

ECONOMIC DEVELOPMENT OR HUMAN RIGHTS?

Assessing the Impact of Kenya's Trade and Investment Policies and Agreements on Human Rights

International Fact-Finding Mission

Article 1 : All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 2 : Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other

limitation of sovereignty.



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I. Introducing the Mission

In December 2006, the International Federation for Human Rights (FIDH) and its member organisation in Kenya, the Kenya Human Rights Commission (KHRC), in collaboration with the Centre for Research on Multinational Corporations (SOMO), carried out a joint fact-finding mission to investigate the impact of foreign direct investment and trade liberalisation on the enjoyment of human rights in Kenya. Considering that labour rights violations have been extensively documented for years, the mission chose to look specifically at trade and investment policies and agreements, and their relation to human rights.

The mission, which took place between December 11 and 20, 2006, paid specific attention to the issue of workers' rights in two sectors: Export Processing Zones (EPZs) and the cut flower industry. These sectors are best suited to illustrate the potential and actual impact of trade and investment liberalisation on human rights, as they have experienced blooming expansion in the last five years. Moreover, Kenya is an outward-oriented economy, thus the particular relevance of these sectors due to their external links.

Specific objectives of the mission were:

- To document working conditions and workers' rights violations in the EPZs and in the cut flower industry;
- To examine the national and international legal framework regarding;
 - Fundamental rights at work and unions activities - what are the norms and implementation mechanisms to protect and promote these rights?
 - Investment and corporate responsibilities - what are the exemptions and potential bypasses to social rights introduced to promote industrial investment?
- To analyze, using a human rights approach, the impact of the previous phases of trade and investment liberalisation;
- To examine the potential impact on human rights of ACP-EU Economic Partnership Agreements (EPAs) and of World Trade Organisation (WTO) trade and investment negotiations as well as other negotiations and agreements on investment.

Four delegates participated in the fact-finding mission: Steve Ouma (Kenya Human Rights Commission - KHRC), Koen de Feyter (University of Antwerp, Faculty of Law – FIDH delegate), Esther de Haan (SOMO) and Myriam Vander Stichele (SOMO). Their bios are presented in the annex.

The mission utilized two modes of data collection; literature reviews and interviews with respondents. The latter were conducted through individual interviews and focus group discussions. The mission held meetings in Nairobi and visited Export Processing Zones in Mombasa, Athi River and Ruaraka. The mission interviewed key respondents, among them, workers from EPZs and the cut flower industry around Lake Naivasha, officials from the Ministry of Labour, the Ministry of Trade, officials from key diplomatic missions such as the US Embassy, members of civil society organisations (CSOs) who have been active in the campaign to stop the Economic Partnership Agreements (EPAs) negotiations, investors and organisations involved in certifying flower farms. The list of people and organisations interviewed is in the annex. The report was subsequently completed by important documentary research.

Map of Kenya



The Republic of Kenya: Key Facts

Capital: Nairobi

Geography:

Land Area: 582,646 sq km (224,961 sq miles)

People:

Population: 33.4 million¹

Major languages: Swahili, English

Religion: 40 % Protestant, 30 % Roman Catholic, 6 % Muslim, 23% other religions

Major Ethnic Groups: Kikuyu 22%, Luhya 14%, Luo 13%, Kalenjin 12%,
Kamba 11%, Meru 6%

Life expectancy: 48 years (men), 46 years (women)

Infant Mortality: 79 per 1,000 live births²

Economy

Percentage of population living on less than US\$1 a day: 1990-2004 – 22.8%
(UNDP – Human Development Report 2006)

Human development index (HDI rank): 152³

Resources: Tea, coffee, horticultural products, petroleum products...

Real Gross Domestic Product (GDP) growth: 5.2%⁴

Government

Government type: Coalition government formed on 18 March 2008,

Administrative Divisions: Eight Provinces including the Nairobi area. Provinces are:
Central, Coast, Eastern, Nyanza, Rift Valley, Western and North Eastern. These
provinces are divided into administrative areas known as districts.

National legislature: Multi-party Unicameral National Assembly (210 elected members,
12 nominated members, the Attorney-General and the Speaker as ex-officials)

Last elections: 27 December 2007 (presidential, legislative and civic)

Head of State: President Emilio Mwai Kibaki

Prime Minister: Raila Odinga

1 UNDP, 2005

2 UNICEF, 2005

3 UNDP – Human Development Report 2006

4 2005 estimate

II. The Human Rights Framework

This report evaluates the impact of foreign investment and trade in Kenya from a human rights perspective. The various economic activities are evaluated on the basis of whether they have a beneficial or adverse impact on the rights of those affected by the activity. In the field of investment, those affected not only include the workers, but also their families, the local communities, and in some instances, the society as a whole.

The starting point of this report is that investments and trade policies should not allow nor be based on employment conditions that prevent workers, their families and their communities, from achieving an adequate standard of living.

Apart from its substantive content, a human rights approach essentially insists on the identification of duty holders and of accountability mechanisms.

1. Identification of duty holders

Economic globalisation requires the recognition of multiple human rights duty holders. Human rights are no longer affected only by the State, which has territorial control over the area where people live. Decisions by inter-governmental organisations and negotiations by non-State actors and by other States have far-reaching consequences on the degree to which human rights are enjoyed in a particular part of the world. None of these other actors are, however, yet as sufficiently accountable for the human rights impact of their actions, vis-à-vis people affected by their actions. But the vision is clear: a web of human rights obligations, with a territorially-responsible State located at the centre and surrounded by international actors. For the purposes of this report, developments in the area of the construction of human rights responsibility of third States (i.e. States' impact on the enjoyment of human rights beyond their borders) and of companies (i.e. investors or buyers) are particularly relevant.

1.1 The State of Kenya

Kenya has ratified the following international human rights conventions: ICCPR (International Covenant on Civil and Political Rights, ratified in 1976), ICESCR (International Covenant on Economic, Social and Cultural Rights, ratified in 1976), CEDAW (Convention on the Elimination of All forms of Discrimination, ratified in 1984), CERD (Convention for the Elimination of Racial Discrimination, ratified in 2001), CRC (Convention on the Rights of the Child, ratified in 2000) and CAT (Convention Against Torture, ratified in 1997). International treaties are not considered as part of Kenyan law therefore cannot be directly applied by the courts. This is because Kenya follows the dualist approach to treaty implementation. Kenya has also ratified the African Charter on Human and People's Rights (1992) and the African Charter on the Rights and Welfare of the Child (ratified 2000).

Kenya has ratified 49 ILO Conventions, with the notable exception of ILO (n° 87) Freedom of Association and Protection of the Right to Organise Convention, 1948; ILO (n° 155) Occupational Safety and Health Convention, 1981; ILO (n° 161) Occupational Health Services Convention, 1985; and ILO (n° 187) Promotional Framework for Occupational Safety and Health Convention, 2006.

Kenya's initial report to the UN Committee on Economic, Social and Cultural Rights, released in September 2006 states,

“The Bill of Rights in the Current Constitution has not provided for economic, social and cultural rights hence the courts have been reluctant to pronounce judgments that promote and protect the rights. This challenge was however sought to be addressed by the Draft Constitution of Kenya (2004) which had a comprehensive Bill of Rights that protects economic, social and cultural rights as justiciable rights. The Draft Constitution was rejected by 57 per cent of Kenyans, who voted at the Constitutional Referendum held on 21st November 2005. It is hoped that in a future constitutional review process, the Economic Social and Cultural Rights will be part of the Kenyan Bill of Rights. These rights were not contentious save for the question of availability of resources. The Constitutional review process is on going.”

1.2 States other than Kenya

This report is also concerned with other States' responsibilities for human rights violations occurring in Kenya. States may be held responsible when acting as: a) members of intergovernmental organisations, b) donors, c) parties to investment and trade agreements with Kenya, d) promoters of investment, and e) home States of corporations. States have, among others, the following international obligations⁵ under the ICESCR:

- The duty not to interfere directly with the enjoyment of economic, social and cultural (ESC) rights by persons in other countries. This targets State conduct which has a direct negative effect on human rights elsewhere;
- The duty to exercise due diligence as a home State in controlling corporations involved in serious breaches of ESC rights elsewhere;
- The duty to comply with ICESCR obligations as State parties, when acting as members of a decision-making group in an international organisation (such as the World Bank);
- The duty to take into account international legal obligations in the field of ESC rights when entering into bilateral, regional or multilateral agreements with other States, international organisations or multinational corporations.

1.3 Companies

Progress has also been made in defining the human rights obligations of companies at the international level. The most widely used instrument for defining the obligations of (multinational) enterprises is the non-binding Organisation of Economic Cooperation and Development OECD Guidelines on Multinational Enterprises (1976, revised 2000). In addition to a chapter on labour rights, the Guidelines include a general human rights clause to:

‘Respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments’ Article II, 2 OECD Guidelines on Multinational Enterprises, 27 June 2000.

The Guidelines are addressed primarily to the OECD Member States who are deemed to

⁵ Coomans, F. (2004), ‘Some remarks on the extraterritorial application of the International Covenant on Economic, Social and Cultural Rights’ in F.Coomans, M. Kamminga (Eds.), Extraterritorial application of human rights treaties (Antwerp: Intersentia), 183-199

recommend observance of the Guidelines to companies based in their countries. The Guidelines, however, apply everywhere the companies operate, extending beyond the OECD zone.

On 13 August 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights adopted by consensus the draft Norms on the responsibilities of Transnational Corporations and other Business Enterprises with regard to human rights together with a commentary that is intended to provide practical interpretation. Principle 1 of the Norms reads as follows:

'States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups'.

According to the Sub-Commission, the Norms simply clarify existing corporate human rights obligations under current international human rights law. The Norms acknowledge that corporate human rights obligations are limited to the companies' sphere of influence. However, they define the circle of influence widely, and include the employees, the actors with whom the company entertains contractual relationships (such as buyers and subcontractors), and the affected communities. This is also the notion with which the UN Global Compact uses in order to delineate the respective responsibilities of States and corporations.

The commentary to the Norms provides a more precise explanation of how to make the general principle operational. According to the commentary, companies have the following responsibilities:

- To use due diligence in ensuring that their activities do not contribute directly or indirectly to human rights abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware of;
- To refrain from activities that would undermine the rule of law as well as governmental and other efforts to promote and ensure respect for human rights;
- To use their influence in order to help promote and ensure respect for human rights;
- To inform themselves of the human rights impact of their principal activities and major proposed activities so that they can further avoid complicity in human rights abuses.⁶

Clearly, there is a debate about the extent to which the obligations of States and companies referred to above are already part of international law, as a result of treaty interpretation, general principles of international law, or as customary law. Human rights law is still developing in these areas. However, it is now widely recognised that businesses have the responsibility to respect human rights⁷.

⁶ UN doc. E/CN.4/Sub.2/2003/38/Rev.2 (26 August 2003)

⁷ Report of John Ruggie, Special Representative of the Secretary General on Business and Human Rights to the

Effective human rights protection requires that those whose rights have been violated are able to access mechanisms through which the relevant duty holder can be held accountable. Consequently, this report will review whether such mechanisms – be it at the national or international level - are available in practice.

UN Human Rights Commission, A/HRC/8/5, 7 April 2008, p.8, pp.14-21.

III. Kenya's Trade and Investment Policies and Agreements

Kenya is one of the countries with the oldest and most diversified industrial sector in Africa. After a rapid development in the 1960s to 70s, this sector has experienced several setbacks, specifically since the 1980s. This has largely been attributed to economic liberalisation. This liberalisation resulted from the government's adoption of the World Bank imposed Structural Adjustment Program (SAPs), Kenya's accession to the WTO and from regional trade integration.

In 1986, Kenya started implementing the SAPs which led to the reduction of tariffs and other measures protecting the domestic agricultural and manufacturing sectors, the deregulation in a series of sectors for example, the financial sector⁸; the reduction of government spending in health care and education. It was reinforced in 1990 by the creation of EPZs, with the active support of the World Bank, and in 1993 by the opening to foreign investment, including the liberalisation of foreign exchange, the removal of all restrictions on current accounts and domestic borrowing for foreign investors.

In 1994, Kenya was part of the founding members of the WTO and has, since then, intensified its liberalisation process. At the same time, Kenya is also a founding member of the East African Community (EAC),⁹ which negotiated a Common External Tariff (CET) in 2005 and of the Common Market for Eastern and Southern Africa (COMESA), which established a free-trade agreement amongst nine of its members,¹⁰ including Kenya, in 2000. Part of this “liberalisation menu” is the privatisation agenda. The main agenda of privatisation of public services has been to attract foreign investments. Alongside these incentives, Kenya has entered into three Bilateral Investment Treaties¹¹ (BITs) - with the Netherlands in 1970, with Germany in 1996 and with the United Kingdom in 1999 - and over 30 Bilateral Trade Agreements¹² with the aim of improving investment and trade. Kenya also benefited, until December 2007, from preferential access to the European Union (EU) market through the Cotonou Agreement. Under the Cotonou Agreement the EU and Kenya along with other states from the African, Pacific and Caribbean group were mandated to conclude a new trade regime that complied with WTO requirements. However by November 2007, Kenya like many ACP states was not in a position to sign a comprehensive EPA. To ensure that there was no trade disruption; Kenya under the auspices of the EAC initialled an Agreement establishing a Framework for an Economic Partnership Agreement – or the Interim EPA. The African Growth and Opportunity Act¹³ (AGOA), signed in 2000 also grants Kenya

⁸ A number of reform measures intended to enhance the effectiveness of monetary policy were put in place from 1986 but significant reform was the liberalisation and complete decontrol of interest rates in July 1991 and the introduction of open market operations in the same month. Available at:

[http://www.reservebank.co.za/internet/Publication.nsf/LADV/1E734E10BCCD1C7E42257051003FE988/\\$File/kenya.pdf](http://www.reservebank.co.za/internet/Publication.nsf/LADV/1E734E10BCCD1C7E42257051003FE988/$File/kenya.pdf)

⁹ The East African Community (EAC) is the regional intergovernmental organisation of the Republics of Kenya, Uganda, the United Republic of Tanzania, Republic of Burundi and Republic of Rwanda with its headquarters in Arusha, Tanzania. (<http://www.eac.int>)

¹⁰ Original members include: Djibouti, Kenya, Madagascar, Malawi, Mauritius, Sudan, Zambia and Zimbabwe. Burundi and Rwanda joined the FTA on 1st January 2004. (www.comesa.int)

¹¹ Source: www.worldbank.org/icsid/treaties/treaties.htm

¹² The full list is available on the website of the Government of Kenya Ministry of Trade and Industry (www.tradeandindustry.go.ke)

¹³ Under this arrangement, Kenya's manufactured products (textile, leather, horticulture, fish, rubber, iron and steel products) enjoy duty free access to the US market. For more on the AGOA, see: www.agoa.gov

preferential market access to the US.

However, from January 2008, under WTO requirements, the preferential access to the EU must be replaced by a trade arrangement that is reciprocal and gives the EU more access to Kenyan markets.

The reforms Kenya has undertaken and the agreements it has been negotiating aim at promoting its products on international markets, particularly those of developed countries; speeding up Kenya's industrialisation process and reducing barriers to foreign participation in the Kenyan economy. However, these trade liberalisation agreements have little to balance the economic commitments included in the agreements with human rights obligations, as will be shown below.

Liberalisation coupled with bad governance and corruption, a crippled agricultural and manufacturing sector has had a great impact on social and economic development. For the last 20 years, Kenyans have experienced reduced access to basic social services due to decreased government revenue allocations, rising levels of unemployment especially among women, development of precarious forms of livelihoods in the informal and formal sectors, de-industrialisation, reduction of workers' earnings and loss of state revenues¹⁴.

Recent Economic Development

Kenya is still undergoing a very important and complex political transition. The 2002 General elections, which ushered in the National Rainbow Coalition (NARC)¹⁵, were the first electoral transfer of power in the country's history. But this "velvet revolution" did not automatically make Kenya a democracy, for in building a democracy, the country must create institutions to cultivate the rule of law and a culture that promotes and protects human rights. The NARC victory ushered in a new administration, which vowed to rid the country of poor governance and improve the living conditions of the people.

In line with this agenda, the NARC government introduced a number of initiatives to revamp the economy. Among these was the Economic Recovery Strategy for Wealth and Employment Creation (ERSWEC) 2003-2007 (popularly known as the ERS) drawn in June 2003 as a blueprint for development in the context of a vision for up to 2015. The Ministry of Planning has the task of coordinating and ensuring the implementation of the ERSWEC. This was the designated road map or policy document for Kenya's economic future.¹⁶ A key element of the strategy was the promotion of investment and trade¹⁷. The ERS is built around four pillars, namely, restoration of economic growth within the context of a sustainable macroeconomic framework, strengthening the institutions of governance, restoration and

¹⁴ This was evident in Kenya's macro social indicators as detailed in Kenya's 2005 and 2006 National Human Development Reports on the Human Development Index. Kenya's HDI has declined from 0.533 in 1990 to 0.520 in 2004. The decline in life expectancy was exacerbated by the HIV/AIDS pandemic and inadequate access to social services (from 66 years in 2001 to 57 years currently), increase in social inequalities, increased part of the population under the poverty line (52 % of the total Kenyan population in 1997, estimated to have reached 57% today), falling school enrollment and literacy rates, etc.

¹⁵ The Kenya African National Union (KANU) ruled the country from 1963 until 2002, when a coalition of opposition parties, the National Rainbow Coalition (NARC), won the elections.

¹⁶ Government of Kenya, Africa Peer Review Mechanism Implementation Strategy for Kenya, 14th February 2004.

¹⁷ Hon. Prof. Anyang' Nyong'o, MP, *Opening address for planning and national development during the inaugural African Peer Review Mechanism (APRM) consultative forum*, held at the Kenya School of Monetary studies 14th July 2004.

expansion of the infrastructure, and investing in the human capital of the poor.

The ERS aimed to ensure that the public sector plays an important role in regulating and facilitating private investment. As highlighted by President Mwai Kibaki in his opening speech during the 2004 International Investment Conference,¹⁸ measures to facilitate and promote private investment include: “creating a legal framework with simplified procedures that govern new investment and privatisation”, reinforcing security (police forces) and anti-corruption measures, “strengthening physical infrastructure (including power, water supply, railways, ports and shipping, road transport, postal and telecommunications and air transport),” “ensuring availability of adequate power at cheaper rates,” and “aggressively pursuing Public-Private Sector Partnership.”

Policies aimed at attracting investors to Kenya seem to have failed to bring in much foreign investment.

According to UNCTAD World Investment Report 2007,¹⁹ foreign direct investment (FDI) to Africa amounted to \$36 billion in 2006, twice as much as in 2004, a surge that was in large part related to investments in extractive industries, as well as to investments in service industries. According to the report, the increase in investment flows is due to measures taken by these countries to open their economies to foreign investment²⁰. As a result of new oil exploration activities and privatisations, FDI inflows to East African countries rose to approximately \$2 billion in 2006, compared with \$1 billion the previous year. However, the report estimates that the sub region still ranks low in FDI inflows to Africa. In Kenya, FDI increased due to large privatisation sales in the telecommunications industry and investments in railways. However, the country saw the closure of some foreign-owned production facilities in garments and other manufacturers²¹, which may be explained by the appreciation of the real exchange rate in a country with relatively high costs of production and low competitiveness. FDI inflows to Kenya were \$46 million in 2004, \$21 million in 2005 and \$51 million in 2006. Prospects for 2007-2008 are not very good.

With the World Trade Organisation (WTO) trade and investment negotiations on agriculture, None-Agricultural Market Access (NAMA) and services, and negotiations of an Economic Partnership Agreement (EPA) between the European Union and the Eastern and Southern African region (ESA),²² of which Kenya is part, Kenya is now faced with the prospect of further trade and investment liberalisation.

The following two chapters present an assessment of the human rights situation in EPZs and in the flower industry. Consistent with the human rights approach, special attention will be drawn to identifying duty holders and the availability of protection mechanisms and remedies.

¹⁸ Speech by His Excellency Hon. Mwai Kibaki, CGH, MP President and Commander in Chief of the Armed Forces of the Republic of Kenya during the official opening of the International Investment Conference on 24th March 2004. (Source: <http://www.statehousekenya.go.ke/speeches/kibaki/march04/2004240301.htm>)

¹⁹The report is available at: http://www.unctad.org/en/docs/wir2007_en.pdf [Accessed on 24 July 2008]

²⁰ UNCTAD, World Investment report 2007, p.67. UNCTAD’s annual survey on changes to national laws and regulations shows that in 2006, 40 African countries introduced 57 new measures affecting FDI, of which 49 encouraged inward FDI.

²¹ Op. Cit, p. 64.

²² Burundi, Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Malawi, Mauritius, Madagascar, Rwanda, Seychelles, Sudan, Uganda, Zambia, Zimbabwe.

IV. Human Rights Impact of the Establishment of Export Processing Zones (EPZs)

“Ensuring that EPZs comply with labour standards has been a major challenge. While the Government is committed to maintaining the highest possible standards of employment for all workers in the Country, the concessions that have been given to EPZ companies so as to attract and retain the equally important Foreign Direct Investment (FDI) negate some of the gains made in protecting the rights of workers by the Occupational Health and Safety Standards. The government is however working on amending the exemption which came through a Finance Bill.” (para. 63, Initial report by Kenya to the CESCR)

1. Export Processing Zones in Kenya

There are over 40 Export Processing Zones (EPZs) in Kenya, employing about 40, 000 workers, mostly women. EPZs are the main recipient of foreign direct investment. Most EPZs are dedicated to the export of garments.

EPZs were first created in Kenya in the early 1990s. The original program was funded by the Kenya Government and the World Bank. The World Bank provided 80% of the capital required for the establishment of the Athi River EPZ (near Nairobi), while the government funded the remaining 20%²³. The World Bank originally defined EPZs as “industrial estates, usually in a fenced-in area, that specialize in manufacturing for export. It offers free trade conditions and a liberal regulatory environment.”²⁴ The World Bank supported the establishment of EPZs, as they were deemed to provide foreign exchange earnings by promoting non-traditional exports, providing jobs to alleviate unemployment or under-employment in the host country and assisting in income creation, attracting foreign direct investment to the host country, and when successful, would be accompanied by technological transfer, knowledge spill-over and demonstration effects that would act as catalysts for domestic entrepreneurs to engage in the production of non-traditional products.²⁵

The EPZ strategy for employment creation and export promotion has been promoted in many countries. Within Asia and the Pacific, Sri Lanka, Indonesia, the Philippines and Bangladesh, there are rapidly growing EPZ industries. China also has a thriving EPZ business in manufacturing. Within Africa, Egypt, Mauritius and Tunisia all have incentive structures to promote EPZs. Experience from countries with EPZs illustrates that the enterprises attract labour intensive and simple manufacturing processes.

The EPZ program in Kenya was inaugurated on 23 November 1990 with the enactment by Parliament of the Export Processing Zone Act, Cap 517, laws of Kenya²⁶. The Act defines EPZs somewhat abstractly as “...a designated part of Kenya where any goods introduced are

²³ C. Mereri (2000), *“The impact of export processing zone development on employment creation in Kenya”*, Singapore Journal of Tropical Geography, Vol. 21(2), 152.

²⁴ Dorsati Madani, *Export Processing Zones I* (1998)

²⁵ D. Madani (1999), *“A review of the role and impact of export processing zones”* (Washington: World Bank), 108p, at 14-15.

²⁶ The EPZ Act provides for: The formation of an Export Processing Zones Authority under part II, establishment of Export Processing Zones under part III, licensing provisions under part IV, export processing zone developers and operators under part V, Export processing zone enterprises under part VI, Operations within export processing zones under part VII, Benefits to export processing zones enterprises, etc.

generally regarded, insofar as import duties are concerned, as being outside the customs territory, but are duly restricted by controlled access...".The objectives of the EPZ program are to attract investment, create employment, diversify the export-base, increase foreign exchange earnings, and ensure technology and skills transfer to Kenya. ²⁷. The Export Processing Zones Act sets up an EPZ Authority that regulates and administers activities within the zones. The EPZ Authority grants licenses to enterprises operating in the zone, and formulates rules to enforce the orderly and fair development and operation of the zones.

The EPZ incentive regime, as implemented in Kenya, provides exporting firms with a 10-year tax holiday, unrestricted foreign ownership and employment, and freedom to repatriate an unlimited amount of earnings.

In particular, local and foreign investors are offered the following incentives:

- 10-year corporate tax holiday and 25% tax thereafter
- 10-year withholding tax holiday on remittance of dividends
- Duty and VAT exemption on raw materials and capital goods
- Stamp duty exemption
- 100% investment deduction on capital expenditure within 20 years
- A host of procedural incentives including work permits for technical expatriate staff; unrestricted investment for foreigners and access to offshore borrowing²⁸.

The ownership structure of the EPZs shows that more than half (57.4%) of the enterprises are owned by foreigners. Only 13% are owned by Kenyans while 29% are under joint venture. . The foreign investors in the EPZs are mainly drawn from Sri Lanka, India, Taiwan, Bahrain, Qatar, USA, United Kingdom (UK), Belgium, Netherlands, China, South Africa and Tanzania.²⁹ Since the EPZ Act allows investors to repatriate an unlimited amount of profit, the skewed nature of the EPZ ownership in favour of foreigners may imply that returns gained by the foreign investors in the framework of the African Growth and Opportunity Act (see more on this below) is repatriated to the parent countries of the investors, leaving the domestic country (Kenya) as a net loser. This line of argument has been advanced in the public realm with critics maintaining that almost all the earnings from the EPZ factories are held abroad, thereby making the government to subsidize the firms at no gain to the Kenyan taxpayers. The Central Organisation of Trade Unions (COTU) and the Tailors and Textile Workers Union (TTWU)³⁰ have equally voiced a similar concern giving credibility to the argument that the EPZ incentive regime has not been beneficial to the Kenyan workers or the Kenyan public in general.

In addition, many of the revenues from FDI in the garment industry have been undercut by tax concessions offered to the investors. Because of the above mentioned 10-year tax holiday, and since most of the garment firms operating in Kenya are enrolled in the EPZ program, the vast majority are exempt from corporation tax, withholding tax and the value added tax.

²⁷ Republic of Kenya, Ministry of Trade Homepage, available at <<http://www.trade.go.ke>> last accessed on 27 July 2008

²⁸ EPZ Authority website, available at <www.epzakenya.com>, last accessed on 27 July 2008.

²⁹ *Ibid.*

³⁰ This is the union that has been granted the legal mandate under the Trade Unions Act (Cap. 233) and the Trade Disputes Act (Cap. 234) to organize and represent the EPZ garment workers in all matters relating to their terms and conditions of employment. COTU (K) and the TTWU held a joint press conference in February 2007 to condemn mistreatment of workers at the EPZs.

Consequently, even though the value of manufactures from the EPZs has more than doubled since 2000, the attendant government revenues accruing from the trade have lagged far behind.

Kenya's problem of tax revenue stands to worsen in the future. Amidst fears that quota liberalisation in the apparel market will induce companies to leave Kenya, the leadership of the EPZ Authority has started lobbying the government to expand tax privileges for textile firms for an additional five years.³¹ If the EPZ Authority's bid is successful, some apparel firms will be exempt from taxes until 2015, when the preferential treatment granted under AGOA is set to expire. This means that the garment industry will fail to generate any substantial amount of revenue for the Kenyan government, by which it might implement programmes to give Kenyans basic social human rights, such as education and health services.

2. The African Growth and Opportunity Act (AGOA) and its effects on EPZs

The US African Growth and Opportunity Act (AGOA) has been a major factor in the development of the EPZ textile industry in Kenya. AGOA provides most preferential market access, duty free and quota free, to manufactured products from designated African countries. In addition, a special dispensation applies and allows eligible African countries (including Kenya) to export apparel to the United States, even if the fabric came from another country. This so-called third country fabric provision currently extends until 2012 and explains why large garment exporters (e.g. from Asia) would wish to invest in Kenyan EPZs. Production in Kenya provides them with an access to the US market that they might otherwise not have (particularly under the now expired Multi Fibre Agreement that set the quota for Asian importers). Kenya is facing pressure at the moment from garment companies, which are threatening to relocate now that the specific advantage Kenya could provide, in relation to the MFA, is disappearing. Also, the US is pushing, including as a condition under AGOA, African countries and regions, to give extensive opening and BIT-like protection measures to US investments.

The EPZs have largely benefited from the market prospects presented by the tariff and quota advantages granted by the US under the African Growth and Opportunity Act.³² An elaborate analysis of the contribution of the EPZs under the AGOA framework is displayed in an assessment of the trend of some of the zone's key performance indicators as summarized in Table 1.

³¹ Anyanzwa, James (2004). "Textile Players Lobby for 5-Year Tax Waiver" The East African Standard. (<http://allafrica.com/stories/200412070605.html>)

³² Omolo, J.O. (2006). "The textile and clothing industry in Kenya" in Herbert Jauch and Rudolf Traub-Merz (Eds), *The Future of Textile and Clothing Industry in Sub-Saharan Africa*, Bonn: Friedrich-Ebert-Stiftung.

Table 1: Key EPZ performance indicators: 2002 - 2006

	2002	2003	2004	2005	2006
Gazetted zones (No.)	31	37	41	43	39
Enterprises Operating (No.)	54	66	74	68	71
Employment (Kenyans) a	26,447	38,199	37,723	38,051	36,767
Employment - (Expatriates) b	701	912	837	800	649
<i>Total Employment (No)=a+b</i>	<i>27,148</i>	<i>39,111</i>	<i>38,560</i>	<i>38,851</i>	<i>37,416</i>
Turnover (Kshs. Million)	11,040	14,817	24,217	23,774	23,352
Exports (Kshs. Million)	9,741	13,812	23,047	20,036	22,893
Domestic Sales (Kshs. Million)	932	619	651	3,160	1,403
Imports (Kshs. Million)	7,043	9,920	13,029	12,497	12,674
Investment Kshs. Million	12,728	16,716	17,012	18,682	20,320
Local Purchases (Kshs Million) 1	1,127	1,176	1,893	2,388	3,253
Local Salaries (Kshs million) 2	1,582	2,398	3,258	3,017	3,299
Expenditure on power (Kshs m) 3	147	258	302	366	522
Expenditure on telecommunication (Kshs million)4	73	82	105	112	117
Expenditure on water (Kshs m)5	24	61	72	84	121
Other Domestic Expenditure (Kshs Million) 6	698	994	1,701	2,288	1,861
<i>*Total Domestic Expenditure (Kshs Million)</i> <i>= 1+2+3+4+5+6</i>	<i>3,651</i>	<i>4,969</i>	<i>7,331</i>	<i>8,255</i>	<i>9,173</i>

Source EPZA, 2008

*** Foreign exchange equivalent injected into the economy**

- All figures are in Kshs. Million except where stated.

These figures show that the number of gazetted zones has been increasing, albeit at a declining rate. The number of gazetted zones increased from 23 in 2001 to 43 in 2005, representing an annual average increase of 22%. Considerable increase in the number of gazetted zones was recorded in the 2001-2003 period, manifesting the policy shift and positioning within the country to exploit the AGOA benefits through the EPZs. Consistent with the increase in the number of zones, the number of EPZ operating enterprises almost doubled between 2001 and 2004, increasing from 39 in 2001 to 74 in 2004. The number of EPZ enterprises, however, declined to 68 in 2005, reflecting the effects of the end of the Multi Fibre Agreement (MFA) and the phasing out of textile quotas with effect from January 2005. This phenomenal growth in the number of EPZ firms is compared to an average of 20 firms that operated in the zone before the AGOA pact (1997-2000).

Total direct employment within the zones increased considerably from 13,758 persons in 2001 to 36,767 persons in 2006. This is compared to an average of 3,483 persons employed by the EPZs in each of the years 1993-2000. During the period 2001-2005, the number of expatriate workers was low - at an average of 2% of total EPZ employment. The majority of the expatriate staff is found in the higher echelons of the enterprise. The EPZ employment figures show that the total level of employment in the zone was considerably higher during the AGOA period than *before*. That means that the employment creation objective of AGOA was mainly fulfilled through the EPZs.

Data in Table 1 shows that an investment of close to half a million Kenya shillings (Kshs.493,763) is required to create a single EPZ job that pays an average monthly salary of Kshs. 5,835. The average monthly salary is, however, 28.6%, 23.3% and 10.6% below the 2006 average statutory minimum wage rates for employees in the cities, municipalities and rural areas respectively as provided under the Regulation of Wages and Conditions of Employment Act, Cap. 229 of the laws of Kenya (now repealed). The implication is that even though AGOA contributed to increased employment opportunities, especially within the EPZs, the jobs are not well paying. Thus, the employment opportunities offered have not accorded the workers the necessary push required to lift them out of poverty.

It is also clear from Table 1 that the amount of money injected into the economy (domestic expenditure) through the EPZs has been low at 33-40% of the total expenditures. This implies that most of the products used by the EPZ firms have been sourced abroad, thereby limiting the benefits to the economy. It especially limits the much needed foreign exchange and linkages between micro, small, medium and large enterprises, which is required for industrial take-off.

Further desegregation of the EPZ performance indicators data reveals that the garment sub-sector is the most dominant in the industry (Table 2). In 2005, it constituted about 37% of the EPZ enterprises and contributed 90% of the local jobs. It also consumed 52% of the local resources. This confirms the strategic position of the sub-sector in the AGOA trade.

Table 2: Sub-Sectoral Composition of the EPZ, 2005 (%) *

Sub-Sector	No. of firms	Exports	Total sales Kshs million-US dollars	Local jobs	Local resource	Investment	Average
Agro Processing	11.8	5.2	4.9Kmil- \$71,014	2.9	10.6	8.2	7.2
Chemicals	11.8	7.2	7.1K- \$102.898	0.9	18.0	13.1	9.7
Electronics	2.9	1.9	1.6K- \$23,188	0.5	0.6	0.5	1.4
Garments	36.8	74.4	63.9Kmil- \$926,087	90.0	52.1	53.4	61.8
Spinning	1.5	1.4	1.2Kmil- \$17,391	0.8	1.1	2.3	1.4
Darts board	1.5	1.4	1.2Kmil- \$17,391	0.3	1.1	0.4	1.0
Printing	4.4	3.3	13.9Kmil- \$201,449	0.9	7.5	13.0	7.1
Pharmaceuticals	4.4	0.7	1.0Kmil- \$14,492	0.4	1.0	1.2	1.5
Plastics	2.9	0.5	0.4Kmil - \$5,797	0.2	0.3	0.4	0.8
Service	16.2	3.7	4.2Kmil- \$60,869	2.8	7.2	6.8	6.8
Other	5.9	0.3	0.7Kmil - \$1,014	0.2	0.5	0.7	1.4

Source: EPZA (2006)

* All figures are in Kshs. Million except where stated.

3. Legal Framework

The Kenya labour laws trace their origin to the colonial establishment. The laws were designed and enforced as part of the colonial project to reorganize African politics and the economy.³³ Over the years, Kenyans have toiled under labour laws that were lopsidedly designed to ensure cheap and abundant labour would be available. Over twenty Kenyan legislative documents are labour-related. Out of these, eight are considered core legislation. These are the *Employment Act (EMPA)* Chapter 226 of the Laws of Kenya (now repealed), the *Regulation of Wages and Conditions of Employment Act (RWCEA)* Chapter 229 (now repealed), the *Trade Unions Act (TUA)* Chapter 233 (now repealed), the *Trade Disputes Act (TDA)* Chapter 234 (now repealed), and the *Workmen (sic!) Compensation Act (WCA)* Chapter 236 (now repealed), the *Factories and Other Places of Work Act (FOPWA)* Chapter 514 (now repealed), the *National Social Security Fund Act (NSSF)* (Chapter 258) and the *National Hospital Insurance Fund Act (NHIFA)* (Chapter 255).

³³ See Mohammad Mamdani. *Social Basis of Constitutionalism in Africa* in the Journal of Modern African Studies, Vol. 28, No. 3. (Sep., 1990), pp. 359-374.

3.1. EPZs and the Dilution of Labour Laws

Even though the EPZ firms are not explicitly exempted from observing core labour laws and regulations (as was the case before the labour strike by EPZ workers in 2003), they are immune to enforcement of the FOPWA of 1951. The Act authorizes health and safety inspectors with the Ministry of Labour's Directorate of Occupational Health and Safety, to inspect factories and work sites. As a result of the 1990 amendments, the Directorate's inspectors may now issue notices prohibiting employers from participating in practices or activities that involve a risk of serious personal injuries. Previously, only magistrates were vested with this authority. Such notices can be appealed to the Factories Appeal Court, a body of four members, one of whom must be a High Court judge. The amendment of the EPZ Act on safety and health and the strengthening of labour inspectorate would be the best route for tackling hazardous problems in the zones. Unfortunately, this provision has since been misinterpreted to bar labour officers from inspecting work places³⁴.

The amendment proposed by the Finance Act No. 4 of 1994 constitutes another glaring example of dilution of Kenya's labour laws. The Act amended section 16 of the Employment Act³⁵ and The Regulation of Wages and Conditions of Employment Act to circumvent the requirement of Union involvement in the redundancy of workers and related safeguards and procedures. Various investors in the EPZs have used this provision to jump ship when there is increased pressure for accountability and demand for better workers' welfare. The classic case is that of Tri-star,³⁶ which left quickly when the incentives period ended in Kenya, abandoning workers, who fell into deeper poverty, after assisting them to train a new workforce in Uganda

It should be noted that until 2003 trade unions were restricted from organizing and recruiting EPZ workers for purposes of negotiations and collective bargaining. To date, the firms generally remain resistant to trade union activities. It was soon after the new government came to power that the workers' expectations in the EPZs boiled over into frustration resulting in massive and spontaneous work stoppages in January 2003. These workers were not union members and the new government along with TTWU and COTU urged workers to join unions and use structures to deal with their grievances. The employer's response was rapid and thousands of workers were dismissed. The government, fearing further instability, ordered EPZ employers to recognize unions and engage in structured collective bargaining.

3.2. The Current Revision of Kenyan Core Labour Laws

Kenyan core labour law legislations have virtually been intact since their enactment apart from the reviews facilitating the cheap labour. Kenya is a signatory to various international human rights instruments and to 42 ILO conventions and several recommendations. The Kenya Human Rights Commission (KHRC) led the civil society in calling for the review of these laws, in particular through the *Human Rights Are Workers Rights!* campaign commenced in 2001. Faced with the rising pressure, the government appointed a task force on 18th May, 2001 to review the existing labour legislation. The Task Force to Review Labour Laws is tripartite in character, involving the government, the trade unions and the employers. The Task Force received technical assistance from the International Labour Organisation and

³⁴ Interview with officials from the Ministry of Labour met during the mission

³⁵ Cap 226 of the laws of Kenya (repealed)

³⁶ This has been documented in details by Steve Ouma in a report entitled: The loose Foot Investors in east Africa- the Case of Tri-star. A study Commissioned by Center for Multinational Research (SOMO)

the US Government.

The Task Force was mandated to review six core labour laws: the EMPA, RWCEA, TUA, TDA, WCA and FOPWA (see previous page). The primary objectives were:

- To bring the laws into conformity with international labour standards;
- To promote employment and movement of labour across borders as envisaged under the regional integration plans of the East African Community, and
- To address contemporary needs and expectations of labour

In May 2004, the Task Force proposed a number of bills that would replace the core Kenyan labour legislation. The proposals included both the strengthening of the Department of Labour and the creation of a National Labour Court (to replace the Industrial Court) with real enforcement powers. After numerous debates with the stakeholders, the bills were presented to parliament in June 2007 and were first operationalised in October and December 2007. The laws were later re-gazetted on 2nd June 2008. These newly approved laws seem to provide an adequate response to the current labour situation in the country.

In brief, the laws provide as follows:

- The Labour Institutions Act, 2007 establishes and strengthens institutions which deal with labour administration and management of labour relations, such as the National Labour Board, the National Labour Court, Wages Councils and Employment Agencies.
- The Employment Act, 2007 strengthens minimum terms and conditions of employment, prohibits forced and child labour, sexual harassment and discrimination, provides for 21 days annual leave, three months maternity leave, and provides the same protection to legal migrant workers as to Kenyans.
- The Labour Relations Act, 2007 promotes protection of freedom of association.
- The Work Injury Benefits Act, 2007 extends insurance cover to employees and ensures adequate compensation for injury and work-related diseases.
- The Occupational Health and Safety Act, 2007 secures safety and health for people legally in all workplaces.

If applied effectively, the laws can facilitate effective and prudent labour management. However, the government must also expedite the constitutional reforms process and ensure effective and impartial labour administration.

4. Human Rights Impact of EPZs

Perhaps the most direct benefits of EPZs, result from the effects of investment on employment. UNCTAD noted in their 2005 Investment Policy Review of Kenya, that FDI has been an important source of employment in recent years. The rise in foreign investment in labour-intensive garment production boosted employment in EPZs to 35,000 people, with around 12,000 additional jobs created indirectly as a result of sub-contracting. EPZ employment, which rose 32 percent in 2003 from a year earlier, accounted for around 17 percent of total formal manufacturing employment in 2003, up from less than 3 percent in 1999. Horticulture is the other sector where foreign investors have significantly contributed to

output and employment growth. The horticulture sector is also labour intensive. In 2003, the sector employed approximately 135,000 people, compared with a total of 260,000 formal private sector agriculture and fishery workers³⁷. That investment has generated significant employment in export-oriented labour-intensive activities, primarily in lower-end manufacturing, but also in services. Studies show that increases in investment have had positive effects on the participation of Kenyan women in paid employment over the past 20 years³⁸. The share of women in the national labour force has risen from 19 per cent in 1963 to 29 per cent in 1997. Women are slightly more numerous than men in EPZ businesses; 52 per cent of EPZ employees are women.³⁹

The increase of employment can have positive impacts on the enjoyment of human rights by empowering people and creating more equal societies. For women in particular, access to paid employment - even low-paid employment – has provided a vehicle to increased autonomy both within and outside the family and leads to increased pressure for greater social recognition of women's equal rights. However, increased employment opportunities for women in the rapidly growing horticulture and Export Processing Zones manufacturing sectors, do not correlate with equal rights between women and men workers.

Interviews of EPZ workers in EPZs in Athi River, Ruaraka⁴⁰ and Mombasa⁴¹ confirm the findings of earlier studies, *The Beauty and Agony*, *The Manufacture of Poverty*, *Leasing the Nation*⁴² and 2003 report: *The Manufacture of Poverty; the Experience of Working Conditions in the Kenya EPZ*⁴³ undertaken by the Kenya Human Rights Commission and other organisations.

The following pattern emerges:

- EPZ workers do not earn a living wage;
- Forced and inadequately compensated overtime is common;
- Working hours are unpredictable, and overtime is neither properly regulated nor remunerated; the consequences for the private life of employees are devastating.
- No training is provided on the job, and few opportunities for promotion exist (particularly for women who make up the large majority of the workforce);
- There is little job security, due to either the nature of the employment contracts or the frequent use of sanctions by employers;

³⁷World Bank (2004) Investment Climate Assessment. Kenya 2003. Initial results and comparisons. Washington ,DC.

³⁸UNCTAD, *Foreign Direct Investment and Development*, UNCTAD Series on issues in international investment agreements, United Nations, New York and Geneva, 1999, and N.Cagatay, “*Trade gender and Poverty*”, United Nations Development Programme, New York, October 2001.

³⁹ Mireri Caleb, *The Impact of Export Processing Zones on Employment Creation in Kenya*, available at: <http://www3.interscience.wiley.com/cgi-bin/fulltext/119039755/PDFSTART> ,

⁴⁰ Workers interviewed shared their experience at Upan and Apex EPZs.

⁴¹The mission held an off site focused group discussions with the EPZ workers from Mombasa. The workers came from California EPZ, Kapric EPZ, Blue Bird EPZ, Mega EPZ and Ashton EPZ.

⁴² The KHRC has done advocacy work in this sector over the years. These experiences are now captured in several publications including: *The Beauty and Agony*, *The manufacture of poverty* and *Leasing the Nation*. Part of this advocacy work has now resulted into establishment of a multi-stakeholder, Horticultural Ethical Business Initiative (HEBI) which aims at ensuring reforms in the social conditions in the industry.

⁴³See the KHRC, 2003: *The Manufacture of Poverty; the Experience of Working Conditions in the Kenya EPZs*, Nairobi, Kenya.

- Sexual harassment is prevalent;
- There are frequent alleged incidents of racial discrimination by foreign (generally Asian) management and supervisors vis-à-vis the Kenyan workforce;
- Workers' rights to join trade unions of their choice or to undertake collective bargaining are violated.

Although these problems have been known for years, it is striking that no substantial change can be observed on key issues like working hours, living wage or freedom of association. As a result, the employment created by the export processing zones does not generally enable workers, their families or the communities to which they belong to achieve an adequate standard of living.

5. Protection mechanisms and remedies

This state of affairs happens, notwithstanding the availability of numerous mechanisms at both the domestic and international level, to - at least in theory – offer human rights protection to workers in the EPZs. At the Kenyan level, such mechanisms include: law enforcement and inspections by the Ministry of Labour, labour dispute settlements and trade unions monitoring. Below is an explanation of these mechanisms and the extent to which they have failed to provide adequate protection to the workers. This explanation is followed by a review of international policies and mechanisms developed to protect human rights.

5.1. Poor and lax labour administration

With the notable exception of rules on occupational health and safety, Kenya labour law applies in the EPZs. According to the Ministry of Labour, inspection takes place in the EPZs with the same regularity as everywhere in Kenya. The 2005 Annual Report of the Labour Department of the Ministry of Labour notes that the department's funding is inadequate. Staffing levels were 282 against the approved establishment of 618. Most local stations were not able to carry out planned inspections because of lack of funds and transport. The report describes the working environment at the labour offices as poor. In addition, the quality of the inspections was contested by a number of interviewees employed in the EPZs. The Kenyan Government does not appear to prioritise labour issues – perhaps because this is seen as harming its foreign investment policies. It is also unclear to what extent labour officials at the various levels are able or willing to weigh on government policy.

The Export Processing Zones Authority is supposed to regulate and administer activities within the zones. Although the EPZ Act does not explicitly deal with labour issues, nothing prevents the EPZ Authority from ensuring that Kenyan labour law is complied with in the zones. In practice, however, the EPZ Authority concentrates on the attraction of investors to the zones. The EPZ Authority only intervenes in labour disputes when they endanger the operation of the zone (e.g. when there are strikes), and as perceived by workers, only in order to ensure the smooth operation of the contested EPZ enterprise. Similarly, the 2005 EPZ Authority Annual Report deplores the current labour laws' demand for permanent employment. The report favours short-term employment contracts "given the swinging and cyclical nature of orders received in the apparel and textile business"⁴⁴.

⁴⁴ EPZ Annual Report 2005, p. 23.

5.2. *Lopsided dispute resolution mechanisms*

Trade disputes are governed by the Trade Disputes Act (TDA) CAP 234, which came into force on the 14th April 1964, with subsequent amendments in 1965 and 1971. The Act makes provision for the settlement of trade disputes, including disputes in essential services, and further establishes the Boards of Inquiry and the Industrial Court, which is at the apex of the trade disputes procedures. The Act also provides for the control of strikes and lockouts and for the collection of union dues and other related matters.

It should be noted that although the legislative mechanism for resolving disputes remains the TDA, there is also the Industrial Relations Charter, first established in 1962 and revised in 1980. It is basically a tripartite agreement between the Government, the Federation of Kenya Employers and the Central Organisation of Trade Unions (K). Although the Charter has no legal binding authority it has been used severally in the settlement of disputes and strikes/lock-outs. No representation of the parties is accepted before they enter into recognition agreement. After recognition, the parties have to resort to collective bargaining agreement, which is required to be registered by the Industrial Court. The Recognition Agreement further guides the parties on the machinery to follow in case there arises a trade dispute, strike or lock-out.⁴⁵ A trade dispute has to exist and be reported to the Minister for Labour in accordance with Section 4 of Cap. 234.

At the judicial level, the Industrial Court has a limited mandate in dealing with labour disputes. Acting as a court of arbitration based on equity, it has no enforcement powers. Even though there is an expectation that parties comply with the Industrial Court's verdicts, they are often ignored by EPZ enterprises. The cases must be taken to the High Court for enforcement orders to be given.

It should be noted, as has been argued by Justice Cockar,⁴⁶ that the major objectives of the Trade Disputes Act were to ensure that parties to a trade dispute adhere to agreed procedures for settling disputes, to limit sympathy strikes and sympathy lockouts, to establish mandatory binding arbitration by the Industrial Court in trade disputes in 'essential services' and to provide for the compulsory 'check off' of union dues where permitted by the Minister for Labour. It is clear, however, that one of the key objectives of the Act was to virtually outlaw strikes. Over the years it has become almost impossible for the Kenyan workers to organize a lawful strike. The underlying philosophical basis upon which the Act rests is the belief and assumption that the best way of resolving trade disputes is through negotiations and agreement by the parties.

This is a very sound principle in theory, but in practice it is predicated on a strong trade union movement and the availability of sufficient room to resort to industrial action to exert pressure. In both instances Kenya scores very dimly. In the first instance, the trade union movement has over the years been very seriously weakened by administrative or executive (read government) interference, seemingly sanctioned by Section 16 of the Trade Unions Act (now repealed). This section grants the Registrar of trade unions, a political appointee, and power to refuse to register a trade union. Secondly, the law has placed a lot of restrictions on

⁴⁵ It is obvious that before the Minister agrees to declare a dispute, he/she should look very closely at the Recognition Agreement. What this means is that the dispute resolution machinery is in the first instance to follow the procedures set out in the Recognition Agreement which may vary from one case to the other, but the main underlying principle is that all attempts should be made to reach conciliation.

⁴⁶Saeed R.Cockar, *The Kenya Industrial Court: Origin, Development and Practice, January 1981*.

the workers' freedom of action. For instance, the right to strike, which is a fundamental freedom under international law, is not enshrined in the constitution. However, legislation on this right is provided under the Trade Unions Act (now repealed) but it is highly restrictive. In the recent past, the government has also increased its listing of what is referred to as essential sectors. These sectors are not permitted to go on strike.

5.3. Inefficient unions

The situation has been exacerbated by poorly organized, oligarchic and lethargic trade unions. There are 42 legally registered unions in Kenya, representing about 600,000 workers, 34 of which are affiliated to the Confederation of Trade Unions (COTU)⁴⁷. However, it has been alleged that COTU is not an independent organisation or free from outside interference. Though its secretary-general is appointed by delegates nominated from its affiliates, there have been accusations of interference by the then KANU regime. Although the Kenyan Unions have a strong history of anti colonial struggle, according to certain sources the union leadership seems to have lost touch with the workers. A writer with the Labour Awareness and Resource Centre (LARC) Kenya in his article⁴⁸ accuses the union leadership of being corrupt and protectionist citing a provision of the COTU constitution. The section provides that to remove the current Secretary General, one must deposit Kshs 2 million, effectively locking out ordinary workers.

Although the Kenyan Textile Union has taken action on behalf of EPZ workers, both in court, and in the case of the Athi River EPZ by negotiating a collective bargaining agreement (now expired), during the interviews, EPZ workers (most of whom were unionised) expressed criticism of the Union. EPZ workers feel under-represented within the Union, are distrustful of the role of trade union officials in negotiations with management, and generally feel that the unions are unable to deal properly with new labour situations resulting from the global context.



Figure 1: Workers Demonstrating Against Corrupt Labour Officials and Trade Union Representatives

⁴⁷ COTU estimates

⁴⁸ Mwamodo George, *It is High Time Workers Started Addressing and Solving their own Problems*, available at: http://kenyasocialist.org/kswsfiles/2005/kenyan_workers_should_solve_their_own_problems.htm

The employees interviewed in Mombasa were categorically in agreement that the Unions seem more interested in the membership dues/ fees than the workers' welfare. One worker even overtly remarked that it must not be assumed that the unions know and represent the interest of the workers.

The mission was also given reports of instances where the employers opted to dismiss workers or close shop upon realizing that the Union had attained the basic 51% threshold⁴⁹ in its recruitment. This practice is rampant in the EPZs. This practice further limits the growth of and effective participation in trade unions.

6. Economic Accountability Mechanisms for Violations of Labour Rights in EPZs at the International Level

6.1. The US and the AGOA mechanism

In order to qualify for AGOA benefits, African countries must demonstrate that they make continuous progress towards achieving a significant number of objectives defined (unilaterally) in the Act. One of these objectives is the “protection of internationally recognized worker rights”. Countries should also not engage in gross violations of human rights. The US President may withdraw beneficiary status if he determines that a country is not making such progress. It is striking that when the Kenyan government created the Task Force charged with revising Kenya's labour law, it explicitly referred to the need for the new law to comply with AGOA labour standards. Nevertheless, the AGOA mechanism is a blunt one: the only sanction is the withdrawal of AGOA preferential status, a measure that would have tremendous impact given the dependency of the textile industry in Kenya on AGOA. Given these consequences, civil society actors in Kenya may be reticent to invoke the mechanism. AGOA does not provide sanctions for companies (either EPZ enterprises or US buyers) that violate labour standards.

Undeniably, the United States Embassy has an interest in labour rights in Kenya. The US Government funds the American Centre for International Labour Solidarity East Africa Office, based in Nairobi, which promotes the implementation of ILO standards and the independence and good governance of African trade unions. Nevertheless, there appears to be little monitoring of the labour (or human) rights performance of US companies operating in Kenya or of the impact of US buyers. There is little evidence of any attempt to encourage the relevant US enterprises to observe the OECD Guidelines on Multinational Enterprises, in particular its human rights provisions.

6.2. Corporate Social Responsibility in the Textile Industry

Corporate social responsibility (CSR) certainly plays a role in the textile industry, but it is difficult to identify cases involving EPZ enterprises in which it has been effective⁵⁰.

A case in point is the well documented example of *Rising Sun*,⁵¹ a Sri Lankan company based

⁴⁹Essentially, the rule of unions attaining 51 per cent membership in company before engaging in a recognition agreement, was meant to ensure a regulation against a closed shop system.

⁵⁰ See cases in different African countries: E. de Haan, M. Vander Stichele, *Footloose Investments – Investing in the Garment Industry in Africa*, SOMO, August 2007.

⁵¹See Worker Rights Consortium (2006), Preliminary Report: Worker Rights Consortium Inquiry into alleged labour rights violations at Rising Sun Kenya EPZ (Washington: WRC), 14p.

in the Athi River EPZs that produced for a number of American buyers, including Steve and Barry's University Sportswear and Jones Apparel Group.

There is overwhelming evidence that in the course of 2006, the company was engaged in flagrant violations of both Kenyan and international labour laws.

Following a strike at the factory, Rising Sun abusively dismissed approximately 1,270 workers. The conflict between the management and the workers started in June 2006, when workers raised issues to the management concerning; an unlawful mass termination of Rising Sun workers; that the company had failed to pay legally mandated compensation to these workers; that the company had unlawfully engaged replacement workers on a casual employment status; that the company had violated a court order concerning removal of machinery from the facility prior to the resolution of the dispute; and that Rising Sun workers had been the subject of illegal blacklisting by other employers in the zone at the behest of Rising Sun management.⁵²

On 30 June 2006, workers went on strike after the use of abuse language by factory manager: The Manager insulted one Ms Mercy Kagwithia "I will fuck you". The worker raised this matter to the shop-steward who advised her to report the matter to the police at the zone. The manager was arrested and after two hours released and came back to the factory boasting that he can be taken no where and still abused them again with the same words. The workers reacted and went on strike during which the company's property was damaged including 2 cars. The Chief Executive Officer also became a victim of the violence, which only abated after the police dispersed the rowdy workers.

A few days later, it was announced during a meeting between representatives of the EPZ management, the trade union and the workers, that the workers had been dismissed. The dismissed workers were not given any notice or the reasons for their dismissal as required by law. Under the Employment Act, employers are to provide to the worker they intend to dismiss, a letter containing the reason for the dismissal. Prior to dismissal, workers must be provided the opportunity to hear and answer charges against them. At the time of the mass dismissal, Rising Sun neither provided a letter of dismissal or an explanation to workers as to the reason for their dismissal nor did it provide workers with an opportunity to hear or answer charges against them. In addition, Rising Sun did not provide any opportunity for workers to have union representation in addressing any alleged inappropriate actions. Instead, it simply pinned a notice on the factory gate, addressed to 'All unionized former employees of Rising Sun Kenya,' stating that the workers were summarily dismissed, without indicating any reason for the dismissal.

On July 3, workers from most, if not all, of the EPZ's factories participated in a wildcat strike. The Rising Sun workers blocked other workers from entering the zone, some of who joined the strike action, paralyzing all operations in the zone. What had started as a peaceful demonstration spiralled into violent confrontations between the workers and the riot police. That evening, the Minister for Labour, the union's General Secretary and its chairman held a meeting and the Minister ordered Rising Sun to reinstate those locked out workers who wished to

⁵² Worker Rights Consortium, Preliminary Report: Worker Rights Consortium Inquiry into Alleged Labour Rights Violations at Rising Sun Kenya EPZ (November 13, 2006) available at: <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1003&context=monitor>

return to work, and to pay all legally mandated severance to those who did not wish to be reinstated.

Jones Apparel Group has a CSR policy on labour rights, and in fact wrote to *Rising Sun* encouraging the company to adhere to recommendations made by the Kenyan Ministry of Labour and an interim order by the Industrial Court. By the time the letter was written, Jones Apparel had already decided for other reasons to cease production at *Rising Sun*. Therefore, all it could do in the letter was to threaten not to give new business to *Rising Sun* in the future. The threat failed to work as the company already had a variety of clients, and no long-term plan to remain in the country. The decision to leave *Rising Sun*, rather than stay in the facility and use its presence to press for remediation, illustrates how remediation can be severely undermined when production is removed from a noncompliant facility without adequate consideration for the effect of this action on efforts to compel remediation, even when the motive is not necessarily to “cut and run” from responsibility for the violations themselves.

Rising Sun also continues to ignore the recommendations of the Kenyan authorities, and the Industrial Court’s interim orders. *Rising Sun* continues to appeal the matter through the court process, which may well take years to complete. Meanwhile, there have been indications that *Rising Sun* may soon go into bankruptcy or receivership and that the factory may close.⁵³ In view of these developments, it is unlikely that the workers’ rights violations will be corrected

⁵³ *Supra* note 50

7. Conclusion – Is Any Investment Always Better Than No Investment?

Given the lack of political commitment to human rights by the various domestic and international actors, the nature of the investment disallows existing human rights protection mechanisms from delivering, with regard to the textile and garment industry in the EPZs. The AGOA Scheme attracts textile enterprises to the Kenyan EPZs that are interested in making quick profits based on the lowest possible cost of labour. Their presence in Kenya is wholly dependent on artificial investment incentives constructed through law.

Given the relative weakness of Kenyan labour institutions, protection mechanisms by external public and private actors remain ineffective. The mission observed three glaring scenarios which summarize the situation of human rights in relation to investment and exports. These were; pressure to weaken labour laws, poor and lax labour administration and lopsided dispute resolution mechanisms. As a result, the employment created in the textile industry through the establishment of the processing zones has an adverse impact on the human rights of those employed in the zones, on their families and on the communities to which they belong.

Investments in the EPZs have shown no overt link to either their immediate local environment or the Kenyan economy at large. At the level of the Kenya economy - which is broad enough and provides room for greater linkage - what the mission observed from both the companies value and supply chain was blatant disarticulation with the Kenyan economy. The establishment and organisation of the zones is such that they are typically seen as independent foreign economies. Thus, there is no forwards backward linkage between the zones and the Kenyan economy.

The government's strategy to raise economic growth results in a policy by which Kenya tries to attract any form of foreign investment, because some investment is better than no investment. The government is concerned that it would attract very little investment if any assessments were made of the benefits and costs of the measures used to attract it. As a result, the EPZs have been used to attract investment but the government does not know what the benefits of the EPZs have been. No studies have been done. Although government officials are aware of 'rumours' whereby investors close the door and re-enter Kenya in another name in order to benefit again from the 5-year tax holiday, this has not been investigated. The lack of transparency concerning ownership structures by the foreign investors also plays a role.

Although the Investment Promotion Act (2004) made it mandatory to vet investment to gauge whether it would create employment, and there might be cases of concern where foreign investments do not reflect the development policies of the governments, vetting is not possible. Government officials felt they could not be very demanding on quality of foreign investment as the policy is to ask for foreign investments and investors are already scarce. The Kenyan Government also gave examples on how they are caught in fierce competition in order to attract investment with neighbouring countries.

There is however some awareness that specific types of investment should be considered inappropriate. For instance, the government is looking at the concept of introducing free ports and incubators, as well as local content requirement for the use of domestically produced cotton for instance. The government officials said in December 2006 that they wanted a national discussion about these issues.

V. A Closer Look at CSR: The Flower Industry in Kenya; A Case Study of Sher Agencies Ltd. And Homegrown Kenya

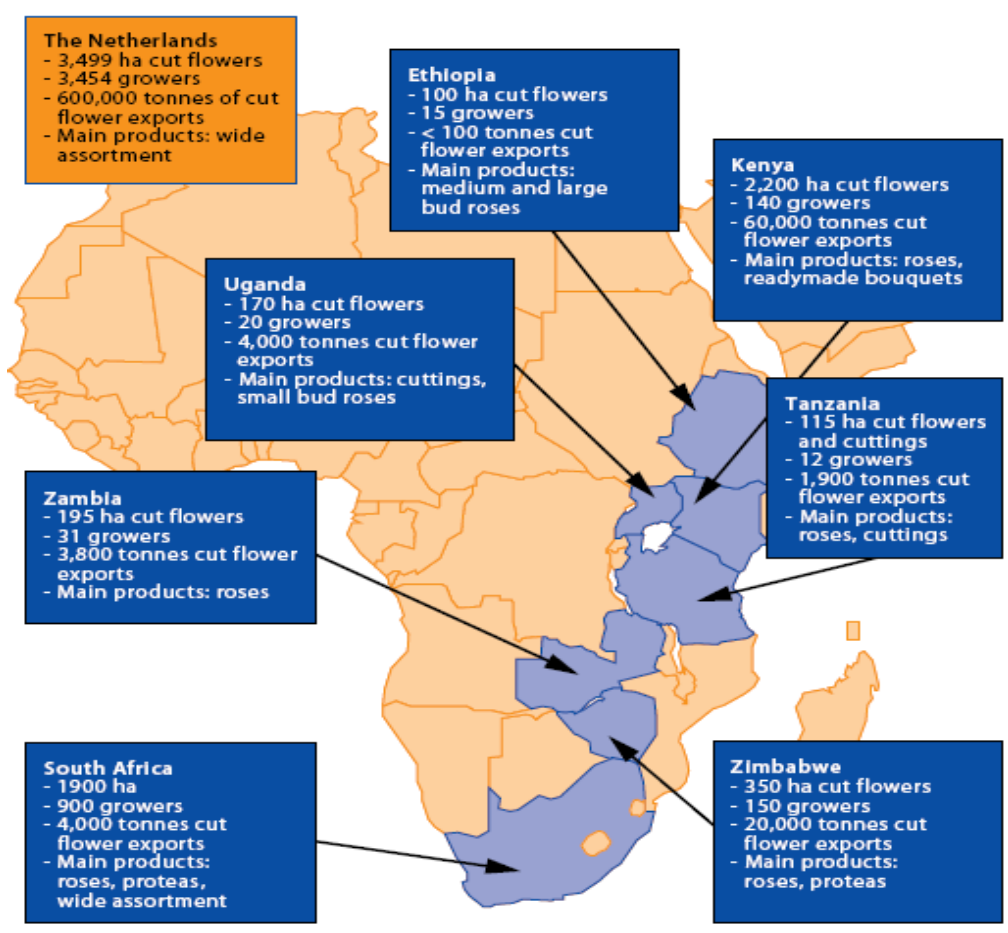
A widely used definition by the World Business Council for Sustainable Development states that “CSR is the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large”. Similarly, the concept of corporate citizenship deals with the responsible involvement of a company with the wider community; the notion assesses the contribution a company makes to society, and its engagement in public policy.

1. The Cut Flower Industry In Kenya and CSR

The cut-flower industry is presently one of the most profitable agricultural undertakings in terms of high profit in Kenya. A lot of foreign investment is pouring into this industry, mainly due to the fact that investors can expect high rates of product output at much lower costs of production, when compared to production costs in other parts of the world. Besides, Kenyan investors in this sector enjoy benefits of an efficient transport and good climate. Most important, however, is the government policy. According to the recently released report by the United States International Trade Commission, entitled *Sub-Saharan Africa: Factors Affecting Trade Patterns of selected Industries*,⁵⁴ Kenya was given an outstanding mention for demonstrating how favourable government policies could influence the growth of exports in a specific sector. The report noted that the tremendous growth of the Kenya floriculture industry in the 1990s and 2000 was mainly supported by its liberal macro economic policy environment and government encouragement of foreign investment and international trade.

Key figures for the cut flower sector in the most important African producing countries are presented in the map below.

⁵⁴ United States International Trade Commission Report, *Sub-Saharan Africa: Factors Affecting Trade Patterns of selected Industries*, Investigation No. 332-477, USITC Publication 3989 (April, 2008) available at: <http://hotdocs.usitc.gov/docs/pubs/332/pub3989.pdf>



Source: Rabobank, January 2005

To date, the flower sector is the fastest growing sub sector of Kenyan agriculture, at 10% to 20% per annum. Although roses, with a market share of 70% are the dominant product, Kenya still has a larger variety of products than other African countries. Most flowers are grown around Lake Naivasha. Kenya is Africa's largest exporter of flowers with 60,000 tonnes in 2003. Volumes have more than doubled since 1998⁵⁵. 65% of Kenyan production is being exported to the Netherlands, 20% to the UK. The major Dutch owned companies are Sher Agencies, Oserian and Homegrown. Kenya has good logistical facilities (by African standards) at the Jomo Kenyatta International Airport (JKIA) for processing and storing flowers due to the large scale of the horticultural sector. At the moment Kenya is facing increasing competition from other African countries⁵⁶.

The KHRC has widely documented labour violations occurring in this sector⁵⁷. This mission undertook to review the steps being taken to strengthen the CSR agenda by the companies and the impact of the company's activities on the environment and on workers' rights.

⁵⁵ In 1998, Kenya exported 32,513 tonnes of flowers while in 2007, Kenya exported 91,193 tonnes of flowers. Available at: http://www.hcda.or.ke/default2.asp?active_page_id=92

⁵⁶ See the report on Analysis of power distribution within the East African export sector of cut flowers by Oxfam NOVIB, 2007.

⁵⁷ The key report in this process has been the KHRC report, Beauty and Agony- A case of working conditions in the Flower industries, (July, 2001)

Corporate Social Responsibility in the Horticulture Industry

Since 1999, there has been concerted lobbying to ensure social accountability by the private actors in various sectors of the economy in Kenya. In the subsequent years, many sectors have become aware of this scrutiny and have sought to regulate themselves to avoid bad publicity and eventual loss of business. Many companies have developed their own CSR codes and policies. The flower industry's CSR certification schemes and initiatives at the international and national level that are of interest are as follows:

– MPS Social Chapter⁵⁸

MPS (*Milieu Programma Sierteelt* - Environmental Program Horticulture) is an international organisation based in the Netherlands offering products/services with regard to certification in the horticultural sector, including the MPS Social Chapter certification. MPS Socially Qualified (SQ) is a certificate that allows growers to demonstrate that their products are cultivated under good working conditions. MPS-SQ includes requirements on health, safety and terms of employment, and is based on universal human rights, the codes of conduct of local representative organisations, and International Labour Organisation (ILO) agreements.

– Fair Trade Label⁵⁹

Fairtrade Labelling Organisations International (FLO) has created its fair trade certification based on Fairtrade Standards which are developed by various stakeholders from FLO's member organisations, producer organisations, traders and external experts. The scheme includes both generic and product specific standards. Generic standards include social development standards, environmental standards, as well as labour rights standards including freedom of association as stated in relevant ILO Conventions. FLO has developed Fairtrade Standards for Flowers and Plants for Hired Labour which also includes a number of detailed requirements regarding labour conditions. Further, a fairtrade premium is used for projects to improve the social conditions of workers and their communities. Currently, there are eighteen (18) Kenyan growers and traders of flowers and plants certified by FLO.

- HEBI – Horticultural Ethical Business Initiative⁶⁰

HEBI was incorporated in 2003 as an independent not for profit organisation whose aim is to promote ethical social behaviour in the horticulture and floriculture industry in Kenya, based on the principle of striving for excellence. HEBI board of directors is composed of various stakeholders including representatives of Human rights NGOs, Trade Unions, Companies, and the government. HEBI has developed in collaboration with other stakeholders a social base code, which provides guidelines in implementing globally acceptable ethical business practices in the horticultural industries in Kenya and the region. The code includes the following requirements: Child labour shall not be used; employment is freely chosen; working conditions are safe and hygienic; freedom of association and right to collective bargaining are respected; no discrimination is practised; no harsh or inhumane treatment is allowed; working hours are not excessive; living wages are paid; regular employment is provided; protection of the environment; management systems are responsible for compliance with this base code. HEBI also provides training to social auditors.

58 For more information: <http://www.my-mps.com>

59 For more information: <http://www.fairtrade.net>

60 For more information: <http://www.hebi.or.ke>

- The Kenya Flower Council (KFC)⁶¹

The KFC is currently composed of 50 members that represent between 70% and 80 % of the flower industry in Kenya. Its main goal is the institutionalisation of CSR among its members. KFC has developed a Code of Practice detailing standards in environmental, social accountability and good agricultural practices. Detailed audits are carried out by independent third party auditors of KFC members' compliance with the Code. The sanction for non-compliance is cancellation of membership in the organisation. According to a KFC senior staff member, it is essential for the Kenyan Flower Industry to demonstrate to the global market that flowers are produced in Kenya in ways that adhere to global environmental and social standards. There is a direct relationship between the capacity to demonstrate such ability and the market. Although the KFC certification scheme appears to be quite detailed, its seriousness is difficult to assess, given the confidential nature of the code which is only shared amongst the members which harms the credibility of the whole scheme.

- International Code of Conduct (ICC) for Cut-Flower Producers⁶²

This was proposed in 1998 by the International Union of Food Workers and unions in Germany, Holland and Switzerland. This code emphasizes employers' respect for labour rights, such as freedom of association, collective bargaining, equal treatment, living wages, child labour, compliance with health and safety standards, environmental protection, and limited pesticide and chemical use.

- Max Havelaar⁶³:

Beginning in 2001, the Switzerland-based Max Havelaar Foundation began to award its label to ICC-certified cut-flower producers from Ecuador, Kenya, Tanzania, Zambia and Zimbabwe. The foundation certifies agricultural products that are produced and sold in accordance with international criteria for fair trade. Exporters selling flowers with the Max Havelaar label have received a higher price in the Swiss market because Swiss consumers will pay more for certified flowers.

- Flower Label Programme (FLP)⁶⁴:

FLP was created in 1996 as a business-to-business code between BGI, a German importers association, and the Association of Flower Producers and Exporters of Ecuador (Expoflores). The initial standards focused on environmental conditions associated with cut-flower production but were expanded to include social and labour conditions in 1999, when ICC standards were incorporated into FLP. There is an annual inspection required prior to re-certification.

- VeriFlora⁶⁵:

VeriFlora is a sustainability certification program for fresh cut flowers and potted plants. VeriFlora-certified products have been produced in an environmentally and socially responsible manner with the highest standards for freshness and quality. This program began in 2003 when a group of U.S.-based cut-flower producers, distributors and merchants saw the success of European-labelled sustainably grown programs and contacted SCS (Scientific

61 <http://www.kenyaflowers.co.ke/>

62 www.fian.de/fian/downloads/pdf/blumen/guidelines-icc.pdf

63 <http://www.maxhavelaar.ch/en/>

64 <http://www.fairflowers.de/>

65 http://www.organicbouquet.com/i_120/20050729-Sustainable-Industries-Gerald-Prolman.html

Certification Systems) to develop standards that would better address differences between the North American and European markets.

2. Sher Agencies' CSR Agenda

In understanding the practice of corporate citizenship in Kenya, the mission reviewed three major areas namely: employment practices, community impact, supply chain management. We will first give an overview of the different components of Sher Agencies' CSR agenda.

The farm has about 6000 workers - 4100 of whom are women - and mainly specializes in roses, but also grows some summer flowers. On the company website, Sher describes itself as the world's largest producer and supplier of roses. The organisation consists of three companies: Sher Agencies Ltd., a rose production facility in Kenya; Sher Ethiopia Ltd., a rose production facility in Ethiopia, and Sher Holland B.V., located at the Aalsmeer Flower Auction (VBA), where the roses flown in from Kenya and Ethiopia are prepared for the auction clock or for direct sale to customers. Gerrit and Peter Barnhoorn, two Dutch nationals, lead the company, which is fully owned by Dutch investors. The Kenyan facilities are based at Lake Naivasha.

Sher has developed a wide range of activities in the area of CSR. These activities include concerns for working conditions, providing social services to the employees and their families, and building a good rapport with the local community. Interestingly, the company does not have an enterprise code of conduct, and CSR activities are not described in terms of commitments or entitlements that can be claimed by beneficiaries. The company's CSR agenda is entirely based on philanthropy, and Sher Agencies Chief Executive is described on the company website as a "father" of the family of the close to 5000 employees that work at the farm. The CSR Agenda is part of the brief of the company's Human Resource Manager, Martin Kamwaro⁶⁶, who during the interview demonstrated full awareness of international developments in the area of CSR.

According to Mr. Kamwaro (Human Resources Manager), in the area of labour rights, Sher complies with Kenyan legislation, but when that is not sufficient, takes inspiration from ILO Conventions regardless of whether these are ratified by Kenya or not. Moreover, Mr. Kamwaro asserts that the company does not use bonded labour; respects union officials (70% to 80% of workers are unionized); complies with working hours and pays normal overtime, grants 3 months maternity leave, and provides protective clothing and training to employees on when to use them. Furthermore, the company employs many Kenyan nationals in senior positions and sets aside job opportunities for minority groups. It has transparent and objective disciplinary procedures, has specific policies on providing protection to HIV affected workers and does not tolerate the use of psychological abuse or oppression on the work floor. The company has acted on incidents of sexual harassment by occasionally sacking managers involved in such incidents.

Across the road from the company's facilities, Sher has built a company village that currently houses 16,500 workers in stone houses equipped with electricity and water. The village includes a free nursery school and day care, a free primary and secondary school, a hospital, a social hall and a sports stadium. The company also invests in relationships with the local

⁶⁶ Martin Kamwaro is left Sher Agencies in 2007

community including building a school for the local community, providing foodstuffs to victims of drought, sponsoring the village mortuary, supporting activities of the World Wildlife Fund in the area and even providing infrastructure for the local police. However, workers interviewed by the mission contradicted the Human Resources Manager.

2.1. Certification schemes

Sher has obtained the MPS Social Chapter certification (see above), but as a new participant, it is only required to comply with the occupational health and safety component of the certification scheme, not with the Conditions of Employment Chapter that covers most of the ILO's core labour standards. In both 2005 and 2006, Sher received a Certificate of Ethical Management from a Kenyan NGO called the Workers Rights Watch for "the most improved flower farm on human rights standards and corporate social responsibility", which figures prominently on the Sher website. Sher has applied for the Fair Trade Label, but the consideration of the application is still in its early stages. Sher's Human Resource Manager sits on the board of HEBI (Horticultural Ethical Business Initiative).

Also, Sher does not participate in the Kenya Flower Council (KFC) code of conduct and certification scheme.

3. Workers' rights violations

The mission conducted both on site and off site interviews of Sher Agencies' workers. During interviews, workers complained about low salaries that did not amount to a living wage. For instance, if one reviews the salary schedules offered on Table 3 below, alongside the fact that a family with 3 children spends Kshs 3500 in 2 weeks to only meet basic needs (including housing outside the camp) without buying new clothes etc., such a family needs to borrow from neighbours to survive and will consequently live in debt. Even for a single mother the salary is low considering, amongst other factors, school fees are Kshs. 10,000. Overtime is paid per hour, at a low rate (based on basic salary). The general workers said that they were paid overtime at a rate of Kshs. 29 per hour.

Working conditions are harsh due to the high temperatures in the greenhouses and exposure to chemicals. One of the major attributes of Sher Agency is the high turnover of the staff members. The mission established that the arbitrary and numerous dismissals are predominantly caused by the non realisation of targets. The company has fixed targets which are hard to achieve. On most occasions, workers are unable to meet the set targets attracting the wrath of the manager, resulting in warnings. After two warnings, a worker is dismissed. For the harvesters, a single warning can be sufficient for one to be shown the door. Efforts to explain the difficulties in pursuing the target are usually met with rebuke and trivialisation by the management. Unfortunately, the local labour office, although largely aware of this pattern, has been unable to respond and deal with it.

Workers interviewed felt that the company's mechanisms to deal with workers' complaints were not effective, and neither did union interventions lead to improvements in working conditions either. The sour union relations and the salary concern may emanate from the fact that though Sher Agency recognizes the workers' Trade Union, the Kenya Plantation and agricultural Workers Union (KPAWU), it has refused to negotiate Collective Bargaining agreements directly with the Union.

Table 3: Wages at flower farms

Employment Category	Monthly Remuneration (Kshs.)	Monthly Remuneration (USD)
general workers	Kshs 5291	\$76.68
seasonal contract	Kshs 4791	\$69.43
casual contract	Kshs 4371	\$63.34

Source: Interview with Workers on 13th December 2006.

The table demonstrates that the amount earned by the workers falls below the survival threshold and does not represent the Sher's ability to pay. Furthermore, workers are not allowed to carry out other work or activities that would provide them with additional income. The company does not have a gender desk; complaints about sexual harassment are dealt with by men.

The company provides housing for some⁶⁷ of its workers. During the mission, it was observed that the houses provided measure at 3x3 meters. Further, some of these houses are shared by 2 or 3 families. As a result of this crowded condition, most residents of Naivasha refer to the housing facilities as "Sher camps". People living in the camp have access to free water and electricity, but utilisation of electricity is limited to lighting, radio and television, and cannot be used for cooking or ironing. To enforce this, the company does conduct late and unannounced inspections.

Perhaps the greatest difficulty the workers face is that all aspects of their life are dominated by the company: the income of both parents, the education of the children, and even leisure time. Inevitably, this creates a situation of dependency. Clearly, for Sher workers, the company provides nearly all services that States usually provide their citizens, without the democratic accountability mechanisms that operate (at least ideally) in the relationship between the government and the population. People living in the local community, who do not work for the flower farms, dismiss the workers as slave labourers. Although the company describes its relationship within the local community as positive, within that community, dissenting voices are heard.

4. Community Impact

The most contentious issue in relation to most flower investment companies around Naivasha relate to the twin issues of: non-employment of the locals in the farms and the unsustainable exploitation of Lake Naivasha. In relation to the employment of members of the local community, Sher Agencies seems to be in the lead amongst local companies, deliberately employing as many locals as possible. This affirmative action has paved the way for a better relationship between the farm and the community. In any event, one presupposes that such an action shall in the long run, be done within a well defined framework of equity and transformation. Our observations and the feedback received from the workers during the course of the mission was that the current employment of the locals seems to be more or less a way of recruiting sycophants and clientele.⁶⁸

⁶⁷ Those who do not reside in the housing offered by the flower farm are given a housing allowance of KSh 1000.

⁶⁸ This feedback was given during the interview with the workers from Sher Agencies.

The other subject is the Lake. Perhaps it is here that Sher Agencies Ltd. has fallen flat. Lake Naivasha, being a fresh water lake, is a very important resource not only for the people living within Naivasha town, but also serves an important role as a national asset. The lake is a tourist attraction and its waters are a resource to the growing number of horticultural farms around its shores. These farms have in turn created employment for thousands of people. The lake is also a considerable asset to the fishing community in Naivasha who earn their daily bread by selling the popular tilapia. When the mission met the stakeholders⁶⁹ around the lake, including farmers, fishermen, local tourists, and pastoralists, three issues were raised. The first one related to the encroachment by most companies on the riparian land. Sher Agencies is one of the companies that have not only encroached on such land, but that have also erected permanent building on it. This concern was also raised by the Presidential Commission on Illegal and Irregular Allocation of Public Land Ndung'u Commission formed to review land and make recommendations on how to deal with illegal allocation of public land.

The second concern relates to the water level at Lake Naivasha. An official from the Ministry of Water and Irrigation informed the mission that the Ministry's hydrology section had noted decreased levels of water in the lake; water that is was mainly used for irrigation purposes by the flower industry. The official also had the feeling that the communities surrounding the lake were not benefiting from the use of the lake. Upstream residents experienced water shortages; women spent days looking for water, some walking up to 5 kilometres daily in search of water.

The third concern relates specifically to the sealing off of the corridors that facilitate access to the lake. There were complaints within the local community about the lack of access for locals to the lake (there are few public corridors to the lake that are still open). The community members whom the mission spoke to reported that this problem was particularly worrying for the pastoralist community, who were unable to access the water for their livestock. They gave the example of an incident that occurred during the 2006 drought where pastoralists had crossed a particular farm in the town in search of water, when they were confronted by the owner of the farm who ordered his workers to slash their livestock. The witnesses claimed that people who accessed the lake using the grabbed corridors were charged with trespassing. The mission was further informed that farm owners had erected "No Trespassing" signs on riparian land claiming that they had negotiated with the colonial government to move their fences towards the lake when the waters rescind.

The mission also met representatives from the fishing folk. The representatives informed the mission that their greatest problem was access to the lake.⁷⁰ They reported that on several occasions, the fishermen were arrested on their way to the lake on allegations of trespassing. Further, stocks of tilapia, a favourite fish, had been depleting over the years due to interference with its breeding and the emission of toxins into the lake from the flower farms. The investors, they claimed, used very powerful water pumps which sucked up fish eggs from the lake. The mission also received reports that fishing had been curtailed to a few months in the year due to the falling water levels of the lake. They attributed this to the erection of boreholes by investors, interfering with the underground water supply to the lake. Fishing was annually banned from June to November in certain parts of the lake. Although this measure could be legitimate and viable, the other concern that came to the attention of the mission was

⁶⁹ The mission was also brief on the efforts being made by Lake Naivasha Basin Strategic Environmental Analysis and Conflict Transformation Group (SEAN) which had trained the various actors around the lake on causes of conflict and conflict resolutions.

⁷⁰ This complaint had earlier been mentioned by Thuo and Tialolo

that the Lake Naivasha Riparian Association⁷¹ seemed to be managing the lake without due consultations to the other stakeholders.

5. Social Auditing: A Problem Solving Mechanism?

Social auditors' visits to Kenya seem to have been more frequent as buyers want to avoid buying goods that are made under bad working conditions. Social auditing comes from buyers' clients such as supermarkets who sell flowers and feel the pressure from consumers to avoid exploitative working conditions, as this might damage their image. Buyers are demanding certain conditions of production on a take-it-or-leave-it basis: only those who comply with the demands can receive the order. The mission received no insight from the Athi River Export Processing Zone Authority as to whether producers/factory owners were receiving better prices for complying with the buyers' social standard demands. It should be noted that unless prices increase, the cost burden of complying with better standards remains with the factory, squeezing the already low profit margins too much. As a result, factories struggling to survive, may transfer the burden to the workers in some way or another, or may have to merge or acquire in order to reach an economy of scale that allows them to cover their costs.

Workers in Naivasha reported that auditors had come to a flower farm in September 2006 and had observed long working hours. After the audit, the working hours were reduced and the workers were provided with more protective equipment. However, although the auditors reportedly came back in December 2006 to check whether working hours had improved, they did not speak with workers, as far as the workers interviewed were aware.

Many problems with the auditing methodology were reported by the workers and their organizers in the area:

- Before visiting, the auditors announce their visit, giving the flower farm owners an opportunity to address some problems for the visit.
- The auditors visit the farm accompanied by the director, making it impossible for workers to speak freely.
- Auditors do not always talk to the workers.
- When visiting a house provided for by the flower farm, the female “general worker” chosen was the wife of a clerk and therefore had better housing than the general workers. This provided a false impression that general workers have good housing.
- Auditors did not act on the fact that Homegrown, a vegetable export farm, had in 2005 sacked 2400 unionised workers. (see box)

HomeGrown Kenya

In the year 2004, HomeGrown sacked 2400 workers in one stroke. According to their records,

⁷¹ Formed in 1926, the Lake Naivasha Riparian Owners Association claims to draw its members from small individual plot owners, large horticultural farmers, dairy and ranching operations, hotel owners, pastoralists, fishermen, as well as the Kenya Power Company, the Kenya Wildlife Service, Naivasha Municipal Council, the Ministry of Water Resources, the National Environmental Secretariat, the Fisheries Department, and the Ministry of Agriculture.

the company claimed that these dismissals were done on the grounds of redundancy⁷². At that time the company had claimed that the reason for the layoffs was the strong nature of the Kenya Shilling against international currencies therefore eating into their profit margins.

The mission's investigations revealed that the intention of the company was to decrease wages paid to employees. Following the redundancies, workers were re-engaged on less favourable terms. Instead of Kshs. 4,600, the company's basic minimum at the time of the 'redundancy', employees were engaged at a basic minimum of Kshs. 3,100. Moreover, while the 2400 of the fired workers were unionized, it is alleged that Homegrown re-hired the same number of non-union workers. This mission was informed that since 2006, there has been no right to unionize at Homegrown but that the company still receives an Ethical Trading Initiative certificate.

In conclusion, consumer pressure can play a role in making buyers make social standard requirements to manufacturers. However, the (social) auditing system is far from adequate and sophisticated enough to report on breaches on social standards and to act on such breaches in an appropriate way.

6. Obligations of the Home State of the Corporation to Protect Against Human Rights Abuses Involving Corporations

Although the Netherlands, Home Government of Sher, is a party to the OECD Guidelines on Multinational Enterprises, it does not engage in monitoring of the human rights impact of the activities of Dutch companies in Kenya. The OECD Guidelines are considered merely as a model for a set of corporate responsibility guidelines that are comprehensive and that involve an institutional promotion mechanism.

One of the most creative ingredients that OECD brings is the extra-territorial obligations. This implies that home countries have an obligation to monitor the conduct of enterprises from their jurisdictions.

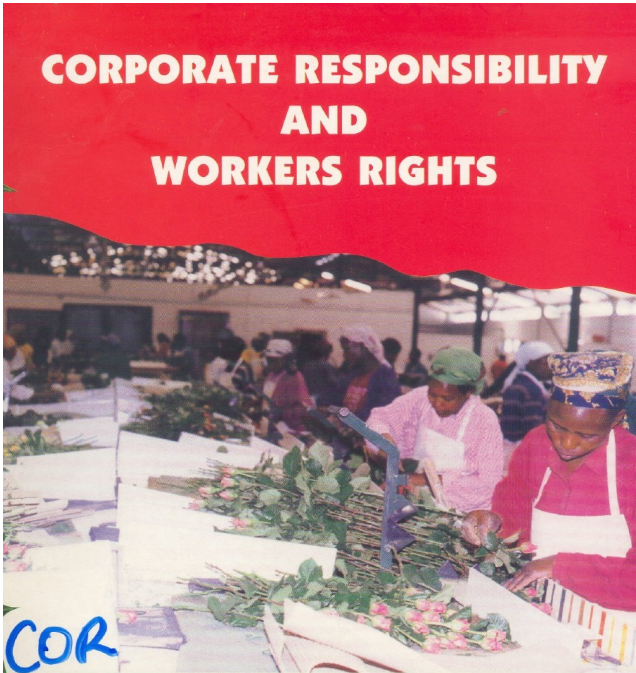


Figure 2: At work in a cut flower farm.

The Dutch embassy maintains contacts with all companies from the Netherlands and it is even stated that they played a mediator role between the investors, the Ministries concerned (Trade and Industry, Environment and Labour) and the flower sector workers. The embassy has encouraged the collaboration between flower companies with the KFC. It also noted that they

⁷² The redundancy provision is an amendment of the employment act CAP 224 in response to the provision in the Finance Act of 1990. The provision gave employers a leeway to dismiss workers with no consultation with the Trade unions.

have promoted small scale growers for export purposes thus creating employment for individuals. The Dutch embassy also visits the various companies twice a year on a random basis, but does not monitor them though it claims to play a positive role through the private companies. This is due to the fact that the embassy does not support any development projects in Kenya, having closed them down in 1998 due to corruption allegations on the previous government. The private sector has come up with a development project through the Ministry of Trade and Industry on issues relating to water and governance.

The embassy's human rights department falls under the Office of Political and Good Governance. There appears to be quite a strict separation within the embassy staff, between those dealing with human rights and trade issues. In the past, few links were established between these two fields of foreign policy but there are plans to strengthen the links between human rights, trade and investment.

A bilateral investment agreement exists between the Netherlands and Kenya (signed in 1970, but entered into force only in 1979), that according to embassy staff, has largely been forgotten. In any case, the Bilateral Investment Treaty does not offer any incentives for Dutch companies that invest in CSR.

7. Conclusion - Comparing the Human Rights Impacts Of EPZ Enterprises and Companies in the Flower Industry

There are striking differences between the human rights impact of EPZ enterprises and of enterprises in the flower industry. Although workers in the flowers industry also face harsh living conditions and will find it difficult to access protection mechanisms when their rights are abused, they are comparatively better off.

Clearly, the companies in Kenya that operate in the flower industry are more sensitized on human rights related issues than the companies that set up business in the EPZs. Pressure from external actors (the market in the North) has a larger impact on the flower industry than on the textile industry in the EPZs. Consequently, there is much more awareness within the flower industry of the need to demonstrate progress on human rights in its relationships with the workers, their families, and the local communities, even if results may still fall below international standards.

This difference is not merely attributed to the fact that CSR mechanisms are better developed in one sector than in the other, but due to the different nature of the investment in the textile industry and the flower industry. UNCTAD's 2005 Investment Policy Review of Kenya highlights the fragility of the garment industry in the EPZs, "which appears to have developed over the past four years as a result of large quota-driven trade distortions". Foreign investors in the garment industry appear to choose Kenya mainly "for quota-hopping reasons"⁷³. Firms invest minimally in fixed equipment, and not substantively in training. This situation contrasts with "favourable land and weather conditions and acquired skills, technology and process, that have enabled Kenya to build a demonstrated comparative advantage in the production of flowers, fruits and vegetables for the world market"⁷⁴. The horticultural sector is described as a success story, where considerable scope for expansion remains.

⁷³ UNCTAD (2005), Investment Policy Review Kenya (New York: UN, 2005), p. 25; p. 100.

⁷⁴ *Ibid.*, p. 94.

While foreign investment in the textile sector is largely artificial – linked to quotas - , there are objective reasons for the flower industry to continue its presence in Kenya. This different economic reality translates into a different human rights impact of both industries. While the human rights impact of the textile industry in the EPZs is almost entirely negative, sufficient incentives exist for the flower industry to devote at least some of its resources to activities that may have a beneficial impact on human rights. It is up to other actors, including the host State, the home States and international organisations to exercise more pressure on corporate actors to ensure that companies contribute fully to the realisation of human rights.



VI. Reconciling Trade and Investment Agreements with Human Rights Obligations

While the Kenyan state has signed international agreements which demand, on the one hand to respect, protect and fulfil human rights, and on the other hand, to respect trade and investment agreements, the sanction mechanisms included in WTO, bilateral or regional trade and investment agreements mean that in practice, that the latter prevail over the former, as will be shown below.

1) The WTO

Although the preamble of the WTO states that the WTO aims at more jobs, better income and better living standards agreements, there are no instruments in the WTO that specifically assess whether the WTO is achieving these goals or whether the agreements signed by the WTO members have the potential to achieve these goals. Under the WTO, no instrument allows states to restrict market openings to protect citizens against negative impacts of such an opening, or restrain market access to companies on the basis of non- respect of human rights. The need to have human rights obligations in the WTO agreement has been opposed on grounds that such obligations are non-tariff barriers that go contrary to the idea behind the establishment of the WTO. Labelling of products (Production and Processing Methods - PPMs) on the basis of labour conditions and environmental impact is already controversial in some aspects at the WTO, to the extent that it might conflict with the key principle of non-discrimination.

In order to avoid a conflict of interest, it can be argued that such instruments would be better implemented outside the WTO. The ILO and other UN bodies have so far had too little capacity and received too limited a mandate to address human rights impact of WTO agreements and the worldwide competition it has created (resulting in company strategies that pressure wages and working conditions downwards). ILO provides for various protection mechanisms of labour rights, however ILO does not have effective enforcement mechanisms as the WTO has and relies on the goodwill of states to enforce Conventions. Workers do not have direct access to the WTO dispute settlement mechanism, but only via their governments, when for instance lack of observance of WTO rules by importers result in negative impacts on them. The strength of the WTO with its binding trade rules under international law and sanction mechanism contrasts with other human rights treaties such as ICESCR which have no sanction mechanism.

2) The Economic Partnership Agreements (EPAs) being negotiated between the EU on the one side and Kenya and other countries from the East Community African (EAC) region on the other

Because WTO rules oblige member states to treat goods from all other WTO members equally and because free trade agreements outside the WTO framework need to have a very substantial product coverage (and trade liberalisation), in 2004, the EU started negotiating EPAs with the African, Caribbean and Pacific (ACP) countries. ACP countries are requested to open up their markets much more on a reciprocal basis, contrary to the non-reciprocity included in the Lomé and Cotonou Conventions of which EPAs will replace the trade and investment aspects. In practice, this means that in order to keep wide market access for the

products produced in Kenya – and which the mission has witnessed are not all produced by Kenyan entrepreneurs nor produced with respect of labour rights. Kenya has to give a huge amount of market opening concessions for products from the region as well as for European goods. Although ACP countries are worried about the negative impact of EPAs on their economies, without explicitly mentioning working conditions of workers, and although a review process of the negotiations has found that ACP countries are not ready to finalise the negotiations as currently pushed by the EU, the EU has refused to look into alternatives. On the contrary, the EU is pushing to put liberalisation and protection of foreign investment into the agreements although the governments of African countries clearly stated in April 2006, in the Nairobi Declaration on Economic Partnership Agreements of the Trade Ministers of the African Union, that they do not want investment issues to be part of the EPAs. However despite the position taken by the African Trade Ministers, the Agreement establishing a Framework for an Economic Partnership Agreement mandates parties to the agreement to continue negotiations on the Singapore Issues including on liberalisation of investments⁷⁵.

The European Commission, as a negotiator for the EU, has been insisting on market access and liberalisation and protection of foreign investments under EPAs. The position is based on the view that this, and the creation of the regional markets under EPAs, will attract investment, and that foreign investment equals development. The Kenyan and other ACP negotiators of the EAC region, on the contrary, have emphasized that development should be at the core of the EPAs and have made proposals for cooperation (not liberalisation) in the area of investment and private sector development. Kenya has not been satisfied with the slow responses from the EU to all of its development oriented proposals during the negotiations. Moreover, Kenya feels it has insufficient capacity to be strong in the negotiations: it lacks the capacity and technical expertise to calculate all the options on which it can base its negotiation position and its partners in the EPA negotiations. The neighbouring ACP countries, have even much less negotiation capacity. The Kenyan Trade Ministry, however, has made attempts to improve its coordination capacity between the different negotiations (WTO, EPAs, COMESA, etc.) as requested by Kenya Human Rights Commission. Kenyan officials stated that if the EU does not respond in practice to the ACP demands for development, e.g. through additional financial sources by the EU and/or its member states; they are not interested in continuing or moving forward with the negotiations. However, during the last phase of the negotiations, Kenya has been under pressure to conclude negotiations for fear of losing export markets.

The Kenya Human Rights Commission together with the Kenya Small Scale Farmers Forum took the government to court in October 2007 under Section 84(1) of the Constitution of Kenya and various international instruments for the impact the signing of an EPA might have on the enjoyment of fundamental rights and freedoms. The arguments raised were as follows⁷⁶:

- The EPA aims at liberalizing substantially all sectors of the Kenyan economy.
- According to an analysis carried out by the Ministry of Trade, 65% of Kenyan industries will be vulnerable to unfair competition from the EU. These industries include food processing, textiles, paper and printing. Over 100,000 Kenyan workers

⁷⁵ The Framework Agreement was initialled by the EAC on 27th November 2007 in Brussels. The Framework Agreement served the purpose of committing the parties to continued negotiations of a comprehensive EPA. The Agreement was initialled in a bid to ensure that there was no trade disruption once the December 31st deadline had lapsed

⁷⁶ Kenya Human Rights Commission, Media Alert For Thursday 25 October 2007 - The KHRC to Sue Government for Human Rights Abuses, Press Release

in the manufacturing and industry sector are likely to lose their jobs. This would seriously undermine the government's efforts to create 500,000 jobs a year.

- Over 5 million Kenyans who depend on maize, wheat, rice and dairy farming might also lose their livelihoods.
- Loss of livelihoods and employment will contribute to the violations of the right to life, the right to work, the right to food, the right to education, the right to health, the right to adequate housing and the right to live a dignified life.
- The EPA thus contradicts both the human rights obligations of the Kenyan government and of the EU. The Kenyan government has an obligation to its citizens to respect and protect life as explicitly stated in the Constitution and to achieve the full realisation of the rights enshrined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

In addition, the government has refused to inform the parliament properly about the state and contents of the negotiations.

In conclusion, the EPA negotiations take place in a way that trade and investment liberalisation is not linked with development strategies, let alone with mechanisms by which investment and trade liberalisation are underpinned by instruments to guarantee labour and other human rights. Although the Kenyan and other ACP governments feel that their demands are not being met by the EU, they are giving in to the EU pressure to move into an unbalanced agreement and are responsible for signing an agreement which will potentially lead to violations of economic and social rights of their people. Civil society in Kenya has been clear that it wants its government to take the responsibility not to sign such an agreement.

3) The Investment Agreement by members of the Common Market for Eastern and Southern Africa (COMESA)

Since March 2005, Kenya has been party to the negotiations of an Investment Agreement for the COMESA's Common Investment Area (CCIA)⁷⁷, together with 15 other member states. The negotiations have been in their final stages for a long period. In May 2007⁷⁸, a new draft was proposed without public discussion. After these processes, the draft COMESA investment agreement was to be approved at a COMESA Council of Ministers with apparently no input from Parliament let alone by civil society. At the same time, COMESA is negotiating draft Regulations for Establishing a Regional Framework Agreement for the Liberalisation of Trade in Services in COMESA, which includes investment in the services sector.

⁷⁷ The member states agreed to promote regional integration through trade development and to develop their natural and human resources for mutual benefit of all people. One of the five objectives of COMESA relate to "(the) free movement of capital and investments supported by the adoption of a common investment area so as to create a more favourable investment climate for the COMESA region." In 1998, the COMESA Common Investment Area (CCIA) was launched. Further to this, in 1999 Comesa decided to establish a Regional Investment Agency to implement the CCIA and to attract foreign investors to COMESA as a regional block and not as separate national markets. It was assumed that investors were more prone to investing in a region due to its large consumer bases. The RIA was also charged with developing an Investment Framework Agreement.

⁷⁸ To be found on the website of COMESA:
http://www.comesa.int/investment/regimes/investment_area/Investment%20Agreement%20for%20CCIA%2C%20May%202007 (viewed October 2007)

According to the draft Investment Agreement for the COMESA Common Investment Area of May 2007, the agreement contains investor protection measures similar to those in bilateral investment agreements which curb the policy manoeuvre of national governments and parliaments.

This means that an agreement that not only opens the market but that also provides far reaching protection to foreign investors coming from the COMESA region (the May 2007 draft does not mention any more that such protection shall be granted in a later stage to all foreign investors) will be signed without an equal level of protection of other stakeholders against negative impacts of foreign investors, including on human and labour rights. At least one article (Art. 5.(e) in May 2007 draft) mentions that the COMESA member states will not derogate or offer to waive measures concerning labour, public health, safety or the environment as an encouragement for the establishment, expansion or retention of investments. The question remains whether this will solve the negative competition for foreign investment by which Eastern African countries provide more and more incentives to woo foreign investors, without distinguishing and without looking into their economic, social, environmental and human rights impact. In parallel, the US has been signing a Trade and Investment Framework Agreements (TIFA)⁷⁹ with COMESA. According to the US government, “although TIFAs are non-binding, they can yield direct benefits by addressing specific trade problems and by helping trading partners develop the experience, institutions and rules that advance integration into the global economy, creating momentum for liberalisation that in some cases can lead to a Free Trade Agreement (FTA)”⁸⁰.

4) *Bilateral Investment Agreements*

The Kenyan government intends to sign Bilateral Investment Treaties (BITs). The Kenyan government has designed a “model” BIT that forms the basis of Kenya's current (e.g. with Thailand) and future BIT negotiations. The Kenya model BIT incorporates major elements featured in the more recent national and regional BITs signed by other countries (there are more than 5200 world wide). As will be explained, they do not include responsibilities for investors, an omission that could have deleterious effects on human rights. Under investment agreements, companies get rights (to invest, to be compensated in cases of expropriation and to freely withdraw their investments: see next paragraphs) regardless of whether they behave in a socially responsible way.

(A) Non-discrimination principle: investment agreements state that foreign investors cannot be treated less equal than national investors (National Treatment principle), and governments have to provide equal treatment between all foreign investors (Most Favoured Nation treatment principle). From a human rights perspective, the non-discrimination elements of investment treaties do not allow governments to discriminate against companies that have a record of breaching human rights in other countries. The non-discrimination principle also conflicts with positive discriminatory regulations in some countries to promote marginalized groups or to provide a preferential treatment for companies that operate in a socially responsible way. Only national legislation and action by national authorities can address

⁷⁹ “A Trade and Investment Framework Agreement (TIFA) is a consultative mechanism for the United States to discuss issues affecting trade and investment with another country. TIFAs have been negotiated predominantly with countries that are in the beginning stages of opening up their economies to international trade and investment, either because they were traditionally isolated or had closed economies. In recent years, the United States has concluded many TIFA's”. (<http://www.state.gov/e/eb/tpp/c10333.htm>)

⁸⁰ *Ibid.*

harmful human rights practices, while investors' rights are protected by a BIT dispute mechanism at the international level.

(B) The right to fair treatment: Bilateral investment treaties give investors the right to “fair and equitable treatment” by the government. From a human rights perspective, this right is not balanced in the BITs with the right of citizens of the host country to a fair and equitable treatment, including the respect of labour rights and other human rights by the investors. A BIT allows a foreign investor to sue the government before an international dispute settlement panel, for the claim of unfair treatment. However, workers and citizens have no access to international dispute settlement mechanisms when they suffer unfair and inequitable treatment by a foreign investor.

(C) The right to compensation of expropriation: BITs give foreign investors the guarantee of compensation in case of expropriation by national governments. This guarantee has been expanded to compensation of “indirect expropriation” i.e. loss of profits because of the introduction of new laws, even if those laws or regulations were introduced to protect human rights and were created democratically. BITs do not balance the investors' right with governments' right to act against foreign investors, including through expropriation, in case the government's obligation to implement internationally recognized social, economic and cultural rights is at stake. An example is when a foreign water company sets very high water prices and the majority of the population cannot pay them.

(D) The principle of free movement of investment capital: BITs guarantee that investors can move their invested capital and profits out of the country without restrictions. Depending on how the Kenyan government negotiates, an investment agreement can provide the country the conditional right to prohibit movement of investors' capital in the case of balance of payment problems. From a human rights perspective, restrictions to capital movement might be necessary to prevent a financial crisis, which could severely affect developing countries' economies, resulting in increased poverty and lack of basic services for many citizens.

(E) The principle of foreign investors taking governments before international dispute panels (investor-to-State disputes): The dispute settlement systems incorporated in BITs allow foreign corporations to sue national governments before non-transparent international dispute settlement panels, (such as the recourse to the International Centre for Settlement of Investment Disputes (ICSID)) when corporations are of the view that BITs rules have been breached. From a human rights perspective, the investors' right is not balanced by the right of governments, and their citizens, to take the foreign investor to an international court when they have been treated unfairly or when foreign investors have not respected human rights.

Although Kenya intends to negotiate and sign many new investment agreements, the government does not assess how this should be done to best benefit the Kenyan citizens. There is little democratic preparation and finalisation process of the negotiations in order to achieve more balanced agreements.

VII. General Conclusion

This mission is an important eye opener and lays bear the challenge and tension between the human rights law and economic law. Coined under the rubric of liberalisation, the evidence from the mission is all about Kenya attempting to create both a liberal democracy and a liberalised and outward oriented economic system that relies on foreign direct investment and exports. Talking to the State officials, it was apparent that they are under pressure not to scare away investors. This may be the reason why the ministry of labour department in charge of the labour laws severely lacks resources to enforce laws.

The mission found major faults in the management and operation of the much touted foreign direct investment. In both the flower industry and the Export Processing Zones (EPZ) the complaints of the workers were the same. They all talked about long working hours --which were not paid or paid at a low rate-- low wages, arbitrary dismissals without due procedures or absence due to illness, sexual harassments, undignified and unhealthy working conditions.

Two major factors contribute to the disregard for the workers rights by the investors. First, many years of misrule in Kenya caused foreign direct investors to leave the country and resulted in skyrocketing levels of unemployment and poverty. The remaining investors seemed to have cashed on this situation and disregarded the dignity and rights of the people whom they employed. They abused their financial and economic power to deny workers the “right to the enjoyment of just and favourable conditions of work”⁸¹ and “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”⁸² The other factor is competition from the neighbouring economies for FDI. Faced with this situation, Kenya seems to have opted for minimal regulation and protection of the workers in order to compete with its neighbours. But even this does not seem to have yielded corresponding results.

The mission also notes that the buyers seem to be having important influence on ethical conduct by the supplying companies. Evidence from the horticultural sector attests to the fact that where the buyers are engaged in an ethically conscientious supply chain then the likelihood of adherence to good practices, even if at the level of philanthropy, was higher. What has been very striking during the mission, however, is that many of the problems of the workers in EPZs in the flower and garment sectors have been known for years but have not been addressed. CSR programmes of companies who sell the products to consumers in the North seem to have some influence on a few practices (less overwork time), but so far the impact has been insufficient to provide workers and communities with adequate living conditions. Indeed, the demands for better treatment of workers do not always result in buyers paying better prices so that the employers continue to pay low wages or cannot remain competitive enough. Therefore, in order for trade and investment to promote and respect human rights, the response must be holistic and must extend up to the consumer (who should pay a better price where necessary) and in so doing the global supply chain is both an important enabler and enforcer.

The issue of investors rights *vis-à-vis* obligations also came to the attention of the mission. In this regard, it was reported to the mission that, the governmental labour authorities and the

⁸¹ Article. 7 of the International Covenant on Economic, Social and Cultural Rights

⁸² *Ibid.*, at Article 11

police are often seen as taking sides with the investors and not acting on reported abuses. The government is preoccupied with attracting investment and does not really consider whether the negative consequences of these investments for the people of Kenya do not outweigh the assumed positive aspects. Moreover, the government of Kenya is increasingly signing investment agreements at the regional and bilateral level which give more access, rights and protection to foreign investors, without providing equal rights to the government, workers and people of Kenya, especially through international and regional instruments. This unbalance in the enforcement of rights denies many Kenyan workers of their labour and human rights and of adequate instruments to redress existing abuses.

Besides, the mission took note of the fact that in attracting the FDI, Kenyan authorities do not consider human rights but only macro-economic development objectives. The Kenyan authorities assume that more FDI will result in employment creation and more exports. FDI has increased employment, however, workers have not truly benefited from this economic development. Analysis shows that the kind of jobs offered by the EPZ sector are indeed 'poverty jobs' because the low wages and enslaving work patterns perpetuate poverty and stifle the workers' ability to develop their careers.⁸³ This inadequate regulation of FDI has had detrimental effects with regard to the enjoyment of human rights for the workers and their communities. Worse, even the review of the track record of the investors is lacking.

Investment liberalisation and investment agreements reduce to some extent the scope of Kenyan State action and policy (policy space) in relation to investors and investments. A human rights approach emphasizes that trade and investment liberalisation and agreements should not compromise State action and policy to promote and protect human rights in the name of attracting and pleasing investors.

Finally, the mission found little evidence of attempts by other States to institutionally monitor the impact of their companies on economic, social and cultural rights (let alone take action when things go wrong), and little integration of human rights in trade and investment agendas, policies and support measures.

⁸³ Kenya Human Rights Commission, Manufacture of Poverty: the Untold Story of EPZs in Kenya, (2004)

VIII. Recommendations

To the Kenyan Government

This report has illustrated that there is an urgent need for Kenya to rebalance its economic policy with its human rights obligations. The current policy is focused on attracting investors and increasing exports as a way of achieving economic development. Any trade and investment policy pursued in the future should guarantee that Kenyan citizens benefit from a decent work, life and income. Specifically, the following measures could be adopted by the Kenyan government in order to achieve such reorientation:

- Expedite the constitutional reforms process and ensure that economic, social and cultural rights are adequately protected by the Bill of Rights in the new Constitution;
- Ensure adequate implementation of international covenants ratified by Kenya;
- Ratify the main ILO conventions, among which the following deserve to be recognized a high level of priority: ILO (n° 87) Freedom of Association and Protection of the Right to Organise Convention, 1948; ILO (n° 155) Occupational Safety and Health Convention, 1981; ILO (n° 161) Occupational Health Services Convention, 1985; ILO (n° 187) Promotional Framework for Occupational Safety and Health Convention, 2006;
- Ensure effective and impartial labour administration, and effective labour remedies;
- Ensure that trade and investment agreements do not contain provisions that may have a negative impact on the enjoyment of human rights in Kenya; Kenya should retain its capacity to discriminate or introduce special measures such as positive action schemes to promote human rights; Kenya should also retain flexibility to regulate and control some forms of investment, in particular short-term and volatile investment that is widespread in EPZs;
- When negotiating investment agreements, pay due attention to the guidelines proposed by the 2003 report on "Human rights, trade and investment" by the Office of the High Commissioner for Human Rights⁸⁴;
- Set up a mechanism to assess the positive and negative impacts of trade and investment agreements in Kenya in order to reorient trade and investment policies to the benefit of the population, and consider linking the granting of industry licences or incentives to the human rights performance of investors;
- Agree with countries in the region - e.g. at the COMESA level - on incentives for investors that should not be allowed (e.g. tax holidays for 10 years) and other measures to prevent a 'race to the bottom' in order to attract investment. Trade and investment agreements, e.g. at the regional level, should enforce treaty articles in which governments agree not to lower, or forego, national law and international standards regarding human rights, labour rights and environmental protection.
- Create with other countries in the region or in Africa an information sharing system that contain the human rights records of companies trading, buying and investing in the related countries.
- Improve the coordination across ministries, by establishing an inter-ministerial

⁸⁴ E/CN.4/Sub.2/2003/9, (July 2, 2003)

taskforce on the human development impacts of trade and investment; reinforce coordination across ministries to ensure adequate integration of human rights obligations in policy-making and implementation.

To Other States

- Exercise due diligence in controlling trans-national corporations domiciled under their jurisdiction, in order to ensure that these corporations shall not be involved in serious breaches of internationally recognized economic, social and cultural rights, in conformity with the United Nations Charter and with applicable rules of international law;
- Establish adequate and easily accessible mechanisms to deal with human rights problems related to national companies investing abroad, such as the national contact points within the framework of the OECD Guidelines for Multinational Enterprises, as well as judicial recourse mechanisms for business-related human rights violations abroad;
- Take into account and incorporate international legal obligations in the field of Economic, Social and Cultural rights when entering into bilateral or multilateral agreements with other States, international organisations or multinational corporations; provide support, dialogue and enforcement mechanisms for human rights in such agreements;
- Comply with ICESCR obligations as State parties when acting as members of a decision-making group in an international organisation; take into account that undue competition between unequal countries can lead to pressure to reduce enforcement of human rights, including labour rights. Ensure that countries signing bilateral, regional or international trade and investment agreements retain their full right to regulate in order to respect and strengthen the economic, social and cultural rights of their citizens;
- Create at the embassy level a function or task description entrusting a staff person or a service with the charge to monitor the impact of companies on economic, social and cultural rights and ensure the proper integration of human rights in trade and investment agendas and policies;
- Ensure that donors who provide advise or support mechanisms on how to attract foreign direct investment, fully take into account ways to integrate respect for labour rights and other human rights.

To Corporations

- Use due diligence in ensuring that company activities do not contribute directly or indirectly to human rights abuses, and that the company does not directly or indirectly benefit from abuses of which it was aware or ought to have been aware;
- Adopt purchasing practices and manage orders (e.g. delivery times, pricing) in a way that will not induce labour rights abuses on the side of producers trying to meet unrealistic deadlines and prices;
- Refrain from activities that would undermine the rule of law as well as governmental and other efforts to promote and ensure respect for human rights; companies should ensure that their eagerness to invest in developing countries does not lead to human rights violations, and they should implement respect for internationally agreed labour and other human rights;

- Use the company influence in order to help promote and ensure respect for human rights;
- Seek information on the human rights impacts of the company's principal activities and major proposed activities so as to avoid complicity in human rights abuses;
- Engage in multi-stakeholder initiatives in which brands and retailers work with trade unions and other workers' rights organisations in order to improve conditions. Evaluate these initiatives in order to ensure that they lead to improved working conditions and respect for labour rights.

IX. Annexes

- Biographies of mission delegates
- List of people met by the mission

Bios of mission Delegates

Koen de Feyter (University of Antwerp, Faculty of Law):

Chair in International Law University of Antwerp, Koen de Feyter is also the Convenor of the Law and Development Research Group and of the International Network on Localising Human Rights, and Coordinator of the Flemish Centre for International Policy.

Esther de Haan (SOMO):

She is Senior Researcher at the Centre for Research on Multinational corporations (SOMO). She is specialized in research of labour conditions of textiles and garments factories in Africa and Asia and has been active in supporting workers in these sectors. She has worked through research and advocacy on corporate responsibility issues within the garment and textiles sector as well as ICT sector.

Steve Ouma (Kenya Human Rights Commission) :

At the time of this mission, Mr. Ouma was a Programme Coordinator and Deputy Executive Director at the Kenyan Human Rights Commission. Mr. Ouma Akoth is an economic anthropologist from Moi University and currently a Masters candidate at the University of Western Cape (South Africa). He has a strong background and competence in Human Rights Advocacy and has played a key role in agenda-setting within the Kenyan and international human rights network. Ouma focuses on good corporate citizenship and Economic, Social and Cultural rights, gender and related issues in Africa.

Myriam Vander Stichele (SOMO):

She is Senior Researcher at the Centre for Research on Multinational corporations (SOMO). She is Fellow of the Transnational Institute (NL) since 1991. Myriam Vander Stichele has a background coordinating NGOs working on trade, and in publishing and speaking for NGOs about negotiations on trade and investment between Europe and developing countries. At SOMO (1999), she focused on the services sector and researching the impact of services trade negotiations in developing countries. She also works with partners in the South to analyze and stimulate the political debate on the impact of investment and trade liberalisation agreements and the performance of foreign companies within those contexts.

**Diary of Meetings – mission on the impact of trade and investment policies in Kenya
December 11 to 20, 2006**

<i>Day</i>	<i>Meetings</i>
Tue 12 (Public holiday)	Mombasa, Nairobi and Athi River EPZs and flower industry workers
Wed 13	Naivasha Current and former workers in the cut flower industry Duty bearers such as Kenya Flower Council, Agricultural Employers Association, CODES (FLO, Max Havelaar, Maggie Opondo) Kenya Riparian Association
Thurs 14	am: Breakfast meeting with key donors (their trade attaches): World Bank, American, DFID, RNE, EU pm: Meeting with UNCTAD
Fri 15	am: Ministry of Trade and Industry Permanent Secretary: David Nalo Ag. Coordinator, Kenya European Union Post – Lomé Trade Negotiations KEPLOTRADE: Irene Mbugua Managing Director, Kenya Investment Authority: Susan Kikwai pm: Albert GUMO, Chief Executive Director EPZ Authority
Sa 16	
Su 17	
Mo 18	pm: Meeting with the Ministry of Labour and Manpower Permanent Secretary: Nancy Kirui (met with Mr. Kirigua, Mrs Taabu (Chief Industrial Relations officer) and Mr. Aida (Deputy Labour Commission)
Teu 19	am: Meeting with the trade unions General Secretary, Kenya Tailors and Textile Worker's Union: William Muga Aketch, General Secretary, Kenya Plantation and Agricultural Workers Union: Francis Atwoli pm: Meeting with CSOs – Eco – news, Action Aid, Oxfam, Sodnet, Seatini, CUTS, Dr. Julius Ngetich, Dr. Ludeki Chweya, Peter Aoga

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KHRC

The Kenya Human Rights Commission (KHRC) was established in 1992 in response to serious human rights abuses by the government of Kenya against its people.

Between 1992 and 2003, the KHRC focused on monitoring, documenting and publicizing violations of civil and political rights and played an important role in strengthening the role of civil society in advocating for democratic reforms. It also focused on human rights work broadened to incorporate a wide range of economic, social and cultural rights.

In its current phase, Vision 2012: "...Rooting Human Rights Work in Communities...", the Kenya Human Rights Commission's goal is to adequately root human rights and democratic values in communities, for them to defend and also claim their rights. In achieving Vision 2012, the KHRC seeks to address multiple concerns such as sustainability of the human rights movement, liberation (notably in the context of political struggles against injustice), social justice, accountability and gender mainstreaming.

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on 5 continents



Article 3: Everyone has the right to life, liberty and security of person. Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 6: Everyone has the right to recognition everywhere as a person before the law. Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any such discrimination. Article 8: Everyone has the right to an effective remedy