, C.G.H., President and Commander in Chief of the Defence Forces of the Republic of Kenya During the State of The Nation Address at Parliament Buildings, Nairobi On 2 March, 2015', in Statements and Speeches available at https://www.president.go.ke/2015/03/26/speech-by-his-excellency-hon-uhuru-kenyatta-c-g-h-president-and-commander-in-chief-of-the-defence-forces-of-the-republic-of-kenya-during-the-state-of-the-nation-address-at-parliament-buildings-na/ (accessed 29 March 2021)

[4] Gazette Notice No. 2118 of 30 March 2015 (published in The Kenya Gazette (Special Issue) of 31 March 2015).

[5] Transparency International 'Corruption's Perception Index Report, 2020' available at https://images.transparencycdn.org/images/CPI2020_Report_EN_0802-WEB-1_2021-02-08-103053.pdf (accessed 29 March 2021).

availing capital, efficiency in trade, technology, improvement of skills; and by providing domestic small and medium-sized enterprises with linkages and markets for the supply of goods and services.[6] However, FDI can only meet these benefits if its lifetime is free from corrupt practice. The gains of FDI cannot be realized in Kenya since they are lost in corrupt ventures. Whereas corruption is a global phenomenon, its effect is mostly felt in least developed and developing countries where resources that ought to be channeled to development are unduly diverted to private hands.[7] This in turn hampers economic growth by the resultant failure to realize the economic benefits of FDI.

One key factor that discourages FDI in Kenya is the 'high level of corruption'.[8] The reality of this challenge has been witnessed when foreign investors cite corruption as the key stumbling block to setting up their investment. One report on this prevailing reality states that in particular, corruption presents a major cause of concern to investors who often inquire whether they must pay bribes to secure licenses and do business.[9]

It is widely acknowledged that Kenya was a prime destination for investors who sought to establish their presence in East Africa in the1960s and 1970s but a combination of politically sanctioned economic policies, widespread corruption, government misfeasance, poor infrastructure and substandard public services has discouraged FDI since the 1980s. In the past 25 years, Kenya has comparatively underperformed in attracting FDI. For instance, Tanzania and Uganda, despite their smaller economies, have toppled Kenya in FDI attraction. The UNCTAD 2008 World Investment Report described Kenya as the East Africa region's least effective suitor in attracting FDI. Lately, in the 2020 World Investment Report, FDI inflows to Kenya dropped by 18 per cent to $1.3 billion. This case prevailed despite several new projects in information technology and health care undertaken in Kenya.[10] Further, the drop was witnessed even though Kenya had revised its tax legislations to provide exemptions on taxation in investment targeting various sectors.[11] Therefore, FDI remains weak when

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[6] Benson Ateng' 'Constraints to Foreign Direct Investment Inflows to Kenya: Stakeholders' Perspective' (2017) 5 *International Journal of Education and Research* at 5.

[7] Gamuchirai Chiwunze 'Corruption in Africa: Implications for Development' 2014 available at https://www.polity.org.za/article/corruption-in-africa-implications-for-development-2014-05-22 (accessed 29 May 2021).

[8] As above.

[9] Njiriani Muchira 'Foreign Investors cite Corruption as Major Roadblock to the Region Markets' *The East African, Business* (East Africa) 27 February 2019 at 1 available at https://www.theeastafrican.co.ke/tea/business/foreign-investors-cite-corruption-as-major-roadblock-to-the-region-markets-1413274 (accessed 30 May 2021).

[10] UNCTAD World Investment Report, 2020 available at https://unctad.org/system/files/official-document/wir2020_en.pdf (accessed 30 May 2021).

[11] As above.

juxtaposed with the size of economy and the level of development in Kenya.[12] This state of affairs is attributed to *inter alia*, corruption prevalence in the country. In fact, the Transparency International 2019 Bribery Index for Kenya suggests that the four most notorious areas for bribery are the judiciary, police service, tax authorities and business registration.[13] Coincidentally, these are some of the key areas for consideration by a potential investor.

Corruption has also permeated into investment dispute settlements with states, such as Kenya, using it as a defense for expropriation and nationalization of investments.[14] It is counter-productive that investors at times have their complaints dismissed for being marred with corruption whereas corruption never involves a single party. Is this jurisprudence sustainable for capital-importing countries? The effect of such decisions for a country is to bring about reluctance to invest in such countries by potential investors. Some of the corrupt practices as reported by foreign investors include 'the soliciting of bribes to secure foreign exchange, export, import, investment or production licences or to evade paying tax, although this extortion amounts to an extra tax for foreign investors.'[15] These extra-costs in turn dissuade potential foreign investment. This has therefore led research in this field to conclude that corruption discourages investment especially in an environment where red tape inherently detrimental to investment is low.[16]

This research therefore undertakes an interrogation of the anti-corruption strategies by Kenya from a legal and institutional standpoint. For the avoidance of doubt, the strategies focused on are those that have a nexus with corruption that most directly affects FDI. The research bears the burden of diagnosing the mismatch between Kenya's economic status in the East African region and poor attraction to FDI. It examines the International Investment Agreements where Kenya is a party with the aim of establishing their suitability in fighting corruption.

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[12] Santander 'Kenya: Foreign Investment' (2021) available at https://santandertrade.com/en/portal/establish-overseas/kenya/investing (accessed 31 May 2021).

[13] Transparency International 'Kenya Bribery Index 2019' available at https://tikenya.org/wp-content/uploads/2020/12/2019-KENYA-BRIBERY-INDEX.pdf (accessed 1 June 2021).

[14] *Metal-Tech Limited v Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013), available at http://italaw.com/sites/default/files/case-documents/italaw3012.pdf (accessed 1 June 2021).

[15] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed on 17 December 1997 and in force since 15 February 1999. http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (accessed 12 August 2021).

[16] Alberto Ades & Rafael Di Tella `The New Economics of Corruption: A Survey and some New Result' (1997) 45 at 501.

1.2 Statement of the Problem

This research analyzes Kenya's commitment to the contemporary switch towards an Investment Policy Framework for responsible investment with a specific focus on prudent public governance and institutions.[17] It examines the specific commitments that Kenya has undertaken in ensuring that its legal regime for investment is free from corruption. This main aim of this interrogation is to examine whether there exists an investment friendly environment. The research is premised on the fact that the recent BITs that have been concluded by Kenya lack specific anti-corruption provision. This examination is done within the context of the overarching international obligation on the onslaught against corruption, which necessitates the country to 'adopt effective anti-corruption legislation and fight corruption with appropriate judicial, administrative and institutional means while relying on guidance from international best practices'.[18]

1.3 Objectives of the Study

The overarching objective of this study is to interrogate the legal and institutional framework for the fight against corruption within the context of investment in Kenya. Specifically, this research examines corrupt ventures that create bottlenecks in FDI attraction and management. This research further examines whether the investment regime in Kenya is in-built to cancel the effect of corruption. With an aim of achieving these milestones, this research is guided by the following questions:

1. What is the legal and institutional framework for fighting corruption in Kenya?
2. Are the Bilateral Investment Treaties (BITS) signed by Kenya structured to fight corruption in investment?
3. What are the best practices for investment agreements and BITs signed in Africa for anti-corruption?
4. What conclusions and recommendations do we draw from the study in fighting FDI-related corruption?

[17] UNCTAD 'World Investment Report 2012: Towards a New Generation of Investment Policies' 2012 at 107 available at https://unctad.org/system/files/official-document/wir2012_embargoed_en.pdf (accessed 13 June 2021).
[18] UNCTAD (n 17) 130.

1.4 Hypothesis

This research is premised on the preliminary presumptions that corruption in Kenya has had a defeating effect on the exercise of responsible investment in Kenya. Further, even in the low volumes of attracted FDI, corruption has hampered the realization of economic gains that should result from such FDI. It is also a preliminary presumption that the legal and institutional framework on the fight against corruption is not crafted to deal with corruption relating to FDI specifically and unequivocally. As such, investors can involve themselves in corrupt deals without being penalized on the same. Lastly, it is hypothesized that there exist progressive BITs signed in Africa that have taken a further step in fighting corruption by having anti-corruption provisions.

1.5 Significance of the Study

This study is timely and momentous as it seeks to outline the major reforms that Kenya should undertake to fight corruption with a specific focus on FDI-based corruption. The research provides valuable insights which would feed into Kenya's strategies on its onslaught against corruption. It provides for the various ways in which Kenya can craft anti-corruption provisions in its BITs holding investors liable for such an illegality. The desired end to this study is to restore the investor confidence in the country, reduce the cost of setting up FDI which balloons as a result of corruption and most importantly, ensure the prudent management of existent FDI to spur economic growth in Kenya.

1.6 Literature Review

As indicated in the introduction to this research, FDI is important for economic advancement of many developing states. As a result, Habazin notes that FDIs must conform to the principles of international public policy, including the prohibition of corruption.[19] According to Judge Lagergren in *Argentine Eng'r v British Co*[20] corruption is a flagrant violation of international public policy and good moral. The corrupt deals involve transaction bribes paid

[19] Margareta Habazin 'Investor Corruption as a Defense Strategy of Host States in International Investment Arbitration: Investors' Corrupt Acts Give an Unfair Advantage to Host States in Investment Arbitration' 18(805) *Cardozo Journal of Conflict Resolution* at 823.
[20]ICC Case No. 1110. (1963).

to facilitate legal transaction and variance bribes, which are paid to public officials to allow the investors to violate domestic laws.[21]

However, scholars have noted that very few mechanisms of controlling FDI related corruption exist.[22] Contemporarily, investor-state arbitration is the most preferred avenue for ventilating investor-state disputes including those that are marred with corruption. Investor-state arbitration presents a bargain between capital-importing states and capital-exporting states, whereby the capital-importing state promises to offer legal protections to foreign investors to attract their capital.[23] Presently, the most common investor-state arbitration is the International Centre for Settlement of Investment Disputes.[24] Investment arbitrators can punish a whole spectrum of corruption in FDI as violation of both domestic and international law.[25]

Ideally, the investor-state arbitral facilities were established to encourage FDI in developing states by promising to ensure protection of their investments as part of the BIT between capital-importing state and capital-exporting state.[26] Spalding notes that arbitral facilities are less tainted with protective tendencies of national courts, thereby promoting FDI by providing effective protection to the foreign investors.[27] According to Llamzon, in BITs, capital-importing states constrain their sovereign legislative rights, for the capital-exporting state to provide foreign capital and technology inflows.[28] The measures are strategically designed to protect and entice foreign investors to invest in the capital-importing states.

While resolving investor trade disputes, arbitrators focus primarily on promoting FDI. In doing so, Llamzon notes that the arbitrators provide protection to foreign investors, often in a weaker position relative to the host state.[29] Despite these progressive steps, the level of protection accorded to foreign investors is still unclear. More particularly, Llamzon decries the absurdity in instances where both multinational corporations and the capital-importing

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[21] Aloysius Llamzon 'The Control of Corruption through International Investment Arbitration: Potential and Limitations' (2008) 102 *Proceedings of the Annual Meeting, American Society of International Law at* 208 https://www.jstor.org/stable/25660292 (accessed 1 June 2021).
[22] As above.
[23] Andrew Brady Spalding 'Deconstructing Duty Free: Investor-State Arbitration as Private Anti-Bribery Enforcement' 49(443) *University of California, Davis* at 471.
[24] Art 1, ICSID Convention.
[25] Llamzon (n 21) 208.
[26] As above.
[27] (n 23) 471.
[28] (n 21) 209.
[29] (n 21) 208.

states are tainted with corrupt dealings.[30] In that regard, Alexandrov argues against extending protection to corrupt investors and investments.[31] He observes that investments procured through corruption should not be protected by a BIT.[32]

Unfortunately, withdrawing the protections of a BIT to a corrupt investor may not accomplish the goal of punishing and preventing corruption.[33] It only benefits the host state or its officials who actually engaged in the corruption. Alexandrov argues that application of corruption as a defence may involve the expropriation of an investor's assets without compensation, thus the host state may benefit from its own corrupt conduct.[34] However, the investor-state tribunals cannot take measures further than punishing the investor for a corrupt conduct. Alexandrov notes that the tribunals cannot do more than dismiss the claims of the investor.[35]

Deep in the conundrum is the reality that corruption is difficult to prove. For instance, Llamzon acknowledges that there exists no agreement in investment law on the standard and burden of proof that should be applied to prove corruption.[36] It is argued that a tribunal should have a wide discretion to evaluate the evidence.[37] Moreover, Alexandrov notes that the investor-state tribunals lack the instruments that law-enforcement authorities need to investigate and prove corruption.[38] It is suggested that the arbitral tribunals ought to rely on municipal law enforcement systems to establish relevant facts to a finding of corruption. Nevertheless, it may still behoove the tribunal to further evaluate and assess the evidence to reach its own conclusions.[39] This presents a great incentive for in-built BIT provisions specific to the consequences of corruption in an investment for both parties.

In some instances, host states raise corruption as a complete defense to allegations of unlawful treatment and contractual breach by investors. According to Alexandrov, the defense is often brought in disputes under BITs for the arbitrator to dismiss an investor's claim on the basis of the investor's illegal act of corruption. However, Llamzon argues that to claim corruption as a complete defense, the host state must show genuine interest in

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[30] (n 21) 208.
[31] Stanimir A Alexandrov 'Corruption in International Investment Arbitration' (2015) 109 *American Journal of International Law at* 703
[32] Alexandrov (n 31) 703.
[33] Alexandrov (n 31) 705.
[34] (n 31) 705.
[35] (n 31) 706.
[36] (n 21) 208.
[37] Alexandrov (n 31) 704.
[38] (n 31) 703.
[39] Alexandrov (n 31) 703.

combating corruption.[40] For instance, the state should attempt to prosecute the offending public officials and recover the proceeds of the corrupt dealings.

Capital-importing states have for instance raised corruption as a defense for denying aggrieved investors reliefs. However it is unclear whether an investor who has contributed to economic advancement of the public should be denied remedy for corruption through public officials. It is questionable to apply corruption as a complete defence in such instances, and to completely ignore investor protection considerations. Similarly, ignoring proscription of corruption in decision making would undermine the host state's rule of law, especially where a BIT requires compliance with the laws of the host state. Therefore, investment arbitrators must not only focus on investigating and punishing corruption, but also strike a balance between combating corruption and protecting investors.

While some BITs require compliance with the law of the host state, this superficial provision has proven to be ineffective in minimizing corruption in investment. The lack of a specific treaty provision on corruption weakens the fight against FDI based corruption. Moreover, Alexandrov notes that the tribunals have invoked the doctrine of 'unclean hands' where such a provision is not incorporated in a BIT.[41] However, he argues that it is not clear how the arbitration tribunals will implement the multiple policies of international and national norms against corruption.[42] This the leads the research to its main proposition that has not met much scholarly attention that states should consider including anti-corruption obligations in BITs and agreements containing investment provisions that they negotiate or renegotiate, building on recent treaty practice.[43]

This proposition has been lauded by Hong-Lin and Belen who postulate that the general practice of excluding investments that are not in accordance with the host state law should be advanced by taking a further step.[44] The traditional criteria established in *Salini* emphasizes the need for the investment to be in conformity with the host state's law to ensure its

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[40] (n 21) 209.
[41] (n 31) 703.
[42] Alexandrov (n 31) 703.
[43] Guy Marcel Nono 'Fighting Bribery and Corruption in Africa: From AU and OECD Conventions to a General Principle of International Investment Law' MARCH, 2020 available at https://www.iisd.org/itn/en/2020/03/10/fighting-bribery-and-corruption-in-africa-from-au-and-oecd-conventions-to-a-general-principle-of-international-investment-law-guy-marcel-nono/ (accessed 5 June 2021)
[44] Yu H & Olmos Giupponi 'Analysing Obstacles and Challenges in Fighting Corruption in Cases of Illegal Investments: How to Bell the Cat? (2020) in Halmai G, Lovejoy M & Mardikian L (eds) *Corruption, Democracy and Human Rights: Exploring New Avenues in the Fight against Corruption*, Florence, Italy, Cambridge.

validity.[45] However, these authors emphasize the need to move from the inclusion of "in accordance with domestic law clause" to the incorporation of specific "anti-bribery and anti-corruption provisions"; such as "in accordance with domestic law clause" in Bosnia and Herzegovina-Malaysia BIT (1994) and the anti-corruption clause embodied in the Morocco-Nigeria BIT (2016).[46] This trend has an effect of ensuring the investors' accountability and an effective anti-corruption system.

According to Chidede, many BITs lack substantive provisions on the States' right to regulate.[47] The texts and contents of the treaties are heavily influenced by the Western capital-exporting economies who are primarily interested in maintaining international rules favourable to their economic interests.[48] The BITs are therefore concluded as instruments for investor protection and promotion. Chidede notes that under the BITs, the developing states (largely African countries) are merely rule consumers, since they lack enough capacity to negotiate and develop issues into the BITs.[49]

Lastly, Manjiao espouses the shift to BITs with anti-corruption provisions virtually hook line and sinker.[50] This author notes that since 2012, a trend of incorporating anti-corruption provisions has been noted in BITs.[51] After an analysis of the Asian experience, Manjiao buttresses the necessity of such provisions in the onslaught against corruption. It is on this note that this research conducts a similar examination with a focus on BITs concluded by Kenya and agreements containing investment provisions that Kenya has ratified.

1.7 Methodology

This research is conducted largely by desktop research. It involves a review of written materials and literature alongside a systematic analysis of the relevant legislation and policies. The research relies on primary sources such as the constitutional provisions, international law, specific domestic legislations and case law. It also draws reference from

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[45] *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco* [I], ICSID Case No. ARB/00/4 <https://www.italaw.com/cases/documents/959> (accessed 12 July 2021).
[46] Yu & Giupponi B (n 44) 2.
[47] Talkmore Chidede 'The Right to Regulate in Africa's International Investment Law Regime' 20 *Oregon Review of International Law* at 443.
[48] As above.
[49] As above.
[50] Manjiao Chi 'Sustainable Development Provisions in Investment Treaties: An Empirical Exploration of the Sustainable Development Provisions in BITs of Asia-Pacific LDCs and LLDCs' (2018) at 31 Prepared for ARTNeT available at https://www.unescap.org/sites/default/files/Sustainable%20Development%20Provisions%20in%20Investment%20Treaties.pdf (accessed 13 August 2021).
[51] As above.

secondary sources including books, articles, policy statements and internet sources. Other sources of information include media reports and newspapers. It also adopts a comparative analysis of select IIAs with an aim of distilling some of best practices to influence the Kenyan experience.

1.8 Limitations and delineation of Study

This research is limited to the normative dimension of investment law (investment agreements) and will not extensively examine the settlement of investment disputes that Kenya has been involved in.

Further, corruption has sparkled debates in diverse legal, social and governance circles. This study will however be limited to examining corruption in the Kenyan public sector and its effect on FDI. The main focus is to conduct a legal scrutiny of the anti-corruption mechanisms in Kenya with an aim of fostering an FDI friendly environment. Further, and importantly, whereas empirical research on the subject matter has been conducted extensively, this research will not attempt to establish a quantitative link between corruption and FDI inflows.

1.9 Chapter Breakdown

This research is organized into five Chapters. Chapter One provides an overview of the research and outlines the organization of the work in the subsequent chapters. It introduces the aims of the research, provides a statement of the problem and a brief background of the research

Chapter Two firstly establishes the definition of corruption as understood in this research and draws the nexus between it and foreign direct investment. It also distinguishes the various multi-disciplinary approaches for fighting corruption and delineates the focus for this research. It thereafter examines the sufficiency of the legal and institutional framework on curbing corruption in Kenya. The main aim of this Chapter is to interrogate whether the statutory legal structure in Kenya is well poised to handle the challenge posed by corruption with a specific focus on corruption affecting FDI.

Chapter Three analyses whether and how Bilateral Investment Treaties and treaties with Investment provisions signed by Kenya have dealt with the question of corruption. It further examines whether there are direct obligations in the BITs signed by Kenya to deal with corruption in investment or whether reliance is solely made on the laws of the host state.

Chapter Four examines international best practices for BITs that effectively deal with corruption involving the investor in a Host State. The Chapter explores the advantages of having specific anti-corruption provisions in BITs and whether Kenya this move would have any positive advantages to Kenya. It also examines the nature of provisions incorporated in the various BITs that comprise best practice.

Chapter Five gives a conclusion of the research and the major findings. It also gives recommendations the positive steps that should be incorporated top ensure anti-corruption responsive BITs in Kenya.

CHAPTER TWO

AN ASSESSMENT OF THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR COMBATTING CORRUPTION IN KENYA

2.1 Introduction

Corruption is a scourge in Kenya as it poses a real threat to socio-economic actualization. Corruption undermines the government's capability to achieve its commitment to eradicate poverty and to develop sustainably. It may undermine the ability of the state to deliver on its obligations, especially those relating to social and economic rights,[52] hence, stagnating economic growth. Corruption may also reduce investment and 'discourage prospective job opportunities resulting from FDI inflows.'[53]

The sophisticated international network that is perpetuating corruption in developing countries requires urgent attention.[54] Therefore, states must strive to eliminate corruption by adopting effective measures to prevent and deter it while enforcing legislation against corruption.[55] States and supranational bodies have therefore enacted various instruments to quell the deleterious impacts of corruption.

However, a proper understanding of corruption and its consequences is a pressing problem to states and supranational entities in fighting corruption.[56] Especially, this Chapter focuses on the nexus between corruption and FDI from a Kenyan perspective. The research notes that the fight against corruption in Kenya is ideally focused on the 'theory of corruption as a crime' without majoring on the effects of corruption on economic growth[57].

This research acknowledges that it is only by understanding corruption that policy recommendations and solutions can proffered to combat corruption. In the quest to

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[52] *Hugh Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6 para 83.
[53] Mosikari Teboho Jeremiah et al 'Does Corruption Hampers Inward FDI in South Africa from Other African Countries? A Gravity Model Analysis' *MPRA Paper No. 88735, posted 10 Sep 2018 17:04 UTC, North-West University, University of Johannesburg,* 2018 3 https://mpra.ub.uni-muenchen.de/88735/1/MPRA_paper_88735.pdf (accessed 28 August 2021).
[54] (n 52) para 57.
[55] (n 52) para 171.
[56] Pupovic Elvira 'Corruption's Effect on Foreign Direct Investment - The Case of Montenegro' *Economic Review – Journal of Economics and Business, Vol. X, Issue 2, November 2012* p 13 https://www.econstor.eu/bitstream/10419/193813/1/econ-review-v10-i2-p013-028.pdf (accessed 29 August 2021).
[57] Mukunyi Catherine Wangui 'Impediments to Effective Investigation and Prosecution of Corruption Cases in Kenya: The Case of the Ethics and Anti-corruption Commission' Masters Thesis, University of Nairobi 2014 at 41.

understand the role of corruption in development, this research unpacks the effects of corruption on FDI. In doing so, this Chapter assesses the legal and institutional framework for controlling corrupt practices in the investment sector.

2.2 Definition of Corruption

Corruption is a global socio-economic issue, and one of the most ancient problems in the history of man.[58] The definition of corruption is not a settled one in law and just like a tendon, it stretches and constricts depending on the context of its usage. Generally, corruption encapsulates misusing public power for private gain.[59] It constitutes a bundle of acts involving squandering of resources.[60] An examination of the United Nations Convention against Corruption highlights the challenge encountered in attempting a universal definition for corruption.[61] The *travaux préparatoires* for the UNCAC[62] expresses that the definition of corruption belongs to the "domain réservé". The commentary on article 7 of the Convention in subparagraph (b) states as follows:

> While the definition of corruption must be subject to national law, it should be understood to encompass the commission or omission of an act in the performance of or in connection with one's duties, in response to gifts, promises or incentives demanded or accepted, or the wrongful receipt of these once the act has been committed or omitted.[63]

The lack of uniformity then presents a situation where what amounts to corruption is relative and dependent on the jurisdiction. This brings about an obstacle in fighting corruption from the universal scale. Conversely, Article 8 of the United Nations Convention against Transnational Organized Crime takes a different approach to the definition of corruption. It attributes corruption to both the giver and the recipient. First, corruption is the giving or offering or even a promise to a public official, of an undue advantage, for the official or another person or entity, in order that the official act or refrain from acting in the exercise of their official duties. Secondly, it entails the soliciting or acceptance of an undue advantage by a public official, for his or her own gain or another person or entity, for the official act or refrain from acting in exercising his or her official duties.

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[58] Pupovic (n 56) 14.
[59] As above.
[60] Teboho et al (n 53) 3.
[61] United Nations Convention against Corruption (2003) https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (accessed 30 September 2021).
[62] Adopted by the General Assembly in its resolution 58/4 of 31 October 2003, < https://www.unodc.org/unodc/en/treaties/CAC/travaux-preparatoires.html> (accessed 30 September 2021).
[63] As above, xiv.

Nevertheless, from the Kenyan law, Section 2 of the Anti-Corruption and Economic Crimes Act (ACECA) defines corruption to include bribery, fraud, embezzlement of public funds, abuse of office, and breach of trust.

Whereas these definition are not similar or clear in any way, it can be noted that any definition of corruption encompasses more than on party thus making it imperative to have rights and obligations against both the giver and the recipient of the proceeds of corruption.

2.3 The Need to Deal with Corruption from an Investment Perspective Whereas Corruption is a Crime

The question of the legality of the conduct of foreign investors has increasingly been subject to scrutiny. [64] Frequently, the host state postulates before an arbitral tribunal that the lifetime of an investment was marred by corruption or bribery. This can include a plethora of conduct such as the misuse of the system of international investment protection, deceitful conduct, violation of the host state's laws, transnational public policy or the violation of good faith.[65] With these constant nuances that arise in investment tribunals, it would be an omission not to consider corruption from an investment law perspective. Nevertheless, it has been noted that the harnessing of an effective system to counteract corruption in international investment law is quite difficult.[66]

The other incentive of dealing with corruption from an investment law perspective is the fact that the fight against corruption has taken a multi-agency and multidisciplinary approach. This has been exhibited in the international realm by the conclusion of anti-corruption treaties and at the regional level with such agreements such as the African Union Convention on Preventing and Combating Corruption,[67]Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union,[68] Council of Europe Civil Law Convention on Corruption,[69] Council of

[64] Aloysius Llamzon & Anthony Sinclair '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 (205) 18 *Kluwer Law International* at 451.
[65] Llamzon & Sinclair (n 64) 452.
[66] Florian Haugeneder & Christoph Liebscher 'Investment Arbitration - Corruption and Investment Arbitration: Substantive Standards and Proof' in Christian Klausegger, Peter Klein, et al. (eds), *Austrian Yearbook on International Arbitration*, Manz'sche Verlags- und Universitätsbuchhandlung 2009) 539 – 564; 544, 556, 557.
[67] African Union Convention on Preventing and Combating Corruption (2003) (Date of Entry 05 August 2006; Date of last signature 26 December 2018).
[68] Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (1997) Official Journal C 195 of 25 June 1997, (accessed 29 August 2021).

Europe Criminal Law Convention on Corruption,[70]and the earlier Inter-American Convention Against Corruption.[71] This development disabuses the notion that corruption ought to be exclusively a preserve of domestic criminal law as it can be dealt with from various angles, effectively so.

FDI links countries with each other. FDI is a result of globalization that has made it possible for developing countries to attract and retain investment from developed countries. FDI inflow is important to the development of the capital importing states.[72] Therefore, an increase in FDI is a key contribution to sustained economic growth. Developing states like Kenya, must therefore promote inflow of FDI to increase capital and productivity. FDI may also result into technology spillovers, improvements in human capital, facilitation of the access to global markets and increase in the country's competitiveness.[73]

However, many factors determine inflow of FDI in a developing country. Among, the key determinants of FDI inflow are corruption. It is therefore important to understand the effect of corruption on FDI inflow. Research indicates that there are two conflicting conceptions on the nexus between corruption and FDI. The first view postulates that corruption has a negative effect on FDI inflows, while the second one holds that corruption positively impacts FDI inflows.[74] This study focuses on the negative impacts of corruption on FDI in Kenya.

In doing so, the study underscores the role of government in combating corruption to ensure growth and development. As will be discussed later, this Chapter recognises the constitutional obligation for the State to establish mechanisms for battling corruption effectively. Whereas the Constitution is not prescriptive on mechanisms of combatting corruption, the government is explicitly required to formulate a concrete approach to deal with corruption and to establish independent anti-corruption unit.[75]

Kenya's obligation to fight corruption is implicit in the Constitution when viewed in the light of its international treaty obligations. In other words, while there is a constitutional obligation for the states to take effective measures to fight corruption, this research does not narrowly

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[69] Civil Law Convention on Corruption (1999) ETS No.174 (Date of entry 01/11/2003), <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174> (accessed 29 August 2021).
[70] Criminal Law Convention on Corruption (1999) ETS No.173 (Date of entry 01/07/2002),(accessed 29 August 2021).
[71] Inter-American Convention against Corruption, 29 March 1996, (accessed 29 August 2021).
[72] Teboho et al (n 53) 3.
[73] As above.
[74] Teboho et al (n 53) 4.
[75] Art 79, Constitution of Kenya 2010.

construe the options available to the state in discharging that obligation. Unlike the traditional criminal angle anchored in the Constitution, this research proposes methods of dealing with corruption from an investment perspective.

2.4 Legal Framework

The legal framework for combating corruption in Kenya constitutes the Constitution, the UN Convention against Corruption, the UN Convention against Transitional Organized Crimes, African Union Convention on Prevention and Combating Corruption, Anticorruption and Economic Crimes Act, Proceeds of Crime and Anti-Money Laundering Act, Bribery Act. There are however other Acts of Parliament that have singular and isolated provisions whose cumulative effect is to punish some form of corrupt practice. This research does not highlight these statutes. This section assesses the effectiveness of the statutes in combating corruption in the investment sector.

2.4.1 Constitution

The constitution of Kenya is the supreme law of the land and all other statutes are subject to the guiding principles in the constitution. The Constitution is the primal source for the duty of the state to fight corruption.[76] For instance, Chapter Six of the Constitution is dedicated to leadership and integrity, while article 10 entrenches the national values and principles of governance. More precisely, article 10(2) of the Constitution identifies integrity, good governance, transparency and accountability among the binding national values and principles. Moreover, article 79 of the Constitution mandates the Parliament to enact legislation to establish an independent Ethics and Anti-Corruption Commission (EACC) to fight corruption. The requirement for the establishment of EACC imposes an obligation on the state to establish a robust and effective mechanism to curb corruption in Kenya.

While this study focuses on the dealing with investment related corruption, the Constitutional principles are chiefly concerned with corruption in public institutions. For instance, Article 75(1) of the Constitution requires state officers to avoid conflict between individual interests and public or official duties. With regard to public finance, the Constitutional edict advocates

[76] (n 52) para 175.

for openness and accountability in the budgetary and expenditure processes which results into effective financial management of the economy.[77]

Further, the Constitutional principles on combating corruption in the public sector are very informative to the fight of corruption in the investment sector. For instance, the Article 75(1) of the Constitution discourages acting where there is conflict of interest between personal interests and official duties. The Constitution permits dismissal or removal from office of anyone who acts in conflict of interest.[78] Due to the focus of the Constitutional principles to the public offices, the subsequent subsections explore the extent to which the Kenyan statutes and ratified conventions deal with corruption from an investment perspective.

2.4.2 International Instruments

Kenya is a signatory to various international instruments against corruption. This research focuses on the UN Convention against Transitional Organized Crimes and the UN Convention against Corruption.

2.4.2.1 United Nations Convention against Corruption

The United Nations Convention against Corruption (UNCAC) was enacted to promote and strengthen efficient and effective measures to prevent and combat corruption.[79] The Convention seeks to support cooperation at the international level and technical assistance in the prevention of and fight against corruption. The Convention applies to the prevention, investigation and prosecution of corruption. With regard to corruption in the investment sector, the Convention applies to the prosecution and return of the proceeds of corruption.[80] State Parties must therefore, develop anti-corruption policies that promote public participation and ensures the rule of law.

To prevent corruption in the public sector, State Parties are obligated to establish independent bodies to implement the policies against corruption.[81] The State ought to provide the authority with the necessary support in terms of resources for performing their functions. Moreover, State Parties must establish procurement systems entrenching values such as free competition, objectivity in decision making and transparency in order to deal with

[77] Art 201, Constitution of Kenya 2010.
[78] Art 75(2), Constitution of Kenya 2010.
[79] Art 1, UNCAC.
[80] Art 3, UNCAC.
[81] Art 6, UNCAC.

corruption.[82] Therefore states must foster accountability and transparency in the management of public finances. The measures include, inter alia, procedures for the adoption of the national budget, and timely reporting on revenue and expenditure. States must also ensure that documents related to public expenditure and revenue are preserved to prevent the falsification of such important documents.[83] In addition, the State Parties must strengthen judicial integrity and shut out opportunities for corruption among the judicial staff.[84]

UNCAC also provides for the prevention of corruption involving the private sector. In that regard, Article 12(1) of this Convention makes it a requisite for State Parties to enhance standards of audit and accounting in the private sector and, provide proper administrative, civil or criminal penalties for failure to comply with the measures. In doing so, State Parties must advocate for cooperation between private entities and law enforcement agencies; safeguard the integrity of private entities by promoting the development of standards and procedures; encourage transparency among private entities; prevent the misuse of procedures regulating private entities, including procedures regarding subsidies and licences granted by public authorities for commercial activities; ensure that private enterprises, have sufficient internal auditing controls to detect and prevent corruption.[85]

Generally, State Parties need to encourage a multi-disciplinary participation of individuals and groups both from within and without the public sector to create awareness and advance measures to fight corruption.[86] The State must also institute a comprehensive regulatory and supervisory regime for bodies and individuals susceptible to money laundering to detect and deter money laundering.[87] Further, Article 14(2) of the Convention requires State Parties to monitor movement of money across their territorial borders by implementing feasible measures. Such measures may requirement individuals and businesses to report the cross-border transfer of substantial quantities money.

Whereas the Convention largely prohibits corruption in the public sector, Article 21(a) of the Convention requires State Parties to adopt necessary measures to criminalize the act of advancing undue advantage to any person working for a private sector entity to act or refrain

[82] Art 9(1), UNCAC.
[83] Art 9(3), UNCAC
[84] Art 11, UNCAC.
[85] Art 12(2), UNCAC.
[86] Art 13(1), UNCAC.
[87] Art 14(1), UNCAC.

from acting. It is also a crime for a person working in a private sector to embezzle any valuable thing entrusted to them by virtue of their position.[88]

2.4.2.2 United Nations Convention against Transnational Organized Crime

The United Nations Convention against Transnational Organized Crime (UNCTOC) was enacted to foster cooperation in effectively preventing and combating transnational organized crime.[89] The Convention requires States to adopt legislative and administrative measures for 'promoting integrity and preventing, detecting and punishing corruption involving public officials.'[90] Article 9(2) of the Convention prescribes providing the authorities mandated to fight corruption with adequate independence to deter the exertion of inappropriate influence on their actions. However, the Convention is limited to corruption by public officials. It does not directly address the challenge of dealing with corruption affecting the investment sector. Nevertheless, one of the predominant ways in which corruption is manifested is by investors compromising public officials for various favours hence the need to review this international instrument.

With regard to legal persons, the Convention mandates State Parties to embrace steps and actions that are necessary for establishing the liability of legal persons for participating in corruption.[91] The liability may be administrative, criminal or civil. Particularly, Article 10(4) of the Convention requires State Parties to ensure that 'juristic persons held liable are accorded effective, proportionate and dissuasive criminal or non-criminal sanctions, including financial sanctions.'

Moreover, Article 11(4) of the Convention requires State Parties to ensure that courts and other authorities to bear in mind the grave nature of corruption when considering the eventuality of early release or parole of persons convicted of such offences. For investigation purposes, courts or other competent authorities are authorised to order for the production or seizure of bank, commercial or financial records.[92]

State Parties must also adopt within their domestic legal systems, necessary measures to enable confiscation of proceeds of corruption.[93] In that regard, state parties must adopt

[88] Art 22, UNCAC.
[89] Art 1, UNCTOC.
[90] Art 9, UNCTOC.
[91] Art 10(1), UNCTOC.
[92] Art 12(6), UNCTOC.
[93] Art 12(1), UNCTOC.

necessary measures to enable the identification, tracing, freezing or seizure of proceeds of corruption. Article 12(3) and (4) prescribes confiscation of proceeds of corruption notwithstanding their commingling with other property or their transformation or conversion into other forms.

Most significantly, the Convention entrenches international cooperation for purposes of confiscation. In so doing, Article 13(1) of the Convention requires a State Party that has received a request from another State Party having jurisdiction over the crime of corruption, for confiscation of proceeds of corruption, to submit the request to its competent authorities to give effect to the confiscation request.[94] Subsequent to the order, the requested state must take measures to identify, trace and freeze or seize proceeds of corruption for eventual confiscation.[95] For purposes of cooperation in confiscation of proceeds of corruption, Article 13(7) of the Convention urges State Parties to conclude bilateral or multilateral arrangements to enhance international cooperation in combatting corruption.

Furthermore, mutual legal assistance is critical to fighting corruption from an investment perspective. States must therefore, afford each other a 'wide measure of mutual legal assistance in investigation, prosecutions and judicial proceedings' in relation to corruption.[96] Mutual legal assistance may be requested for a party in a second state to take evidence, effect the service of judicial documents, execute searches, seizure and freezing, examine objects and sites, provide information, identify or trace proceeds of corruption, and to facilitate the voluntary appearance of persons in the requesting State Party.[97] Article 18(80) of the Convention obligates State Parties to ensure mutual legal assistance irrespective of the requirement of bank secrecy. Additionally, a State Party may not refuse mutual legal assistance simply because the offence involves fiscal matters.

Where several jurisdictions are involved, State Parties may establish joint investigative bodies to jointly investigate corruption committed in many territories.[98] For proper administration of justice, State Parties may transfer criminal proceedings to one another for proper administration of justice.[99]

[94] Art 13(1), UNCTOC.
[95] Art 13(2), UNCTOC.
[96] Art 18(1), UNCTOC.
[97] Art 18(3), UNCTOC.
[98] Art 19, UNCTOC.
[99] Art 21, UNCTOC.

2.4.3 Regional Instruments

On the regional front, the African Union Convention on Prevention and Combating Corruption is the most substantive instrument dedicated to the fight against corruption in Africa. This research highlights its salient provisions.

2.4.3.1 African Union Convention on Prevention and Combating Corruption

The Convention identifies corruption as an obstacle to socio-economic realization and therefore enunciates fight against corruption as a bridge to the promotion of social, economic and cultural development.[100] Article 2(5) of the Convention also establishes the necessary conditions to foster transparency and accountability in the management of public affairs. In the realization of the set objective, the Convention requires states to ensure transparency and accountability in the management of public affairs.[101] The states must also promote social justice to ensure balanced socio-economic development.[102]

Corruption as defined in Article 4 of the African Union Convention on Prevention and Combating Corruption includes offering to any person any benefit or advantage, in exchange for any act or omission in the performance their official duties. It is the diversion of an official for purposes unrelated to those for which they were intended. Further, corruption involves offering or solicitation of undue advantage to or by persons working in a private sector to act or refrain from acting in breach of their duties.[103]

Most significantly, Article 5 of the Convention requires State Parties to enact legislation to deal with corruption. Additionally, the Convention decrees that states should ensure that the operation of foreign companies in their territories is conducted in conformity to the law of the land.[104] In pursuance of this measure, the OECD and the AfDB established a joint initiative to support business integrity and anti-bribery in Africa.[105] The initiative aims at helping African states in their 'fight against bribery involving public officials in business transactions and to

[100] Art 2(4), African Union Convention on Prevention and Combating Corruption.
[101] Art 3(3), African Union Convention on Prevention and Combating Corruption.
[102] Art 3(4), African Union Convention on Prevention and Combating Corruption.
[103] Art 4(e), African Union Convention on Prevention and Combating Corruption.
[104] Art 5(2), African Union Convention on Prevention and Combating Corruption.
[105] OECD, 'Business integrity and anti-bribery efforts in Africa: OECD/AfDB Initiative' OECD/AfDB Joint Initiative to Support Business Integrity and Anti-bribery Efforts in Africa, available at https://www.oecd.org/corruption/businessintegrityandanti-briberyeffortsinafricaoecdafdbinitiative.htm (accessed 15 September 2021).

improve corporate integrity and accountability, while harboring an attractive environment for attraction of FDI which in turn promotes development.[106]

The partnership between OECD and the AfDB to fight corruption in the investment sector is in line with requirements of Article 11 of the African Union Convention on Prevention and Combating Corruption, through which State Parties undertake to adopt 'measures to prevent and combat acts of corruption and related offences committed in and by agents of the private sector.'[107]

Despite these progressive requirements of the AU Convention on Prevention and Combating Corruption, Kenya has barely established measures for instance, to establish mechanisms to encourage a multi-disciplinary participation that incorporates the private sector in the fight against unfair competition, maintaining the sanctity of the procurement processes and property rights, as stipulated in Article 11(2) of the Convention. Furthermore, Article 11(3) of the Convention mandates State parties to adopt necessary measures to prevent companies from paying bribes to win tenders.

2.4.4 Anti-Corruption and Economic Crimes Act

Anti-Corruption and Economic Crimes Act (ACECA) was enacted in 2003 to provide for a structure for preventing, investigating and punishing corruption.

2.4.4.1 The Role of Ethics and Anti-Corruption Commission in the Investigation and Prosecution of Corruption

EACC is responsible for investigating corruption in Kenya. During investigation, the Secretary of the Commission may require any suspect of corruption to furnish statement in relation to any specified property.[108] Moreover, the EACC may apply to the court to order an associate of any suspect to provide statement relating to property specified by the Secretary.[109] An associate in this context means any person believed to have had dealings with a person suspected of corruption.

In addition to production of property and records, the Commission may also enter upon and search any premises for any record or property suspected to be in the premises.[110] However,

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[106] As above.
[107] Art 11(1), African Union Convention on Prevention and Combating Corruption.
[108] Sec 26(1), ACECA.
[109] Sec 27(1), ACECA.
[110] Sec 29(1), ACECA.

to protect the suspect's right not to give self-incriminating evidence, section 30 of ACECA provides that evidence obtained pursuant such notice shall not be given in-evidence against the suspect in any criminal proceeding.

Furthermore, EACC may discontinue investigation or decline to investigate a complaint. However, the complainant must be informed of the decision and the reasons for the decision.[111] EACC may also undertake not to institute or continue with investigations against any person suspected of corruption.[112] However, the EACC must consult the Minister and the Attorney General, and invite interested persons to approach it for such undertaking.

The undertaking is limited to instances where the suspect discloses facts relating to past economic crime, or pays or refunds to the EACC the proceeds of corruption, or makes reparation to any person affected their corrupt conduct, or pays for the public losses occasioned by their corrupt conduct.[113] Therefore, anyone aggrieved by the decision to discontinue investigation of corruption may object on the ground that the undertaking does not fall within the above instances. Moreover, the Act prohibits the EACC from making any undertaking which may endanger public safety, law and order.[114]

Any person in respect of whom EACC makes an undertaking is disqualified from holding public office.[115] This implies that discontinuance of investigation under section 25A of ACECA is not acquittal. Additionally, section 32 of ACECA also empowers EACC to arrest and detain any person and charge them with any offence under the Act.

However, section 35 of ACECA requires EACC to report to the Director of Public Prosecutions (DPP) on the results of the investigation. The embodiment of EACC as a specialized department in the office of the DPP is likely to interfere with the may interfere its independence. Centralization and hierarchical nature of the prosecutorial structures, coupled with the mandate to report to the DPP presents a risk of interference, as demonstrated in *Hugh Glenister v President of the Republic of South Africa & Others*[116] as follows:

> The risk of undue interference is […] higher when [EACC] lack autonomous decision-making powers and where [the DPP has] discretion to interfere in a

[111] Sec 25, ACECA.
[112] Sec 25A(1), ACECA.
[113] Sec 25A(3), ACECA.
[114] Sec 25A(7), ACECA.
[115] Sec 25A(8), ACECA.
[116] [2011] ZACC 6 para 120.

> particular case. What is required are legal mechanisms that will limit the possibility of abuse of the chain of command and hierarchical structure or interference in the operational decisions involving commencement, continuation and termination of criminal investigations and prosecutions. All of this, however, is subject to the state party's ―fundamental principles of its legal system […]

It is noted later in this study that to ensure independence of the EACC, the Commission be accorded prosecutorial powers. It is noted that investigation and prosecution of corruption and other economic crimes requires specialization and intensive care because they involve very powerful persons. Unfortunately, section 35(2) of ACECA relegates EACC to a mere advisory body in the prosecution of corruption. The DPP reserves the discretion to prosecute or to withdraw any recommendation by the EACC.

2.4.4.2 Assessment of Corruption from the Investor's Prism

Other than the criminalization of corruption, corruption should be analyzed from an investment perspective. However, most domestic laws handle corruption from a criminal perspective. For instance, Part V of the ACECA is dedicated solely for economic crimes. While this research does not argue against criminalization of corruption, the study notes that criminalization is not enough remedy for corruption especially in the investment sector.

For instance, section 42 of the Act creates the offence of conflict of interest. The offence entails an agent having direct or indirect private interest in the decision of his principal.[117] For the offence of conflict of interest and many other offences under the Act, section 48(1) of ACECA establishes a blanket penalty of 'a fine that does not exceed one million shillings, or to imprisonment for a term of ten years or less, or to both; and mandatory fine if, a person receives a quantifiable benefit or another receives a quantifiable loss as a result of the conduct that constituted the offence'..' The challenge in this blanket penalty is that it might fail to achieve the penal effect in an investment set-up where the sums in question are relatively high.

This research notes that criminalization as the sole remedy for corruption is undesirable. First, the crimes are difficult to prove because they often involve high profile persons, hence very difficult to investigate. Secondly, perpetrators of corruption often use Article 50 of the Constitution as a shield against investigation and admission of evidence against them. Lastly,

[117] Sec 42, ACECA.

when found guilty, the sentences the perpetrators serve are usually meager in comparison to the benefits they accrue from corruption.

2.4.4.3 Compensation and Recovery of Improper Benefits

As a result of the inadequacies of criminalization as a remedy for corruption, section 51 of ACECA imbues liability to full compensation on any person who does anything that constitutes corruption to anyone who suffers a loss. The liability extends to any person who benefits from the proceeds of a corrupt conduct.[118] However, the compensation under ACECA is pegged on conviction, therefore, section 54(1) of ACECA provides that 'a court that convicts a person of any corruption or economic crime shall, at the time of conviction or on subsequent application, order the person' to restitute any property acquired as a result of a corrupt conduct. However, this is untenable because of the difficulty in proving economic crimes.

Similarly, section 55 of ACECA allows for recovery of unexplained wealth, however, the same has been challenged for being against the non-derogable right to be presumed innocent until proven guilty.[119] However, it must be noted that the proceedings in this context are commenced in the High Court by way of originating summons, and the court only need to be satisfied on the balance of probabilities that the person concerned does have unexplained assets.[120] The proceedings are therefore civil and not criminal in nature.

The Act also provides for interlocutory remedies where there are chances of the proceeds of corruption being wasted pending hearing and determination of proceedings to recover such proceeds. For instance, section 56(1) of the Act allows EACC to make an ex parte application for 'an order prohibiting transfer or disposal or other dealing with property' suspected to be proceed of corruption. Similarly, EACC may appoint a receiver in respect to property suspected to have been acquired through corrupt conduct.[121]

2.4.5 Bribery Act

This is a recent Act of Parliament in Kenya enacted in 2016 to deal with the prevention, investigation and punishment of bribery. The Act prohibits not only the giving[122] but also

[118] Sec 52, ACECA.
[119] Art 50(2), Constitution of Kenya, 2010.
[120] Sec 55(6), ACECA.
[121] Sec 56A (1), ACECA.
[122] Sec 5 Bribery Act, 2016.

receiving[123] of a bribe. The Act has an extra-territorial application to citizens who bribe foreign public officials in a bid to receive any favours.[124] Other than this, it creates an obligation on private bodies to prevent bribery. This fairly recent Act has not stood the test of time and we still wait to examine its efficacy in combating corruption in Kenya.

2.5 Institutional Framework

Kenya possesses a fairly elaborate institutional framework for fighting corruption. For instance, the EACC is the national institution specially established to fight corruption in Kenya. Generally, the Constitution and other statutes require independence of anti-corruption institutions to protect members of such institutions from undue influence and interference. Independence is important in ensuring that the institutions discharge their responsibilities effectively. Therefore, independence requires a genuine political will to fight corruption. The will must be captured in a comprehensive anti-corruption strategy.

To achieve independence, anticorruption institutions must attain structural and operational autonomy. In that regard, the South Africa's Constitutional Court in *Hugh Glenister v President of the Republic of South Africa & Others*[125] noted that:

> […] it is the structural and operational autonomy that is important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for appointment and removal of the director together with proper human resources management and internal controls are important elements to prevent undue interference.

However, the independence should not be used to shield the institutions from accountability. The institutions must adhere to the rule of law, human rights and submit regular performance reports to the executive and legislature. This section therefore analyzes the various institutions established to combat corruption in Kenya. The institutional framework for anti-corruption in Kenya comprises policy regulatory institutions, law enforcement agencies, partnerships, oversight institutions and other good governance initiatives. The section assesses the effectiveness of these institutions in dealing with corruption in investment.

It is noted in this section that, apart from EACC, Kenya has various public bodies playing a complementary role in the fight against corruption. For instance, the Office of the Director of Public Prosecutions prosecutes corruption and economic crime cases investigated by EACC.

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[123] Sec 6 Bribery Act, 2016.
[124] Sec 8 Bribery Act, 2016.
[125] [2011] ZACC 6 para 16.

The Judiciary on the other hand, adjudicates cases of corruption and economic crimes. There are also the Office of the Attorney General and Department of Justice, the Office of the Auditor General, the Office of the Controller of Budget, the Directorate of Criminal Intelligence, the Financial Reporting Centre, the Assets Recovery Agency, the Public Procurement Regulatory Authority, the National Anti-Corruption Campaign Steering Committee and the Inspectorate of State Corporations, all mandated to fight corruption. However, this section focuses on the roles of EACC and the Judiciary in fighting corruption from an investment perspective.

2.5.1 Ethics and Anti-Corruption Commission

The EACC is the principal institution for dealing with corruption in Kenya. EACC is established at section 3 of the Ethics and Anti-Corruption Commission Act (EACC Act). EACC is governed by the national values and principles and the rules of natural justice.[126] Of significance is the independence of the Commission anchored in Article 79 of the Constitution and section 28 of the EACC Act. Independence of EACC is important because corruption largely involve powerful individuals, hence, the need to shield anti-corruption units from undue influence.[127]

Just like other Commissions, EACC is mandated by virtue of Article 252(1) of the Constitution to conduct investigations on its own motion or on the basis of a report ny a member of the public.[128] While EACC is given the discretion to adopt alternative dispute resolution methods, section 11(1) (d) of the Act limits the role of EACC to investigation of corruption and other economic crimes. It vests the prosecutorial powers with the Director of Public Prosecutions (DPP).

Moreover, the independence of EACC is guaranteed by Article 79 of the Constitution. In performance of its functions, EACC may develop and promote standards and best practices in integrity and anti-corruption, and develop its own code of ethics.[129] Again, this robust mandate is limited by section 11(1) (e) which limits the role of EACC to recommending appropriate action against public officers, and not actually enforcing such actions against the officers.

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[126] Sec 12, ACECA.
[127] (n 52) para 118.
[128] Sec 11(1) (c), ACECA.
[129] Sec 11(1) (a), ACECA.

However, EACC may institute and conduct proceedings in court for the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption, or the payment of compensation, or disciplinary measures.[130] While this study focuses on fighting corruption from an investment perspective, the powers of EACC are confined to corruption committed by public officers. Hence the Commission is well placed to unearth corruption involving investors seeking to compromise public officials for their gain.

As noted above, besides EACC, there are a various public bodies and law enforcement agencies that complement EACC in the fight against corruption in terms of policy, administrative, adjudication and enforcement work against corrupt or unethical conduct. The subsequent subsection will therefore examine the roles of the judiciary in combatting corruption from the investment sector.

2.5.2 The Judiciary

The Judiciary is established under Article 159 of the Constitution of Kenya. In exercising judicial authority, the court is guided by inter alia, the principle of protection of the purpose and principles of the Constitution of Kenya.[131] Article 160(1) on the other hand, guards the independence of the judiciary. It provides that in the exercise of judicial authority, the Judiciary is 'not be subject to the control or direction of any person or authority.'[132] With regard to subordinate courts, Article 169(1) (d) of the Constitution provides that 'any other court or local tribunal may be established by an Act of Parliament.

The Chief Justice may appoint special Magistrates to try inter alia, corruption and bribery.[133] For efficiency, a special Magistrate is required to hold the trial of an offence on a day-to-day basis until completion.[134] To ease acquisition of evidence before anti-corruption court, a special Magistrate may pardon any person privy to an offence, with a view to obtaining evidence against any person concerned in an offence.[135] A special Magistrate is not bound by the provisions of the Criminal Procedure Code and the Magistrates' Courts Act if they are inconsistent with the Anti-Corruption and Economic Crimes Act.

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[130] Sec 11(1) (j), ACECA.
[131] Art 159(2), Constitution of Kenya 2010.
[132] Art 160(1), Constitution of Kenya 2010.
[133] Sec 3(1), ACECA.
[134] Sec 4(4), ACECA.
[135] Sec 5(1), ACECA.

2.6 Conclusion

From the analysis, it is evident that Kenya has made positive attempts to harbor an appropriate legal and institutional framework to combat corruption. However, considering the dynamic nature of corruption in international investment law, this layer of criminalization of corruption is not enough to properly deal with the menace in Kenya. Nonetheless, ACECA also provides for full compensation on any person who does anything that constitutes corruption to anyone who suffers a loss. Mischievously, the compensation is pegged on criminal conviction, which is untenable because of the difficulties in establishing economic crimes.

On the institutional framework, it is worth observing that Kenya has various institutions involved in the fight against corruption. However, EACC is the main anti-corruption agency in Kenya. It is more stable because its existence is anchored in the Constitution.

Chapter Three pitches the discussion an octave higher by examining the BITs signed by Kenya and whether they have taken a rights and obligations approach for both the investors and the state in the fight against corruption.

CHAPTER THREE

AN EXAMINATION OF ANTI-CORRUPTION PROVISIONS IN BILATERAL INVESTMENT TREATIES SIGNED BY KENYA

3.1 Introduction

The access to Foreign Direct Investment (FDI) in a country is made practicable through a variety of legal arrangements including: a Multilateral Agreement on Investment, an exercise that is yet to see the light of day, the formation and subscription into regional trading blocs with investment laws, concessions made by a State to another[136] and the conclusion of Bilateral Investment Treaties (BITs). This Chapter's analysis is mainly focused on BITs signed by Kenya.

Whereas it might seem adorable to quickly undertake a textual analysis of the BITs concluded by Kenya with a bid to examine whether they have anti-corruption provisions with rights and respective duties for States and investors, such an analysis would be misplaced. This research undertakes this view not necessarily because of the lack of legitimacy in the concerns to be raised, but rather, for a failure to appreciate the crucial role played by the ever-present historical nuances to international investment law.

3.2 Traditional Nature of BITs

BITs, which are the oldest known form of treaty based regulation of rules relating to international investments, have been in existence since as early as 1959.[137] A BIT is an international arrangement, reached by two state parties with the aim of codifying the rules for promotion and protection of international investments.[138] BITs are designed to encourage investments by nationals of a State otherwise referred to as the home state into the territory of another State (the host State) by according them a well-defined protection.[139] BITs create a distinct regime, from the domestic investment laws of the host country[140] and customary

[136]Atik Jeffrey 'Fairness and Managed Foreign Direct Investment' (1995) 32 *Columbia Journal of Transnational Law* 1.
[137] Amit M Sachdeva 'International Investment: A Developing Country Perspective - International Investment: A Developing Country Perspective' (2007) 8 *Journal of World Investment and Trade* at 533.
[138] John P. Gaffiscy & James L. Loftis 'The "Effective Ordinary Meaning" of BITS and the Jurisdiction of Treaty-Based Tribunals to Hear Contract Claims' (2007) 8(1) *Journal of World Investment and Trade*.
[139] R. Dolzer & M. Stevens, Bilateral Investment Treaties, Martinus Nijhoff, The Hague, 1995, 26.
[140] M. Sornarajah 'State Responsibility and Bilateral Investment Treaties' (1986) 20 *Journal of World Trade Law* at 79.

international law.[141] They provide a third-tier of protection to foreign investors. This enhanced protection mechanism dispels the fears of foreign investors, more particularly that 'host governments can easily exercise their regulatory authority by altering its domestic law after a foreign investment is made, and the host country officials may fail to act fairly or impartially towards foreign investors and their enterprise.'[142]

BITs are thus differentiated from the municipal laws of a Host state as they are least likely to suffer change with a change in government or even a change in laws.[143] Therefore, their distinctive and attractive mark for the investor is that they are less susceptible to change with a change in government. Additionally, they are not subject to unilateral alteration since they bear bilateral rights and obligations. They therefore ensure stability for the investors with their peculiarities of longevity and continuity of coverage even after the investments are terminated.[144] BITs in essence function to boost and bolster investor confidence in the regulatory and institutional framework for investment existing in the host state.[145] Furthermore, the host country also undertakes to harmonize and make the domestic laws relating to foreign investments are in tandem with its and commitments pledged under the BIT.

Unfortunately, the composition of the traditional BITs signed in the 1950's and 1960's is not very different from those that are in force today in Kenya. Despite the metamorphosis witnessed in the content of BITs post 2000, this desired change has not been seen in BITs signed by Kenya. While there has been an overemphasis on investment protection, holding investors accountable for various breaches perpetrated in host states in the line of their investment has been a challenge. This failure is premised on the prevailing condition that the focus of BITs is mainly investment protection without due consideration being given to any other objective.[146] The current normative framework of BITs in Kenya would still qualify to

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[141] Stephen Schwebel 'The Overwhelming Merits of Bilateral Investment Treaties' (2009) 32(2) *Suffolk Transnational Law Review*, 263-270.
[142] UNCTAD 'The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries' (2009) UNCTAD Series on International Investment Policies for Development UNCTAD/DIAE/IA/2009/5 available at https://unctad.org/system/files/official-document/diaeia20095_en.pdf (accessed 29 August 2021).
[143] Subedi Surya, International Investment Law: Reconciling Policy and Principle (2012) International Investment Law: Reconciling Policy and Principle, Hart Publishing, 55-56.
[144] As above.
[145] Jamieson Sara 'A Model Future: The Future of Foreign Direct Investment and Bilateral Investment Treaties' (2012) 53 *South Texas Law Review* at 609.
[146] Attila Tanzi, 'Balancing Foreign Investment Interests with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector' (2012)11 *The Law and Practice of International Courts and Tribunals* 47, 48.

be termed a traditional BIT as it offers rights of protection to foreign investors without offering corresponding obligations owed to the host state.

The Kenyan situation is typical of capital exporting countries imposing overly protective, catch all, provisions which tend to offer protection to the investor while constricting the policy space of the host state jeopardizing the regulation of matters of public concern. Moreover, the current BIT system fails provide to the host country an effective enforcement mechanism to ensure foreign investors conduct themselves responsibly and contribute to the economic development of the host country. Most importantly, the Kenyan BITs do not have solid provisions on anti-corruption hence the original skewed structure still stands to date. A case study of the Kenyan model BIT and other BITs that are in force presently in Kenya exemplify this position.

3.2.1 The Asymmetry Critique of International Investment Law

Traditionally, BITs are characterized by asymmetry: foreign investors are bestowed with rights that are not accompanied by obligations, while host states are forced into obligations devoid of rights.[147] This notion stems from the early statements in the famous speech of Elihu Root who, while commenting about 'good governance for foreign citizens', stated thus:

> There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.[148]

This therefore suggests a standard of protection for the foreign investor that might surpass that accorded to the citizens of a particular state. This has further led to the evolution of a legal regime that is skewed towards investor protection with little protection on the State. This Eurocentric minimum standard of treatment is juxtaposed with the classical opposition by the Latin American countries which preferred the famous Calvo Doctrine which can be summarized into three key elements; "anti-super-national-treatment, exclusive local

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[147] Matthew Levine, 'Canadian Initiatives against Bribery by Foreign Investors' IISD: Winnipeg (2019) at 12 available at https://iisd.org/library/canadian-initiatives-against-bribery-foreign-investors (accessed 29 August 2021).

[148] Elihu Root ' The Basis of Protection to Citizens Residing Abroad ' (1910) 4 *American Journal of International Law* 517, 521 – 22.

jurisdiction, and the exclusion of diplomatic protection" in the conduct of foreign investment by the host state with foreign investors.[149] However, the 'national treatment'[150] advocacy by the Latin American States did not triumph the Eurocentric approach. Resultantly, the traditional BITs, while providing guarantees to investors, were notorious for remaining silent on the obligations of investors upon setting up investments abroad.[151] Consequently, the host states are subjected into investment arbitration by investors despite their inconsistent conduct when they are for instance involved in fraud, bribery and other forms of violation of the national laws of the host state.

This state of affairs coupled with the realization that the signing of various BITs with concessions on the investors does not necessarily increase investments in a country, has caused a twist and turn in the text of BITs in Africa. The underlying issues to grapple with in these reforms is the classic tension between protection and promotion of investments.[152] African states are engaged in a delicate dance between providing incentives to attract FDI on one hand, and redistribution of rights and obligations between investors and states, on the other.[153] Unfortunately, this wave of change is yet to be reflected in most of the BIT texts which are currently in force and this positive change is only but a mirage in most of the BIT templates that are used by most of the African countries as a basis for negotiations.

3.3 An Inventory of BITs signed by Kenya

Kenya has concluded a number of BITs with other countries. According to the data from the United Nations Conference on Trade and Development (UNCTAD) Investment Policy Hub, Kenya has negotiated and signed BITs with: Singapore, Japan, United Arab Emirates, Korea, Qatar, Turkey, Kuwait, Mauritius, Slovakia, Burundi, Finland, France, Libya, United Kingdom, Germany, Switzerland, China and Netherlands.[154] However, some of these BITs are yet to enter into force. The table below presents the eleven BITs that are currently in force in Kenya.

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[149] Wenshua Shan 'From "North-South Divide" to "Private Public Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law' (2006-2007) 27 *Northwestern Journal of International Law and Business* at 632.
[150] As above.
[151] Levine (n 147) 13.
[152] Ndanga Kamau 'Investment Law and Treaty Reform In Africa: Fragments and Fragmentation' (2020) 1 *African Journal of International Economic Law* at 201.
[153]Tomoko Ishikawa 'Counterclaims and the Rule of Law in Investment Arbitration, Symposium on Investor Responsibility: The Next Frontier in International Investment Law' (2019)113 *American Journal of International Law* at 33–37; Andrea Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17 *Lewis & Clark Law Review* at 361
[154] UNCTAD Investment Policy Hub available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/108/kenya (accessed 3 September 2021)

No	Country	Date of entry in top force
1.	Japan	14 September 2017
2.	UAE	5 June 2017
3.	Korea	3 May 2017
4.	Kuwait	22 April 2015
5.	Burundi	1 April 2009
6.	Finland	2 October 2009
7.	France	26 May 2009
8.	Switzerland	10 June 2009
9.	United Kingdom	13 September 1999
10.	Germany	7 December 2000
11.	Netherlands	11 June 1979

It can be argued that some of these BITs were concluded under the influence and consideration of the Kenya Model BIT. The Kenya Model BIT is a true reflection of an investor friendly model that emphasizes on promotion of investments with very little to talk about on investor duties and obligations. The Model was developed in 2003, a clear indication that it has not been developed to incorporate contemporary practices in BIT drafting by incorporating balanced relationships between investors and the host state.

We zoom into some of the provisions of the Model and a few other BITs in force with a view of examining the salient features and whether they provide for anti-corruption mechanisms other than investor friendly provisions. Nevertheless, most of these agreements contain a similar structure and content with little nuances if any.[155]

[155] Hailu Belete & Esmael Kassahun 'Rethinking Ethiopia's Bilateral Investment Treaties in Light of Recent Developments in International Investment Arbitration' (2014) 8 *Mizan Law Review* 117; Jeswald W. Salacuse,

3.4 Anti-corruption obligation in BITs

Since most BITs lack direct obligations on investors to fight corruption, it behooves states to be firm on the inclusion of such obligations in BITs they negotiate or renegotiate, building on recent treaty practice.[156] Recently, there has been an increased focus on corruption by many BITs. Given their purpose of encouraging trade, this growing focus on corruption, which is detrimental to economies, is not surprising. Since 2000, more than 40% of concluded BITs have anti-corruption commitments.[157] These BIT anti-corruption commitments include pledges to criminalize corruption, protections for whistleblowers, and monetary sanctions for corrupt activities.[158] Despite this deliberate move, it is absurd that some of the countries that have been adversely affected by corruption have not proceeded to implement such direct provisions in their BITs. In the absence of specific treaty provisions on anti-corruption obligations on the investor and host state, there has been reliance on the qualification of investment with 'in accordance with the laws and regulations of the Host State' as the basis for condemnation of illegalities such as corruption. This research interrogates the various forms in which the legality clause in crafted in various BITs with a special focus on the Kenyan Model BIT and other BITs signed by Kenya.

3.4.1 The Qualification of Investment with 'In Accordance with the Laws and Regulations of the Host State

Modern BITs commonly require that investments be made in compliance with the laws and regulations of the host State.[159] A consistent analysis of BITs concluded by a number of both capital importing and capital exporting States leads to an indication that the compliance of foreign investments with domestic law is broadly incorporated in BIT provisions. Many investment protection treaties contain "in accordance with host State law" clauses. The

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'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *International Lawyer* at 659.

[156]Levine Matthew 'A Bit of Anti-bribery: How a Corruption Prohibition in FIPAs can bring a Minimum Standard of conduct for Canadian Investors Abroad' (2019) *Investment Treaty News, 10*(2), 8 11 available at https://www.iisd.org/itn/2019/06/27/a-bit-of-anti-bribery-how-a-corruption-prohibition-in-fipas-can-bring-a-minimum-standard-of-conduct-for-canadian-investors-abroad-matthew-levine (accessed 29 August 2021).

[157]Matthew Jenkins 'Anti-corruption and Transparency Provisions in Trade Agreements' (2017).

[158] Collier Bowling 'Corruption and FTAs: Does an Implicit Cause of Action Exist For Corruption Claims in ISDS? (2019) 51 *International Law and Politics* at 924.

[159] Christoph Schreuer et al *The ICSID Convention: A Commentary* 140 (2d ed. 2009); Andrea Carlevaris 'The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals' (2008) 9 *Journal of World Investment and Trade* at 35– 49; Christina Knahr, Investments "in Accordance with Host State Law", 4 *Transnational Dispute Management Journal* at 5.

wording, structuring and positioning of these clauses can, however, differ significantly.[160] These are hereby assessed in the order of their appearance in BITs. It is generally agreed that the question of legality of an investments is a condition for their protection in investment law.[161] The various formulations of legality clauses require careful examination as they constitute one of the main reasons for the differing applications of the condition and would therefore feed into their considered sufficiency or lack thereof in fighting corruption.

3.4.2 Preambular incorporation of compliance with domestic law

It is generally recognized that a preamble does not have a normative effect, even though it is a vital tool for interpretation of a treaty as it sets out the context, aspiration and at times, object and purpose of a treaty.[162] The Preamble of most of these Agreements contains a restatement of the commitment of the contracting parties to ensure promotion and protection of investment by mutual collaboration. It sets out the objectives to be met courtesy of entering into the agreement. For instance, the Kenya-Japan BIT states as follows in part:

> Desiring to further promote investment in order to strengthen the economic relationship between Japan and the Republic of Kenya (hereinafter referred to as "the Contracting Parties"); Intending to further create stable, equitable, favourable and transparent conditions for greater investment by investors of a Contracting Party in the Area of the other Contracting Party; Recognising the growing importance of the progressive liberalisation of investment for stimulating initiative of investors and for promoting prosperity in the Contracting Parties[163]

This excerpt presents a clear trajectory on the object and purpose of the BIT and the underlying objective of protection and promotion of investment in the contracting parties. Two lessons are deciphered from this statement. Firstly, there exists a strong reiteration that the central theme in the conclusion of BITs is that they are channels for stimulating development; lending themselves to the stimulation of private business ventures from foreign nationals through the establishment and guarantee of certain favourable conditions.[164] Secondly, the promise of reciprocity in treatment is a foundational guarantee in the

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[160] Ursula Kriebaum, Investment Arbitration - Illegal Investments in Christian Klausegger , Peter Klein et al. (eds), *Austrian Arbitration Yearbook* 2010, (C.H. Beck, Stämpfli & Manz 2010) at 307 – 335.

[161] McLachlan, Shore & Weiniger, 'International Investment Arbitration: Substantive Principles (OUP 2007) at 21; J Salacuse, The Law of Investment Treaties, 167.

[162] Art 31(1) & (2) *Vienna Convention on the Law of Treaties* 1155 UNTS 331, 8 ILM 679 (1969), 63 *American Journal of International Law* 875 (1969)

[163] Agreement between the Government of Japan and The Government of The Republic of Kenya for The Promotion and Protection of Investment, Signed 28 August 2016, entry into force 14 September 2017 available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5374/download (accessed 3 September 2021).

[164] Gallis Glenn 'Bilateral Investment Protection Treaties' (1984) 2 *Journal of Energy and Natural Resources Law* 77, 81.

conclusion of BITs. Even-handed as these underlying lessons may seem, they are made on the inaccurate assumption that investment will be flowing from either of the two contracting states to the other party.[165]

References to compliance with domestic law set out in preambular paragraphs can inform the interpretative process of the substantive clauses of the BIT, including any legality clauses.[166] A clear example of this mode of incorporation of the legality clause is afforded in the Kenya-United Arab Emirates BIT[167] which provides thus:

> Recognizing that the promotion and reciprocal protection of such investments, made *in accordance with the laws and regulations of the host contracting party* will stimulate individual business initiative and increase prosperity in both States.[168]

These references in the preamble indicate the shared understanding by the two states that the investment established ought to be complaint with the laws of the host state.[169]

The Kenyan Model BIT's preamble also undertakes a merely promotion based language and does not attempt to insert the legality clause in its text. The preambular reference to the legality clause, though not entirely absent, is not a common phenomenon in the Kenyan BITs that are currently in force. Most of their preambular provisions are couched to restate the promotion and protection of investments.

3.4.3 Legality clause in the definition of an investment

The other form of incorporation of the requirement for investments to be in compliance with the laws and regulations of the host state is within the definition of what amounts to an investment. The BITs cast a wide net in the definition of an investment and an investor with an aim of covering any and all conceivable forms of business endeavors in the host state.[170] Article 1 of the Kenya Model BIT defines investment as follows:

> The term "investments" shall be construed to mean any kind of property invested before or after the entry into force of this Agreement by a natural or legal persons

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[165]As above.
[166] Rumiana Yotova 'Compliance with Domestic Law: An Implied Condition in Treaties Conferring Rights and Protections on Foreign Nationals and Their Property?' (2018) 43 *Cambridge Legal Studies Research Paper Series* at 9.
[167] Agreement Between The Government of the Republic of Kenya and the Government of the United Arab Emirates for the Reciprocal Promotion and Protection of Investments, signed 23 September 2014 entry into force 05 June 2017.
[168] Preamble, Kenya-UAE (2017) BIT.
[169] Yotova (n 166) 9.
[170] Ocran Modibo 'Bilateral Investment Protection Treaties: A Comparative Study' (1987) 8 *New York Law School Journal of International and Comparative Law* at 406.

> being national of one Contracting Party in the territory of the other, *in conformity with the laws and regulations of the latter.* [Emphasis added]

Most of the Kenyan BITs adopt the legality clause on the definition of investment approach. This standard of conformity with the host state's law has been used as the yardstick upon which the investor's conduct is weighed and at times the admissibility of their claims before various investment tribunals. It has been an omnibus provision upon which any quest for observance of the host state's laws lies. Recently, the practice obtaining in investment law is an emerging principle that places as a precondition the compliance with the law of the host state, and by extension international legal principles before being granted substantive legal protections in an investment treaty.[171] This requirement was recognized in *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, where the tribunal went ahead to state as follows:

> [A]n investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; [] if its creation itself constitutes a misuse of the system of international investment protection under the ICSID [International Centre for the Settlement of Investment Disputes] Convention [;] [or] if it is made in violation of the host State's law.[172]

Essentially, this provision has since carried all the obligations of an investor on fidelity to the law of the host state. The risk in leaving very serious objectives of modern investment law such as anti-corruption on this solitary provision is its inherent inadequacies. One such inadequacy is the paradox that it presents in its application: On the one hand, host State law is a point of reference in determining the extent of the jurisdiction of the Tribunal.[173] As such the host state can limit the scope of legal review by the Tribunal. On the flip side, the host State law is often the very subject of the legal review by the Tribunal, which has to determine whether host State law and its application led to breaches of the BIT. Therefore, host State law plays the conflicting roles of being a yardstick and object of review at the same time. Eventually, with the differing approaches by tribunals on what amounts to an investment in the context of the host states law, pegging the legality clause on the definition of an investment is counter-productive. Whereas it might be used as a defence for admissibility in a

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[171] Rahim Moloo & Alex Khachaturian 'The Compliance with the Law Requirement in International Investment Law (2011) 34(6) *Fordham International Law Journal* at 1475.

[172] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 1 123 (June 18, 2010), http://ita.law.uvic.ca/documents/Hamesterv.GhanaAward.pdf (citing *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 106 (Apr. 15, 2009).

[173] Ursula Kriebaum, Investment Arbitration - Illegal Investments in Christian Klausegger , Peter Klein , et al. (eds), *Austrian Arbitration Yearbook* 2010, (C.H. Beck, Stämpfli & Manz 2010) at 307 – 335.

tribunal, in the event the tribunal decides that the considered activity is an investment, the legality provision stands defeated.

It is arguable that incorporating the requirement for compliance with domestic law in the definition of investment clause performs the function of qualifying the consent of the host state with respect to what amounts to a covered investment. The consequence of this is that non-compliance with such a clause is fundamentally influential in determining the jurisdiction of the tribunal.

3.4.4 Legality clause within the scope of application clauses

Some BITs while stating their scope of application clearly delineate the investments that they apply to must be in accordance to the laws and regulations of the host state. This approach has been taken in the Kenya-Switzerland BIT which provides that "the present Agreement shall apply to investments in the territory of one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party".[174]

It is however a self-defeating argument to purport to admit an investment and claim to exclude it from the scope of protected investment even though the conduct of the investor goes against the laws of the host state. Deeper questions lie in determining the manner in which an investment ought to be dealt with during the pendency of the time prior to going against the host state law. For anti-corruption, the question is even more nuanced as to whether an investment, like an pendulum should oscillate in and out of protection upon the occurrence of a corrupt activity. To prevent all these complexities, a specific provision on anti-corruption presents the answer.

The effect of this approach is to disqualify any investment not made in accordance with the Host State law from protection by the BIT.

3.4.5 Legality clause in the admission of investments

BITs also insert the qualification 'in accordance with the laws and regulations' in the provision on admission of investments to a host state. The Kenya-Kuwait BIT adopts this approach by providing that "each Contracting Party shall encourage and create favourable conditions for investments of investors from the other Contracting Party in its territory, and shall in accordance with its laws and regulations, subject to its rights to exercise powers

[174] Art 2, Kenya-Switzerland (2006) BIT.

conferred by its laws, shall admit such investments."[175] This approach is also replicated in the Kenya-Switzerland BIT.[176]

When the clause is included as part of the admission provision, substantively this implies that focus of compliance with the host state law is at the instance of establishing an investment and not necessarily throughout the life of the investment.[177] As noted by Salacuse, "the admission clause allows the host state to retain control over the entry of foreign capital…and to determine the conditions under which foreign investment will be permitted, if at all."[178] The net effect of such adopting this approach is that once an investor has complied with the laws and it has warranted their admission to the host state, their conduct post-admission is not under scrutiny.

The legality clause based on admission cannot be used as a stand-alone provision in ensuring compliance with the host states laws such as anti-corruption laws. It invites questions such as whether such conformity was merely a prerequisite for establishing an investment in a host state and thereafter the investors is presented with a carta blanche to conduct themselves as they wish. This approach has been taken by the Kenyan Model BIT.[179] The underlying concern is premised on the fact that most of the BITs signed by Kenya only insist on compliance with the Kenyan laws at the time of establishing investments. Occasionally, certain investment treaties only require the investors to comply with the laws of the host state that govern the admission of investments.[180] This therefore leads us to the proposition that whereas investment tribunals have always sought to establish whether investments were made in accordance with the host state's laws and regulation, it is appropriate to have specific provisions in BITs to address contemporary challenges to international investment law such as anti-corruption. This would ensure compliance in the lifetime of the investment.

3.4.6 Legality clauses in the protection of investments

This is not a common parlance occurrence in BITs to incorporate a direct link on the legality requirement to the substantive standards of protection of the investment. This research merely recognizes the existence of this approach in the formulation of certain BITs and stops at that. Interestingly, if arbitration would be based on such a clause incorporated in the protection

[175] Art 2(1) Kenya-Kuwait (2013) BIT.
[176] Art 3(1) Kenya-Switzerland (2006) BIT.
[177] Gustav F W Hamester v Republic of Ghana, ICSID Case No. ARB/07/24 Award 18 June 2010, para 127.
[178] Salacuse, The Law of Investment Treaties, 197.
[179] Art 2(1) Kenya Model BIT.
[180] Moloo & Khachaturian (n 171) 1473.

provisions, the legality requirements would not only affect the admissibility of the claim. It would percolate and permeate the arguments on merit. A good example of such a provision in the Germany – Argentina BIT provides that only "investments made by nationals or companies of either Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Party shall enjoy full protection under this Treaty."[181]

On the basis of these approaches, we examine and analyze the provisions of the Kenyan Model BIT mainly, and other BITs concluded with other States to examine the nature of obligations that are provided therein. Of importance is to note whether there exists an impetus to fight corruption from an investment perspective.

3.5 Challenges on the scope of the law covered by the legality clause

In addition to the approaches and positioning of the legality clauses and their effect, other challenges regarding the scope of laws to be observed by an investor arise and are discussed hereunder.

3.5.1 Compliance with all laws or specific fundamental laws?

Investment tribunals have made propositions to the effect that an investor should not comply with all the laws of the host state. These tribunals has since proposed a limitations on the range of host state laws with which an investor is expected to comply.[182] This was the case in *LESI v Algeria*, where the tribunal interpreted the investor legality provisions as enshrined in in the Italy-Algeria BIT to mean that investments would lose treaty protection only when made 'in violation of fundamental principles in force.'[183] This pronouncement set the stage for the tribunals in *Desert Line v Yemen*[184] and *Rumeli v Kazakhstan*[185], to follow this view in stating that an investment legality could only be measured in the context of breaches of "fundamental principles of the host State's law." The takeaway from these tribunals' suggestions is that provided an investor has complied with the fundamental principles of law

[181] Art 2(2) Germany – Argentina BIT, 1991.
[182] Jarrod Hepburn 'In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration' (2014) available at https://www.iisd.org/itn/en/2014/11/19/in-accordance-with-which-host-state-laws-restoring-the-defence-of-investor-illegality-in-investment-arbitration/ (accessed 3 September 2021).
[183] *LESI SpA and Astaldi SpA v Algeria* (ICSID Case No ARB/05/3), Decision on Jurisdiction, 12 July 2006 [83].
[184] *Desert Line Projects LLC v Yemen* (ICSID Case No ARB/05/17), Award, 6 February 2008 [104].
[185] *Rumeli Telekom AS v Kazakhstan* (ICSID Case No ARB/05/16), Award, 29 July 2008 [319].

in the host state, they are not bound to follow the other laws that do not amount to fundamental principles of that jurisdiction. The question that then lingers without a specific answer is threshold of what amounts to 'fundamental principles of law' and where does this threshold stem from when the predominant texts of BITs speaks to the laws of the host state. This then leaves the fight against corruption at a limbo should a tribunal deem the host state's law on anti-corruption non-fundamental. On this basis, security is afforded in advocating for a specific provision on anti-corruption in the BIT which is specifically binding on both parties. Whereas tribunals are not guided by the doctrine of stare decisis, the distinction between fundamental principles of law and other laws creates a possible absurdity for a host state in the event they bring about a defense of legality of an investment. It is possible that a tribunal might hold the law relied on as non-fundamental.

3.5.2 Is the law limited to investment law?

There is no specific treaty provision that has been seen to limit the applicable law and regulations in a host state to those that regulate investment. However, alongside the 'fundamental principles of law exception' it has been suggested by a tribunal that an investor ought to comply with laws relating to investment *stricto sensu*. In *Saba Fakes v Turkey*, the tribunal rejected Turkey's claim on the investor's non-compliance with domestic competition law and telecommunications regulatory law terming it irrelevant, because these were not considered laws "related to the very nature of investment regulation." The *Fakes* tribunal opined that the legality clause solely required the investor to comply with the national laws "governing the admission of investments in the host State".[186]

The interpretation of the law by this tribunal seems wanting as it would be impracticable to fathom establishing an investment for instance in the telecommunication industry without relying on the said laws. This reasoning nevertheless exposes the weaknesses of legality clauses as the sole provision to be relied on in championing for compliance with the host states law. Even though the decision of this tribunal has not been followed, this development exposes the vulnerability of a host state in relying in a non-specific provision to make specific claims on a specified area of law.

[186] *Saba Fakes v Turkey* (ICSID Case No ARB/07/20), Award, 14 July 2010 [119]–[120].

3.6 Exception to the legality clause

Investment tribunals have crafted by the tool of interpretation a number of situations where the host state's claim that the investment was not established in accordance with the law will be by-passed. We consider the exceptions of 'good faith' mistakes and estoppel.

3.6.1 The exception of 'good faith' mistake

A mistake made in 'good faith', despite being an oxymoron has been held by certain tribunals to be an exception to the legality requirement. In *Tokios Tokeles v. Ukraine*[187], a claim regarding defective documents that were produced by the investor in the process establishing an investment were brought to question. The where the respondent alleged that the investors claim should be rejected as it was premised on defective documents. The tribunal in disallowing this contention stated thus:

> Even if we were able to confirm the Respondent's allegations, which would require a searching examination of minute details of administrative procedures in Ukrainian law, to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty. In our view, the Respondent's registration of each of the Claimant's investments indicates that the "investment" in question was made in accordance with the laws and regulations of Ukraine.

The onset of this exception is a clear indication that the tribunals would not judiciously follow every bit and piece of the host state's law to confirm compliance. This therefore behooves states, if they are to rely on the investment law regime for anti-corruption, not to be reliant on the legality clause.

3.6.2 The estoppel exception

Estoppel is a recognized principle in international law that seeks to prevent a party from departing from a representation that it made and another party relied on it to their detriment. The principle is applicable in investment law as was the case in Fraport where the tribunal stated: "[p]rinciples of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law."[188]

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[187] *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on jurisdiction, (Apr. 29, 2004), 20 ICSID Rev. 205 (2005) at 83.

[188] *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25.

It is therefore conceivable that the legality clause can be challenged on grounds of estoppel if a state in one way or another fails to deal with an illegality or is otherwise seen to have condoned the same.

In summary, the legality clause has a lot of limitations on it and it can be defeated by various ways. More importantly, the ambiguity in its construction does not present to the host state and the investors the specific rights and obligations that accrue to them. As such, it is safe to rely on it as a tool to incorporate anti-corruption provisions in a BIT.

3.7 Conclusion

Typically, investment treaties require host states to: provide foreign investors with the standard security in their investments including the fair and equitable treatment and full protection of investments; restricting direct or indirect expropriation of investments by a host state unless it meets the requisite threshold for its pursuit for a public purpose, in a nondiscriminatory manner, in accordance with due process, and accompanied by fair compensation; and discourages discrimination based on nationality.[189] These provisions are prominent in the text of BITs where Kenya is a part.

However, equivalent provisions creating obligations on the investor and specifically anti-corruption provisions are conspicuously absent in both the Kenya Model BIT and the BITs that are in force in Kenya. This position does not sit well with a country that needs the most stringent multi-disciplinary attack to the vice of corruption. Mere reliance on the legality clause cannot assure a strong fight against corruption as a result if the vagueness and short-comings of the provision. As a result of this uncertainty, arbitral tribunals tussle with an interpretation of 'in accordance with the laws and regulation of the host state.' In particular, arbitral tribunals have constantly faltered and stumbled in determining the scope of the obligation as well as establishing whether investors complied with existing host state laws. This necessitates direct in-text obligations that can be strictly adhered.

The next chapter examines the best comparative practices that have been adopted by modern BITs that have direct provisions on anti-corruption with rights and duties on both the state and the investors. Upon highlighting the shortcomings of the Kenyan experience at present, the research sets an example to be followed if the war against corruption is to be won.

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[189] Kenneth J. Vandevelde 'The Political Economy of a Bilateral Investment Treaty' (1998) 92 *American Journal of International Law* 621, 631;Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties (1995).

CHAPTER FOUR

LESSONS ON INCORPORATION OF DIRECT ANTI-CORRUPTION OBLIGATIONS IN INVESTMENT TREATIES IN AFRICA

4.1 Introduction

There exists no doubt at this stage of the research that FDI plays an important role in economic development at municipal and global levels.[190] While FDI has a positive effect in promoting the economic development of the recipient countries, FDI has the potential of posing various challenges to the host state for instance when its operation is infested with corruption.[191] This challenge is exuberated in some developing countries that lack powerful law enforcement agencies, a sound legal system, and a high level of investment governance.[192] To many countries, just as is the case with Kenya, the reconciliation of the two seemingly conflicting goals in investment governance; the promotion of transnational investment and pursuing investment that abides with the host state law, has quickly become a pressing issue. This Chapter undertakes an examination of BITs that have successfully incorporated direct anti-corruption provisions in their text. The chapter does not attempt a comparative study since Kenya has not implemented direct anti-corruption provision in its BITs. It therefore chats a pathway that Kenya can adopt if it is to escalate the anti-corruption war to the investment law realm. The Chapter further interrogates the manner in which these provisions have been enacted and whether there exist any lessons for Kenya in its quest in fighting corruption from an investment perspective.

4.2 Typology of Anti-corruption provisions in BITs

Anti-corruption is broadly considered a core element of good governance and an important part of public policy at both domestic and worldwide levels.[193] Anti-corruption provisions are a developing antidote to the threat posed by corruption associated with FDI, and could play a helpful role in providing access to justice for all and build inclusive, effective and accountable institutions that are intolerant to corruption.[194] Incorporation of anti-corruption provisions in IIAs seems to be a recent IIA-making practice. BITs have generally

[190] L Alfaro et al 'How Does Foreign Direct Investment Promote Economic Growth? Exploring the Effects of Financial Markets on Linkages' (2006) *HBS Working Paper Number: 07-013*, available at http://www.hbs.edu/research/pdf/07-013.pdf (accessed 19 September 2021)
[191] S Hindelang & M Krajewski (eds) *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (2016).
[192] Manjiao (n 50) 18.
[193] As above.
[194] Manjiao (n 50) 18.

incorporated three types of anti-corruption provisions. Firstly, there exists the declaratory provisions that seek to implore both the state and the investor not to engage in corrupt conduct (1.1.1). These provisions do not proceed to spell out respective obligations for either of the parties. The second type imposes an obligation on the contracting states, either to refrain from engaging in corruptive conducts or to take up anti-corruption measures (1.1.2). The third type is directed to investors as it prohibits engaging in corrupt conduct and further outlines the penalties and punishment associated with such corrupt conduct (1.1.3). We examine each of these types briefly below.

4.2.1 Declaratory Provisions

Most of the IIAs concluded after 2012 incorporate an anti-corruption provision in one form or another. A clear example of a declaratory anti-corruption provision is contained in the ECOWAS Common Investment Code (ECOWIC), which states that the member states "affirm their resolve to eliminate bribery, fraud and corruption in respect of the international investment and trade in the ECOWAS territory".[195] The declaratory model which is mostly provided for in the Preamble acts to set the object and purpose of the treaty and in case of any deadlock, it can be used as an interpretive tool for the substantive provisions of the BIT. This is in light of the 1969 Vienna Convention on the Law of Treaties (VCLT), where treaty preambles play a key role in interpreting treaty clauses as "context" under Article 31, and in determining the object and purpose of a treaty under Article 18 and Article 60.[196] This interpretative function of preambular provisions of treaties in investment law has been endorsed by the tribunal in *Siemens v. Argentine*,[197] and *Vivendi v. Argentine*.[198] Nevertheless, despite their interpretative role the applicability of the preambular provisions is limited to the interpretive function as they fall short of conferring contractual rights or obligations on the contracting parties, though they may mirror rules of customary law and form an integral part of a treaty.[199]

4.2.2 Anti-corruption obligation on contracting state parties

[195] Art 35(1), ECOWIC.
[196] E Villiger *Commentary on the 1969 Convention on the Law of Treaties* (2008) (The Hague: Martinus Nijhoff), at 44.
[197] *Siemens* A.G. *v The Argentine Republic* (ICSID Case No. ARB/02/8), Decision on Jurisdiction of 3 August 2004 at para 81.
[198] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v Argentine Republic* (ICSID Case No. ARB/97/3), Award of 20 August 2007 at para 7.4.4.
[199] G Fitzmaurice *The Law and Procedural of the International Court of Justice* (1957) *British Year Book of International Law* at 229.

This model of anti-corruption provisions in IIAs imposes an obligation on the contracting states to combat corruption. A clear manifestation of this model is afforded in the SADC Model BIT.[200] This model is further dichotomized into either general or specific obligations which dichotomy we explore below.

4.2.2.1 General anti-corruption obligations against contracting states

As suggested in the name, these provisions enshrine an umbrella obligation on the contracting states to combat corruption. An example of the general obligation is one that requires the contracting state to "adopt measures and make efforts to prevent and fight corruption."[201] The pitfall of this model is the generality that is devoid of any specific obligations leaving the contracting states with a wide latitude for interpretation and justification of what amounts to the measures anti-corruption adopted.

4.2.2.2 Specific anti-corruption obligations against contracting states

Unlike its general obligations counterpart, the obligations in this model are tied to a specific right on the investor which is justiciable. For instance, a treaty may provide that the contracting states' abusive treatment of investors, such as abuse of power, coercion, harassment, corrupt practices or similar conduct in bad faith, should be deemed as "violation of fair and equitable treatment of the investors."[202] The potential benefit of this model is that it grants the contracting party a specific prescription to be adhered to with ramifications of non-compliance hanging upon such a party.

4.2.3 Anti-corruption obligations on investors

This model of obligations in BITs are directly targeted towards the conduct of the investor in the host state. These provisions are extensively exhibited in a number of BITs such as the SADC Model BIT. The obligations on the investor are further dichotomized as either affirmative or punitive. These types are briefly examined below.

4.2.3.1 Affirmative anti-corruption obligations on investors

A typical affirmative anti-corruption obligation against an investor merely prescribes that the corrupt conduct is against the laws of the host state and does not inflict punishment directly on the investor. A classical provision in this model would provide that "investors and their

[200] Southern African Development Community Model Bilateral Investment Treaty (SADC Model BIT), 2017.
[201] Art 15(1) Brazil Model BIT.
[202] Art 9(2)(e) Dutch Model BIT.

investments shall not be complicit in any corruptive act" and a breach of such obligation shall be deemed "to constitute a breach of the domestic law of the Host State Party concerning the establishment and operation of an investment."[203]

4.2.3.2 Punitive anti-corruption obligations on investors

A punitive anti-corruption obligation on the investor not only condemns the corrupt conduct but also places certain limitations of rights on the investor should such conduct be detected. A classical provision in this category provides that "claims involving corruptive investment activities will not be allowed to be submitted to international arbitration".[204]

In summary, it is not strange in a single IIA to find an overlap of the types of anti-corruption provisions that are feasible in BIT. Some BITs concurrently incorporate both an anti-corruption obligation on the state and those on the investor such as the SADC and Dutch Model BITs. This is necessary practice because the reality of corruption is that it is veiled in secrecy and at best conducted confidentially as between the state entities or officials and foreign investors.[205]

4.3 A Case Study of African BITs incorporating Anti-corruption provisions

In the last few years, Africa has been a normative laboratory for progressive investment treaties.[206] Unlike the past where Africa was regarded as a rule taker in international investment, a notion that borrowed from the predominant Eurocentric approaches to international investment, there has been immense development of international investment law norms from an African standpoint. It is true that traditionally, the BIT regime traces its origin in Europe, and as new countries, including from the developing world, jumped on the BIT bandwagon, the only source of inspiration was the European treaty practice.[207] Furthermore, research from empirical studies has shown that traditionally, developed countries wield more success as compared to developing countries in achieving consistent treaty networks, which essentially means that developed countries tend shape negotiation

[203] Art 10(2) & (3) SADC Model BIT.
[204] Art 13(4) Indian Model BIT; Art 16(2) Dutch Model BIT.
[205] Manjiao (n 50) 31.
[206] S Schill, & M Mbengue (eds) 'Africa and the reform of the international investment regime' (2017) *Journal of World Investment & Trade, 18*(3).
[207] Stephan Schill *The Multilateralization of International Investment Law* (2009) (Cambridge University Press).

outcomes.[208] This notion has placed Africa in the receiving end of international investment law and as a recipient, the normative framework for investment bearing the Eurocentric imprint has worked its way to be a source of inequality and bias to its recipients. This state of affairs created a need to have a decisive break from the past and this has explained the progress in rule-making from an African perspective.

The sprouting investment regime that is blossoming in recent enactments of investment treaties in Africa is congruous with the current global initiatives[209] and new generation of IIAs that strike a balance between the rights and duties of investors and the host states. In contrast, this effect has not been felt in majority of BITs signed by African countries that are currently in force. These BITs do not impose direct obligations on foreign investors thus resulting into unregulated investments.[210] Surprisingly, the imposition of direct obligations on foreign investors is yet to gain real recognition or traction in conventional investment treaty practice,[211] yet it is a viable mechanism for striking an appropriate balance between investment protection and corporate responsibility in host states.[212] Nonetheless, a good number of modern investment treaties are increasingly integrating provisions such as the obligation of foreign investors to comply with all applicable domestic law and measures of the host state. Mbengue and Schacherer emphasize the need to enforce direct obligations for investors, such as "the denial of treaty protection for the investor or the possibility of a state to file counterclaims in an arbitral proceeding"[213] and such emphasis has informed a number of the recent treaties incorporated in Africa which have come up with clear and direct provisions holding investor accountable for their actions in the territory of the host state.

This section therefore discusses the development of various African Investment agreements that enact transformative provisions that seek to balance the rights and obligations of the

[208] Wolfgang Alschner & Dmitriy Skougarevskiy 'Consistency and Legal Innovation in the BIT Universe' (2015) Stanford Public Law Working Paper No. 2595288 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2595288 (accessed 20 September 2021).
[209] UNCTAD Investment Policy Framework for Sustainable Development (2015) and International Institute for Sustainable Development (IISD), Model International Agreement on Investment for Sustainable Development, (2005) available at https://www.iisd.org/ pdf/2005/investment_model_int_agreement.pdf (accessed 20 September 2021).
[210] K Nowrot *Obligations of Investors, in International Investment Law: A Handbook* 1155 in Marc Bungenberg et al. eds. (2015); Fola Adeleke 'International Investment Law and Policy in Africa: Exploring a Human Rights-Based Approach to Investment Regulation and Dispute Settlement (2018) at 17.
[211] Chidede (n 47) 448.
[212] Mbengue Makane Moïse & Schacherer Stefanie, 'The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18(3) *Journal of World Investment and Trade* at 435.
[213] Mbengue & Schacherer (n 212) 437.

investors and the host state. This is done by examining the continental realm of investment law, the regional aspects of the same and lastly some progressive country specific BITs that specifically address anticorruption.

4.3.1 Africa Continental Investment Law

It is factually sound to note that almost every African country has an investment treaty concluded with a country within and outside Africa. However, Africa's international investment law regime is shaped by a complex, fragmented, and heterogeneous network of bilateral, regional, and international legal instruments.[214] More precisely, the regime is composed of customary international law rules, plurilateral, regional and bilateral investment treaties, and free trade agreements that incorporate investment provisions or chapters. Moreover, Africa lacks a legally binding and content-wide instrument that seeks to regulate and govern investments.[215] The international investment regulatory framework is fragmented with various instruments governing various relations be they bilateral or regional. This disjuncture posed a natural question considering the extensive regional initiatives and their limitations as to whether a common continental investment code would be desirable.[216] The introduction of this code would simplify investment rules and regulations, obtaining the clarity and ease in understanding thus creating an environment more conducive to investment.[217] This development would also boost the otherwise low volumes of intra-African investment.

In light of this agitation in Africa, in 2008, the African ministers charged with integration undertook to initiate the work on a comprehensive African investment code.[218] The initiative of concluding the investment code aimed at attracting greater influx of investments into Africa and facilitation of intra-African cross-border investments. Thus, the elaboration of the Pan-African Investment Code (PAIC) which was designed as an antidote of the Africa-specific needs commenced. African independent experts drawn from various relevant fields drafted the text over several years.

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[214] United Nations Economic Commission for Africa (UNECA) 'Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration' (2016) available at https://hdl.handle.net/10855/23035 (accessed 21 September 2021).
[215] Chidede (n 47) 443.
[216] UNECA (n 214) x.
[217] As above.
[218] Mbengue & Schacherer (n 212) 420.

The elaboration of the investment code took three phases. Firstly, the group of African compiled African best practices in the field and elaborated a first draft. This then ushered in the next decisive phase in 2015 when this draft by the expert was discussed at expert level. This was done in two meetings. Independent experts from Africa gathered in Tunisia in May 2015 and in September 2015 in Mauritius to review the first draft. The work of these independent experts was later on reviewed by the experts of the AU Member States during a continent-wide meeting in Uganda that took place in December 2015. The third phase took off in 2016 where the competent African ministers approved the work of the PAIC in ministerial meeting held in March 2016 in Addis Ababa. This protracted process was finally culminated in Nairobi in November 2016 where it was agreed by the representatives of various African governments that the PAIC be adopted as a non-binding model investment treaty. Suffice it to state that the non-binding nature of the document was a brainchild of political compromise since the independent experts envisioned and recommended the PAIC to be a binding instrument with substantive rights and duties. This move is seen as a setback that erodes the gains made by the progressive text of the PAIC and the desire to have a binding instrument to consolidate the fragment parts of investment law in Africa. Nonetheless, African countries, under the auspices of the African Union developed and adopted the nonbinding continent-wide investment code, the Pan-African Investment Code (PAIC).[219]

4.3.1.1 The Pan African Investment Code

PAIC is a model investment treaty drafted from the prospective of lesser developed countries under the patronage of the AU.[220] The PAIC is drafted with the theme of addressing the setbacks of the counter-productive effects of the application of the Eurocentric international investment law in Africa. This informs the main objective in the code which is to promote sustainable development in Africa. As stated earlier, the PAIC is truly African having been drafted by Africans for Africa and from an African perspective. The African perspective is that a proper and progressive investment in Africa is one that seeks to encourage sustainable development. This objective led the drafters of the PAIC to alter "*old tools*" such as the

[219]African Union Commission [AUC], Draft Pan-African Investment Code (Dec. 2016), https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf (accessed 21 September 2021).

[220] Rose Rameau 'The African Perspective: The Development of Investment Laws, the Pan-African Investment Code (PAIC), and the African Continental Free Trade Area in the "New Economic World Order", 114 *American Society of International Law Proceedings of the Annual Meeting* (2020) Washington at 62-67.

traditional clauses (MFN, NT, FET), that are common in most BITs in and advocate for "*new ways*" in order to support and promote sustainable development throughout the continent.[221]

The PAIC aims to create a balanced investment regime that promotes and protects investments while conserving the policy space for host states.[222] Most importantly, the Code not only contains rights but also duties for both the State and the investors. The PAIC dedicates an entire chapter on investors' obligations,[223] a phenomenon that is seldom witnessed in traditional BITs and was further endorsed by an ICSID Tribunal that "the BIT imposes no obligations on investors, only on contracting states."[224] The PAIC "allows host governments to impose certain obligations on investors, including to comply with corporate governance standards,[225] to adhere to sociopolitical obligations,[226] to refrain from bribery,[227] to adhere to corporate social responsibility standards,[228] to exploit natural resources in a responsible and sustainable manner,[229] and to comply with business ethics and human rights".[230] The PAIC further enshrines "provisions regulating state contracts,[231] public-private partnerships,[232] labor relations,[233] human resources development,[234] and the promotion of technology transfer and clean technologies,[235]and environmental and consumer protection".[236] Most importantly, the manner that the PAIC tackles the issue of anti-corruption in a direct manner is of specific concern in this research as exposed in the next part.

4.3.1.2 Specific Provisions on Anti-Corruption

The PAIC commences by broadcasting its anti-corruption aspiration in its Preamble. Though the provision is merely declaratory, it sets a tempo as to the investments that it seeks to protect. It provides thus in preambular paragraph 9:

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[221] Rameau (n 220) 63.
[222] Nowrot (n 210) 131.
[223] PAIC, Chapter 4.
[224] *Roussalis v Romania*, ICSID Case No. ARB/06/1, Award, 871 (Dec. 7, 2011).
[225] Art 9, PAIC.
[226] Art 20, PAIC.
[227] Art 21, PAIC.
[228] Art 22, PAIC.
[229] Art 23, PAIC.
[230] Art 24, PAIC.
[231] Art 26, PAIC.
[232] Art 27, PAIC.
[233] Art 34, PAIC.
[234] Art 36, PAIC.
[235] Art 29 & 30, PAIC.
[236] Art 37 & 40, PAIC.

> RECOGNIZING that investment and trade based activities represent one of the major avenues for illicit financial flows from Member States and that corrupt practices underpin these outflows, and AFFIRMING their desire to promote corruption free investment and trade regimes and improved laws and regulations that promote transparency and accountability in governance.[237]

The provision recognizes one of the key problems ailing investments in Africa and proposes the desire to ensure investment which is free from corruption. This proposition summarizes the main aim of this research which is to champion for investment agreements that are responsive to the corruption question. As such, the PAIC in fact seeks to promote responsible investments.[238] The PAIC does not stop at that in its noble quest. It proceeds to provide a substantive provision on anti-corruption in Article 21 titled bribery as follows:

1. "Investors shall not offer, promise or give any unlawful or undue pecuniary or other advantage or present, whether directly or through intermediaries, to a public official of a Member State, or to a member of an official's family or business associate or other person in order that the official or other person act or refrain from acting in relation to the performance of official duties."

2. "Investors shall also not aid or abet a conspiracy to commit or authorize acts of bribery".[239]

The clarity that visits this direct obligation cannot be overemphasized. The anti-corruption obligation is directly imposed upon investors.[240] In other words, this is a direct obligation. This investor obligation outstrips the mere questions of compliance with national laws and involve how foreign investors should actively contribute to achieve development goals of host states, in this case, the anti-corruption goal. If the country is to make strides on its war against graft in investment, this nature of mainstream reform approach should permeate the BITs signed by Kenya. The PAIC has led the way in advocating for corruption free investment. This presents a rallying call and a challenge to the African states, specifically Kenya, to emulate this progressive development.

4.3.2 The example of some of the investment treaties operative in the ECOWAS Region

The proliferation of comprehensive Regional Trade Agreements (RTAs) all over the globe that include an investment chapter has brought in new anti-corruption provisions which range

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[237] Preamble Para 9, PAIC.
[238] Stefanie Schacherer 'The AfCFTA Investment Protocol: An Opportunity to Converge and Propel the Pan African Investment Code (PAIC) Insights from the Negotiations of the PAIC' (2021) available at https://afaa.ngo/page-18097/10440007 (accessed 21 September 2021)
[239] Art 21, PAIC.
[240] Schacherer (n 238).

from transparency clauses to specific tailored-made provisions aligned with the controversial "Singapore agenda".[241] For instance, the EU has advocated for an inclusion of contested "Singapore" topics with a bearing in corruption: investment, competition and transparency in government procurement. However, achieving consensus on a multilateral level has been a real challenge due to the reluctance of some states to implement "deep provisions" into areas which may limit their sovereignty.[242]

Contemporary RTAs specifically address regulatory areas such as anti-corruption provisions focused on transparency alongside environmental and labour standards.[243] An unprecedented trend starting in 2000 reveals that more than 40 per cent of RTAs concluded since 2000 incorporate anti-corruption and anti-bribery commitments.[244]

Africa has not been left out in the move to have RTAs with investment chapters or even protocols. Africa's Regional Economic Communities (RECs) have adopted regional agreements that are relevant to investment called intra-African Regional Investment Agreements (RIAs). For instance, the Economic Community of West African States (ECOWAS) adopted the Supplementary Act adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS (ECOWAS Supplementary Act)[245] and the ECOWAS Common Investment Code (ECOWIC);[246] the Common Market for Eastern and Southern Africa (COMESA) adopted the Investment Agreement for the COMESA Common Investment Area (COMESA Common Investment Agreement);[247] the

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[241] Ron Sandrey 'Where are the Singapore Issues?' (2015) available at https://www.tralac.org/publications/article/8012-where-are-the-singapore-issues.html (accessed 23 September 2021).

[242] Iza Lejárraga 'Deep Provisions in Regional Trade Agreements: How Multilateral-friendly? An Overview of OECD Findings' (2014)OECD Trade Policy Papers, No. 168, OECD Publishing, Paris http://dx.doi.org/10.1787/5jxvgfn4bjf0-en (accessed 23 September 2021); Pascal Lamy, 'Pascal Lamy on Trade Agreement Generations', New Perspectives on Global Economic Dynamics, Berstelsmann Foundation, (2015) available at <https://ged-project.de/topics/international-trade/effects_of_regional_trade_agreements/pascal-lamy-on-trade-agreement-generations/> (accessed 23 September 2021).

[243] M Jenkins 'Anti-Corruption and Transparency Provisions in Trade Agreements', Transparency International, 2017 available at https://www.transparency.org/files/content/corruptionqas/Anticorruption_and_transparency_provisions_in_trade_agreements_2017.pdf (accessed 23 September 2021).

[244] Lejárraga (n 242) 15.

[245] Supplementary Act A/SA.3/12/08 adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS, Economic Community of West African States, Dec. 19, 2008, https://investmentpolicyhub.unctad.org/Download/ TreatyFile/3266 (accessed 23 September 2021).

[246] ECOWAS Common Investment Code, July 2018 available at https://wacomp.projects.ecowas.int/wp-content/uploads/2020/03/ECOWAS-COMMON-INVESTMENT-CODEENGLISH.pdf (accessed 4 October 2021).

[247] Investment Agreement for the COMESA Common Investment Area, UNCTAD (May 23, 2007), available at https://investmentpolicy.unctad.org/international-investment-agreement/treatyfiles/3092/download (accessed 23 September 2021).

Southern African Development Community (SADC) adopted the Finance and Investment Protocol (SADC FIP)[248] and the SADC Model BIT;[249] and the East African Community (EAC) has adopted the Model Investment Code.[250] These RECs have played a significant role in furthering the promotion and protection of investment. While these RECs have already made important achievements, however heterogeneous, they bear potential for further developments for two main reasons.[251] On the one side, the current network of BITs concluded amongst African States, and between African States and third States remains rather underdeveloped, irregular and fragmentary.[252] On the other hand, there is a strong belief that a sub-regional and in due time a binding pan-African approach, coupled with the progressive harmonization of domestic policies, will maximise the positive impact of foreign investment.[253] The research acknowledges the specific provisions on anti-corruption in the ECOWIC, ECOWAS Supplementary Act as well as the SADC Model BIT but focuses its analysis on the former two due to their binding status on the region.

4.3.2.1 The ECOWAS Supplementary Act

The ECOWAS Supplementary Act is legally binding on the member states parties in ECOWAS, investors and their investments.[254] The Act is one of the most advanced investment treaties that is conscious of the distinctive "context of African countries and adopts a balanced approach in its provisions with a rights-based approach to development."[255] Its relation with the existing BITs in the region is transformative as it imposes an obligation upon the parties to renegotiate within 24 months prior agreements that contain provisions that are inconsistent with its text and to ensure the consistency of all the future agreements concluded in the region.[256]

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[248] SADC FIP was adopted and signed in 2006 and entered into force on Apr. 16, 2010; Talkmore Chidede, Investment Dispute Resolution Under the Amended Annex 1 of the SADC FIP (2018), available at https://www.tralac.org/blog/article/13526-investment-disputeresolution-under-the-amended-annex-1-of-the-sadc-fip.html (accessed 23 September 2021).

[249] SADC Model Bilateral Investment Treaty Template, SADC (Jul. 2012), available at https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf (accessed 23 September 2021).

[250] EAC Model Investment Code, 2006.

[251] UNCTAD 'The Rise of Regionalism in International Investment Policymaking: Consolidation or Complexity?' IIA Issues Note No 3 (June 2013) (accessed 23 September 2021).

[252] Erik Denters & Tarcisco Gazzini 'The Role of African Regional Organisations in the Promotion and Protection of Foreign Investment' (2017) 18 *Journal of World Investment and Trade* at 451, 457.

[253] United Nations Economic Commission for Africa (UNECA), African Union and African Development Bank, Assessing Regional Integration in Africa V: Towards an African Continental Free Trade Area (UNECA 2012).

[254] ECOWAS Supplementary Act Art 4.

[255] Nowrot (n 210) 144.

[256] Art 31(1) & (2), ECOWAS Supplementary Act.

The ECOWAS Supplementary Act makes a paradigm shift from the traditionally unbalanced character of investment treaties.[257] Firstly, its Chapter Two provisions on the standards of treatment of foreign investors is checked by the Chapter Three provisions enshrining the investor obligations and duties. In addition to its standard legality clause, "the Act imposes upon foreign investors the duty to provide upon request from the host State the information concerning the putative investment 'for purposes of decision-making in relation to that investment or solely for statistical purposes."[258] This provision is very fundamental in the fight against corruption since corruption is always bred and veiled in secrecy.

Chapter Three of the Act also imposes specific substantial obligations upon foreign investors, most importantly for this research, the direct obligation to refrain from getting involved into any corruption practice. The Act adopts the hybrid approach of enshrining obligations against the state and the investor in fighting corruption. The anti-corruption provision which is at the centre of our analysis provides thus:

1. "Investors and their investments shall prior to the establishment of an investment or afterwards, refrain from involving themselves in corrupt practices as defined in Article 30 of this supplementary Act.
2. Investors and their investments shall not be complicit in any act described in Paragraph (1) of this article, including incitement, aiding and abetting, and conspiracy to commit or authorization of such acts.
3. The acts referred to Paragraph 1 and 2 shall be punishable in conformity with the provisions of Article 30 of this Supplementary Act."[259]

The anti-corruption obligation specifically refers to Article 30 of the Act which provides a definition of corruption in the context of the Act as follows:

a) "the offering, solicitation or acceptance of an offer, promise or gift of any pecuniary or other nature, whether directly or through intermediaries, to any public official of the host State, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties to achieve any favour in relation to a proposed investment or any licenses, permits, contracts or other rights in relation to an investment; and
b) any acts constituting any of the acts described in Paragraph (A) including incitement, aiding and abetting, conspiracy to commit or authorization of such acts"

The benefit of the Act providing its definition of corruption is the clarity that visits the determination of what amounts to corruption closing the door to any ambiguities. The Act does not stop at imposing the substantive obligations upon foreign investors; it also attaches

[257] Denters & Gazzini (n 252) 479.
[258] Art 11, ECOWAS Supplementary Act.
[259] Art 13, ECOWAS Supplementary Act.

specific consequence in case of non-compliance. Article 18(1) prescribes a stern and "innovative sanction for violations of the obligation on corruption imposed under Article 13. It establishes that a decision by a domestic court finding that an investor has breached Article 13 of the Supplementary Act deprives the investor of the right to initiate any dispute settlement process established under the Supplementary Act". The specific sanction against the corrupt conduct of either parties is a statement of intention to emphatically deal with the corruption scourge in the West African Member States. This nature of pinpointed sanctions are vital in the fight against corruption. This provision is not one-sided as both the host State and the home State may raise this as an objection to jurisdiction in any dispute under the Supplementary Act. A further obligation on the host States on corruption is to investigate, prosecute and punish any corrupt involvement with appropriate sanctions.[260] The state is also tasked with cooperating with an investment tribunal by providing "all available information that might assist a dispute settlement tribunal under this Supplementary Act in determining whether there has been a breach of an anti-corruption obligation."[261]

In summary, these novelties in the ECOWAS Supplementary Act confirms that there is nothing inherent in the unbalanced character of traditional investment treaties.[262] On the contrary, it's a clear manifestation of the deliberate upgrading of investment treaties to continue protecting investments while not losing sight on the need to hold the investors accountable by empowering the host state to deal with public wrongs in this case corruption. In this regard, the Supplementary Act which is used as an example herein reveals the evidence of readiness to reform investment treaties into 'modern' investment treaties in the framework of regional organization to supplement BITs. The ECOWAS Supplementary Act presents a lesson book for Kenya to emulate in terms of setting out deliberate provisions to fight corruption from an investment law standpoint.

4.3.2.2 The example of the ECOWAS Common Investment Code

The ECOWIC was concluded in 2018 with the main aim of establishing a Common market for investment for the West African states. Its design was aimed at operationalizing the

[260] Art 30(1), ECOWAS Supplementary Act.
[261] Art 30(3), ECOWAS Supplementary Act.
[262] Denters & Gazzini (n 252) 481.

ECOWAS Supplementary Act as well as harmonizing the investment policies for the West African states.[263]

The ECOWIC harbors progressive provisions on anti-corruption creating direct and substantive provisions to be adhered by both the member states and the investors in the region. It dedicates a whole chapter[264] to comprehensively deal with the subject of corruption and unethical conduct, a practice that this research advocates for and endorses fully.

The Code commences with a declaratory provision generally stating that the aim of the subsequent provisions which is to banish corruption, fraud and bribery in international investment and trade.[265] Interestingly, it contains a mandatory provision directing member states to ratify or accede the UNCAC which then buttresses it commitment to the global onslaught against corruption.[266] Further, the Code enshrines very specific anti-corruption provisions against the state. It provides for a six-part detailed definition on what amounts to corruption while being alive to the cross-border aspects of corruption.[267] It decrees states to either enact or maintain legislation that provides for punitive sanctions for any of the acts constituting corruption committed in their territories.[268] The Code specifically provides that its provisions are not limited to natural persons as the sanctions might be meted on juridical persons punitively by way of fines, seizure of property and forfeiture of assets to satisfy any penalties in the Code. The detailed provisions do not stop at that. The Act proceeds to direct states to maintain national measures on record keeping that involves the "maintenance of books and records, financial statement disclosures, and accounting and auditing standards" to prevent *inter alia*, any falsification of records, recording of false expenditure and intentional destruction of records upon investigation.[269] The Code also protects whistleblowers who give information on any contravention of its direct provision which provision encourages giving of vital information without fear of retaliation.[270]

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[263] ECOWAS Trade Information System 'ECOWAS Common Investment Code and Policy' available at https://ecotis.projects.ecowas.int/policy-development/agreemenst-under-negotiations/ (accessed 4 October 2021) at 1.
[264] Chapter 9, ECOWIC.
[265] Art 35(1), ECOWIC.
[266] Art 35(4), ECOWIC.
[267] Art 36(1), ECOWIC.
[268] Art 36(2), ECOWIC.
[269] Art 36(5), ECOWIC.
[270] Art 36(6), ECOWIC.

The Code's crosscutting approach is further evident in its direct obligations on public officials on maintaining integrity.[271] The Code provides innovative provisions such as training of such officials, rotation if need be and such other national measures that have the cumulative effect of eradicating fraud and corruption as perpetrated by public officials. It further makes provision for punitive measures such as suspension of culpable public officials to foster a strict regime for anti-corruption. Truly, these are most susceptible people in the whole chain of fighting corruption. The Code also enacts strict provisions on investors to desist in any manner from being party to corruption, fraud or bribery and strict penalties ensue in case of such outlawed practices.[272] Lastly, the transformative provisions of the Code extend to regional cooperation and coordination on the onslaught on corruption[273] and the transnational bribery measures which involve extra-territorial application of the Code in cases where the offence transcends national boundaries.[274]

In summary, ECOWIC provides the most comprehensive provisions on corruption and unethical conduct presenting a deliberate attempt to fully deal with the plague of corruption from an international investment perspective. The research endorses this approach as an antidote to the corruption menace in Kenya, if a single prescription were to be recommended to substantively deal with this question in Kenya.

4.3.3 At the bilateral level

The BITs signed by African countries have been criticized for being weak in leveraging and imposing obligations on investors, and the BITs tend to have bias towards foreign investors while failing to address questions of economic sustainability for the continent.[275] For example, certain BITs do not emphasize on the need to exhaust local remedies hence a foreign investors can bypass the host state's local courts and proceed to submit their investment claims directly to international arbitral tribunals mostly based overseas.[276] It has been noted that African countries find themselves exposed to the risk of legal disputes and hefty fines "which put a further strain on scant government resources and narrow the policy space when designing policies which touch on investment."[277]

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[271] Art 37, ECOWIC.
[272] Art 38, ECOWIC.
[273] Art 39, ECOWIC.
[274] Art 40, ECOWIC.
[275] UNECA (n 214) 39.
[276] Chidede (n 47) 461.
[277] The Pan African Investment Code and the Investment Chapter of the CFTA: Opportunities for Rationalising Investment Regulation in Africa, Concept Note for the High Level International Investment Agreements

Nevertheless, all is not lost. The wave of change in provisions of investment treaties to incorporate a balanced approach towards the rights and obligations of investors and the host state has since blown to BITs in Africa. Some of the BITs concluded in Africa, have since departed from the traditional architect of BITs and they now promote responsible investment. This is a desired departure from the 'take-it-or-leave-it' BIT offers by developed countries in the negotiation of traditional investment treaties with African countries.[278] This research examines one such bit to provide a lesson for the Kenyan negotiators and drafters to directly import the onslaught on corruption into investment treaties. This research interrogates the Morocco-Nigeria BIT which has been showered with praise for its transformative and progressive approach towards investment.

4.3.3.1 The Morocco-Nigeria BIT

The 2016 Morocco-Nigeria BIT is a leading example of the new generation of IIAs with a number of non-conventional provisions focusing on the obligations of the investor.[279] On 30th August 2017, the Moroccan Parliament ratified the Morocco-Nigeria bilateral investment treaty (BIT),[280] and upon ratification from Nigeria, the Treaty enters into force.[281] This treaty is part of a suite of agreements signed between Morocco and Nigeria at a ceremony in Casablanca in December 2016 seeking to foster developmental relationships between the two African States. It is therefore a remarkable attempt made by two developing countries to bring investment treaties in line with the recent evolution of international law.[282]

The Morocco Nigeria BIT has been hailed for its elaborate provisions on investor obligations including a corporate social responsibility provision addressed to the investor,[283] pre-establishment obligations stipulating a mandatory requirement on the investors to conduct environmental and social impact assessments and to apply the precautionary principle,[284]

Conference 2017, UNECA, http://investment-policyhub.unctad.org/Upload/Documents/UNECA%20Final%20Side%20event%20Agend a.pdf

[278] Gus Van Harten 'A Critnique of Investment Treaties' in (Kavaljit Singh & Burghard Ilge (eds) Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices (2016) at 41, 50

[279] Yulia Levashova, 'The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law' (2018) 14(2) *Utrecht Law Review* at 46.

[280] Morocco-Nigeria BIT (signed 3 December 2016), http://investmentpolicyhub.unctad.org/IIA/treaty/3711 (accessed 23 September 2021).

[281] Thomas Kendra, 'The Morocco-Nigeria BIT: a new breed of investment treaty?' (2017) available at http://arbitrationblog.practicallaw.com/the-morocco-nigeria-bit-a-new-breed-of-investment-treaty/ (accessed 23 September 2021).

[282] Tarcisio Gazzini, 'The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties' (2017) available at https://www.iisd.org/itn/en/2017/09/26/the-2016-morocco-nigeria-bit-an-important-contribution-to-the-reform-of-investment-treaties-tarcisio-gazzini/ (accessed 23 September 2021).

[283] Art 24, Morocco-Nigeria BIT (2016).

[284] Art 14, Morocco-Nigeria BIT (2016).

obligations upon establishment of investments requiring investors to comply with environmental and labour standards,[285] investor obligations to abstain from corruption practices,[286] and a provision on investor liability,[287]to name but a few. The research scrutinizes the anti-corruption provisions in the BIT.

4.3.3.2 Anti-corruption in the Morocco-Nigeria BIT

The BIT presents a strong normative backing for the fight against corruption in investment. Both States agreed to prevent and combat corruption regarding foreign investment. The Treaty enshrines an anti-corruption charge on investors thus:

> Investors and their Investments shall not, prior to the establishment of an Investment or afterwards, offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the Host State, or a member of an official's family or business associate or other person in close proximity to an official, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relations to an investment.[288]

This provision extends to an investor not being a complicit in any corrupt act by way of including "incitement, aiding and abetting, and conspiracy to commit or authorization of such acts."[289] Interestingly, the Morocco-Nigeria BIT covers corrupt acts in the pre-establishment and post-establishment stage of the investment leaving no room for tolerance in the lifetime of an investment. It further provides a penalty for breach of this provision which entails prosecution in the host State, according to its applicable laws and regulations. This is a revolutionary provision since there is little doubt that corruption impairs development in host States.[290] With the increased reliance on the defense of corruption by host states to evade liabilities that befall them as seen in *World Duty Free v. Republic of Kenya*[291] and *Metal-Tech Ltd. v. the Republic of Uzbekistan*[292] amongst others, this provision affords foreign investors the necessary incentive to act in accordance with the law.

Further, the Morocco-Nigeria BIT empowers the Host State to seek information from an investor 'about its corporate governance history and its practices as an Investor, including in

[285] Art 18, Morocco-Nigeria BIT (2016).
[286] Art 17, Morocco-Nigeria BIT (2016).
[287] Art 20, Morocco-Nigeria BIT (2016).
[288] Morocco-Nigeria BIT (n 283).
[289] Morocco-Nigeria BIT (n 287).
[290] Chrispas Nyombi, Tom Mortimer & Narissa Ramsundar 'The Morocco-Nigeria BIT: towards a new generation of intra-African BITs' (2018) 29(2) *International Company and Commercial Law Review* at 71.
[291] ICSID Case No.Arb/00/7.
[292] ICSID Case No.ARB/10/3. 22.

its home state.'[293] This requirement for disclosure functions to dispel any secrecy that would veil anti-corruption creating an incentive for transparency for the investor. Cumulatively, the treaty's incorporation of direct anti-corruption obligations against the investor heralds a new dawn of responsible investment that necessitates the fighting of corruption in investment.

In summary, the Morocco–Nigeria BIT, although not yet ratified by the parties, sends a clear signal to the rest of the world that African countries have begun to embrace the new generation of investment treaties and, therefore, are ready to charter a new course in their reform of the international investment regime.[294]

4.4 Conclusion

This typology of anti-corruption provisions in IIAs and their enactment in select investment instruments has been exposed in this Chapter for the benefit of Kenya. The trajectory that modern investment treaties have adopted leans towards a balanced approach on rights and duties of the host state and the investors and a departure from the burdensome traditional dispensation that was a yoke on the host states. The select instruments discussed in this chapter present important lessons for Kenya and other African countries on how to redistribute rights and obligations between investors and the host state without harming investor confidence to invest. It is therefore prudent that the drafters and negotiators of BITs for Kenya and beyond to incorporate these changes to the upcoming treaties and if possible, renegotiate the traditional one-sided BITs.

The next Chapter seeks to give a conclusion to this study while proposing recommendations arising from the research.

[293] Art 21, Morocco-Nigeria BIT (2016).
[294] Nyombi et al (n 290) 75.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This study has undertaken a journey in examining the legal and regulatory framework for fighting corruption in Kenya from an international investment law perspective. The main burden in this research was to examine the legal framework for fighting corruption in Kenya and whether it is responsive enough to deal with the corruption menace. The study is undertaken from a background of prevalent corruption and corruption perception in Kenya as exhibited by indices from reputable sources referred to in the study. Most importantly, the study sought to interrogate the BITs signed by Kenya and whether they have reflected the growing trend of responsible investments practices incorporating duties on the investors to accompany the extensive rights that they traditionally enjoyed.

The purpose of this Chapter is to revisit the research problem and the questions that this research sought to answer in light of the findings in the subsequent Chapters to wit, the second, third and fourth chapters. Thereafter, a suitable conclusion will be drawn and recommendations will arise from the discussions that have ensued herein. The research will also provide possible areas that need further study and were not captured due to the limitation on the scope.

5.2 A restatement of the research problem

The background to this research painted a picture of the prevalence and the adverse effects of corruption in Kenya. It demonstrated how Kenya has been an underperformer in attracting FDI despite it being an economic powerhouse in the East African region with one of the key barriers to attraction of investment being corruption which increases the cost of setting up investments. It thus necessitated the need to deal with this public vice and more specifically from an international investment perspective where the host states laws are not regarded conclusive in dealing with an investment dispute marred with corruption.

This research problematized the lackluster approach by Kenyan BITs in confronting the challenge of corruption in investments. It was specifically noted that despite the clear developments in the text of BITs to include responsibilities and obligations against investors as opposed to mere rights, this effect has not been felt in Kenya as corruption continues to engulf the public and private sectors. The research then sought to scrutinize the quality,

clarity and adequacy of legal provisions dealing with corruption in Kenya, while starting broadly with corruption as a general concept then zooming into BITs which deal with corruption in the realms of bilateral investments.

In finding solutions to this problem, the research assessed the legal framework for corruption in Kenya, whether there exists direct anti-corruption provisions in BIT signed by Kenya and the possibility of lessons being drawn from BITs and other agreements containing investment provisions in Africa on how best to codify provisions on anti-corruption.

5.3 Summary of Findings

Chapter One decried the menace of corruption in the investment sector in Kenya. The Chapter noted that the benefits of FDI can only be realized if its lifetime is free from corrupt practice. The Chapter also underscored the fact that many BITs concluded by African countries do not circumscribe the ability of governments in Africa to take measures to promote domestic development objectives, in many respects they limit the capacity of governments in Africa to adopt relevant policy instruments to regulate FDI in order to build up national industry. Moreover, most of the Agreements do not address pertinent matters such as anti-corruption which are regularly violated by foreign investors.

Chapter Two noted that corruption is among the key determinants of FDI inflow. The Chapter acknowledged the role of government in combatting corruption to ensure growth and development. The Chapter postulated that the government must establish independent anti-corruption unit to deal with corruption from an investment perspective.

Additionally, the Chapter reviewed the legal and institutional framework for the fight against corruption in Kenya. In doing so, the Chapter noted that the Constitution requires the Parliament to enact legislation to establish an independent Ethics and Anti-Corruption Commission (EACC) to fight corruption. Apart from the Constitution, the Chapter also assessed the ACECA which provides that EACC is responsible for investigating corruption in Kenya. Furthermore, the Chapter highlighted that ACECA mainly deals with corruption by imposing criminal sanctions. The Bribery Act, on the other hand, has an extra-territorial application to citizens who bribe foreign public officials in a bid to receive any favours. Moreover, it creates an obligation on private bodies to prevent bribery.

Lastly, Chapter Two assessed the various international instruments to which Kenya is a party. In doing so, the Chapter analysed the United Nations Convention against Corruption

(UNCAC) which applies to the prevention, investigation and prosecution of corruption. Specific to investment sector, the Convention applies to the prosecution and return of the proceeds of corruption both in public and private sectors. Regionally, Chapter Two analysed the African Union Convention on Prevention and Combating Corruption which identifies corruption as an obstacle to socio-economic realization.

Chapter 3 specifically scanned through the BITs that are in force in Kenya while identifying whether there exists anti-corruption provisions. The Chapter underscored the traditional biases in BITs and the asymmetry that the traditional BITs brought. It exposed the embedding of obligations on the host state rights on the investors without or with weak corresponding obligations. It further went through the text of the BITs that are in force in Kenya and the finding was that there were no direct anti-corruption provisions in any of the eleven BITs that are in force in Kenya. This led to the exploration of the legality clause which is the alternative umbrella provision on conformity with the host state law. The research noted that the legality clause might be placed in various provisions in a BIT but it cannot take the place of a direct provision on anti-corruption. It further noted the weakness of the legality clause arising from the exceptions that can be applied to defeat it. Summarily, the Chapter exposed the clear gap that exists in Kenya as a result if BITs not enshrining anti-corruption provisions.

Chapter four took a prescriptive approach while suggesting lessons that Kenya should adopt in structuring its BITs. The Chapter examined the typology of anti-corruption provisions in BITs starting with the declaratory provisions and zooming into the specific provisions creating rights and duties for both the host state and the investor. It highlighted this blossoming pattern starting from the continental perspective with a specific examination of the PAIC, the regional realm by an interrogation of the ECOWAS Supplementary Act on investment and last the Morocco-Nigeria BIT. A common thread ran through this instruments that is worth noting for the benefit of Kenya. These instruments containing direct anti-corruption provisions which not only prescribe the consequences of corruption but also define what amounts to corruption in their operation. These instruments make a clear statement on their intent to deter the prevalent corruption in their area of applicability. These treaties present a lesson book for Kenya to promptly take up the transformative provisions and strengthen its anti-corruption framework from the international investment standpoint. Further, the clarity attendant in having direct provisions on anti-corruption is unmatched and it only acts to discourage corruption during the admission and lifetime of an investment.

Generally, the Chapters have demonstrated the need to have specific anti-corruption provisions in all the BITs that Kenya concludes as it is the most resolute way to deal with corruption should it arise in the lifetime of an investment or in an investment dispute.

5.4 Recommendations

Kenya can incorporate anti-corruption provisions in its BITs. First, anti-corruption provisions can be declaratory provisions imploring both the state and the investor not to engage in corrupt conduct. It simply imposes a general obligation on the states to adopt measures and make efforts to prevent and fight corruption.

Secondly, the provisions can impose an obligation on the contracting states to either refrain from engaging in corrupt conducts or to take up anti-corruption measures.

Thirdly, the provisions should prohibit investors from engaging in corrupt conducts and also outline sanctions for engaging in corrupt conducts. The sanction in this case should be stripping any investor found by the Kenyan courts to have engaged in corrupt dealings from seeking recourse in any dispute settlement process under the BIT.

Kenya should also adopt BITs incorporating both the rights and duties for both the State and the investors. For instance, they should require investors to comply with corporate governance standards, to refrain from bribery, to adhere to corporate social responsibility standards, and to comply with business ethics. More specifically, Kenyan BITs should prohibit investors from offering, promising or giving any unlawful or undue pecuniary or other advantage or present, to Kenya's public official for the official to act or refrain from acting in relation to the performance of official duties.

In summary, and specifically, the research proposes an anti-corruption provision in all the subsequent BITs signed by Kenya to specifically speak to the following issues:

a) General declaration against corruption
b) Measures by the State to combat corruption
c) Record-keeping measures to curb falsification of records during investigation
d) Direct measures to promote integrity among public officials
e) Specific anti-corruption obligations against investors
f) Measures to deal with transboundary corruption

The measures suggested above are further substantiated by a direct reference to the ECOWAS Common Investment Code as a benchmark upon which Kenya can set its anti-corruption provisions in its BITs. Lastly, Kenya should incorporate provisions requiring foreign investors to provide information concerning the putative investment for purposes of decision-making in relation to that investment or solely for statistical purposes.

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