

INVESTING IN KENYA

AN OVERVIEW OF EXISTING REGULATORY ENVIRONMENT AND FRAMEWORK FOR INVESTORS

Prepared on 14th January, 2009

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INVESTING IN KENYA

1.0 Introduction

1.1 Geography

Kenya's position in East Africa is unique. It is bordered by Ethiopia to the north, Somalia to the east, Tanzania to the south, Uganda to the west and Sudan to the north-west. The vast Indian Ocean borders the country to the south-east. Kenya is strategically placed as it is the gateway to the landlocked countries in East and Central Africa.

Its port in Mombasa is also an invaluable asset since it is a major deep water harbour along the East African coast line.

Kenya lies on both sides of the Equator and enjoys a varied climate ranging from tropical to temperate climate. It is hot and humid at the coast, temperate inland and very dry in the north and northeast parts of the country.

1.2 Head of State and Government Structure

Kenya is a republic and is based on a democracy with a multi-party system with both Presidential and National Assembly elections being held simultaneously after every five (5) years. Until early 2008, the President of Kenya was both the Head of State and Head of Government.

Following the post-election violence in early 2008, President Kibaki and the opposition signed a power-sharing agreement. Pursuant to the coalition agreement, President Kibaki remained as the president with a vice-president serving under him. The posts of Prime Minister and two deputy prime ministers were created. A new coalition cabinet was sworn in April 2008, headed by Prime Minister Odinga.

With the creation of the coalition government, the Kenyan Government is expected to focus its attention on achieving its ambitious reform agenda, aimed at avoiding a repeat of early 2008's post-election political and tribal violence, drafting a new constitution, restructuring the land law regime as well as strengthening institutions to create a more effective system of checks and balances.

The Executive, Legislature and Judiciary constitutes the three arms of Government based on the principle of separation of powers (although some of the powers and duties of the three arms overlap) serving as a system of checks and balances.

2.0 The Legal System

2.1 Sources of law

The legal system in Kenya is based on the English common law system as opposed to a civil law system with a number of statutes having been enacted prior to independence (pre-1963).

The Judicature Act (Chapter 8, Laws of Kenya), which sets out the sources of law applicable in Kenya, requires the Kenyan courts to exercise their jurisdiction in conformity with, *inter alia*, the Constitution, all written laws, the substance of common law, doctrines of equity and statutes of general application in force in England on or before 1897. The application of the substance of English common law and doctrines of equity is subject, however, to any statutes enacted by the National Assembly (Parliament) that override the common law or equitable doctrines, and is applicable only so far as the circumstances in Kenya permit.

Statutes regulate to some degree most commercial activities and dealings and it is therefore recommended when considering legal issues arising in Kenya to establish whether any statute governs the relevant transaction before placing reliance on common law principles.

By way of example, there are statutes governing, among other matters, companies, banking and insurance business, capital markets, land law, taxation, local government, shipping, competition law and intellectual property.

Unfortunately, there is no effective system of case reporting in Kenya and in the absence of judicial authority, or in some cases as a result of judicial decisions not being properly disseminated, it is often difficult to opine with certainty on points of law.

Where there is no local judicial authority, the Kenyan courts may consider case law from other jurisdictions, including England and other Commonwealth countries. As a matter of practice, English case law and cases from other Commonwealth countries are often cited in court proceedings. Judicial authorities from outside Kenya although not binding on the courts in Kenya are persuasive.

2.3 Courts in Kenya

The High Court of Kenya has original and unlimited jurisdiction over all claims arising in Kenya. It is also an appellate court.

The Court of Appeal has appellate jurisdiction only and is the highest court in Kenya. Appeals from the decisions of the High Court lie in the Court of Appeal.

The lower courts consist of the magistrate's courts. An appeal from a decision of the magistrate's court lies with the High Court with a final appeal to the Court of Appeal. There are also various tribunals established under various statutes to deal with specific matters and whose decisions may or may not be subject to appeal. Judgments of the superior courts of

record (the High Court of Kenya and the Court of Appeal are binding on the subordinate courts).

3. Business and Investment Environment

Kenya has adopted a free market economy with the market forces determining the prices of commodities and services in the country.

3.1 Economic Trends and Performance¹

GDP vis-à-vis Per Capita Income: In 2007, the economy experienced 7.0 percent growth in real Gross Domestic Product (GDP) compared with 6.4 percent in 2006. This was mainly attributed to the economy's buoyancy, improved business confidence, stable macroeconomic conditions and a rebound of the global economy. The growth in 2008 is expected to be no more than 4% due, presumably, to the post-election troubles.

Interest Rates: The Central Bank Rate (CBR) was reviewed upwards in August 2007 from 8.50 percent to 8.75 percent. In June 2008 the Monetary Policy Committee (MPC) advised that it should be adjusted upwards to 9.00 percent to bring it in line with other short term interest rates.

Short term interest rates rose during the period January to June 2008, with the 91-day Treasury bill rate increasing from an average of 6.68 percent in December 2007 to 7.73 percent in June 2008. The average interbank rate increased from an average of 7.05 percent in December 2007 to 7.79 percent in June 2008, while the Repo rate increased from 7.12 percent in December 2007 to 7.61 percent in June 2008. The average 182-day Treasury bill rate, also rose over the same period from 7.87 percent in December 2007 to 8.84 percent in June 2008.

Treasury Bills are short-term Government securities sold by the Central Bank of Kenya. An investor either buys them at a discount and receives payment of face value on maturity date or for the return of a fixed or floating interest rate. Currently, the Treasury Bills on offer are for maturity periods of 91 days (three months) and 182 days (six months). Individuals and corporate bodies, including non-residents can invest in Treasury Bills. Treasury Bills are sold through weekly auctions. Treasury Bill interest rates are a key determinant of interest rates offered by commercial banks to the public.

Inflation: The 12-month overall inflation fell from 13.6 percent in July 2007 to 12 percent in December 2007, peaked at 31.5 percent in May 2008 before easing to 29.3 percent in June 2008. The increase was mainly on account of supply shocks resulting from adverse climatic conditions that led to food shortages, effects of the post election crisis and sharp increases in international crude oil prices. Average annual overall inflation also declined from 10.4 percent in

¹ Source - Annual Report of the Central Bank of Kenya for the Financial Year 2007/08

the year to June 2007 to 9.8 percent in the year to December 2007, and then rose to 18.5 percent in the year ending June 2008.

The 12-month underlying inflation increased from 4.9 percent in June 2007 to 7.6 percent in June 2008. The average annual underlying inflation also increased from 4.6 percent in the year to June 2007 to 6.0 percent in the year to June 2008.

Balance of Payments: Kenya's balance of payments surplus improved from US\$ 372 million in the 2006/07 fiscal year to US\$ 708 million during the 2007/08 fiscal year. The improvement resulted from foreign direct investment inflows associated with privatization of a state corporation and strategic investments in the banking sector. The surplus in the capital and financial account therefore rose by US\$ 988 million to US\$ 2,059 million during the 2007/08 fiscal year. This improvement more than offset the current account deficit, which had widened by US\$ 652 million to US\$1,351 million during the 2007/08 fiscal year owing to increased merchandise imports.

3.2 Currency and Exchange Rate

Kenya operates a floating exchange rate against foreign currencies. Therefore, the exchange rate between the Kenya Shilling and any other country is determined by market forces, subject of course to interventions from time to time by the Central Bank of Kenya (the "CBK"). The CBK and commercial banks usually publish on a daily basis the selling and buying prices for various leading currencies.

The Kenya shilling had mixed performance against major world currencies in the 2007/08 fiscal year. The shilling appreciated against the US dollar by 4.2 percent between June 2007 and June 2008 to exchange at an average of K.Shs. 63.8 per US dollar in June 2008, compared with K.Shs 66.6 per US dollar in June 2007. The appreciation of the shilling against the US dollar was largely supported by foreign investment inflows. The shilling gained against the Sterling Pound but depreciated against the Euro to exchange at K.Shs.125.3 per Sterling Pound and K.Shs. 99.2 per Euro in June 2008, compared with K.Shs. 132.3 per Sterling Pound and K.Shs 89.3 per Euro in June 2007. Currently (in mid-January, 2009), the shilling is trading at K.Shs. 78.6 against the US Dollar, K.Shs. 114.7 against the Sterling Pound and K.Shs.104.4 against the Euro.

3.3 Relationship of Government and Business

The Kenyan Government encourages private sector participation in economic activities in the country and also engages in public private partnerships in certain areas such as telecommunications and energy production. The Government is presently divesting its interests in commercial enterprises. The stated aim of the Government is to have minimal interference in business and the Government is increasingly relegating itself to the role of a regulator rather than an active participant.

In furtherance of this objective the licensing regime in Kenya was in 2006 overhauled with a view to reducing the number of licenses required. The Licensing Laws (Repeals and Amendment) Act which was passed in December, 2006 repeals and amends certain licensing Acts which will have the effect of reducing the number of licences businesses currently require.

3.4 Financial Sector

The Banking Industry: There are over forty (40) commercial banks in Kenya and several non-bank financial institutions like building societies and mortgage finance companies. However, the banking industry is dominated by three (3) major banks being Kenya Commercial Bank Limited (a local bank which is a listed company), Barclays Bank of Kenya Limited and Standard Chartered Bank Kenya Limited which are subsidiaries of Barclays Bank Plc and Standard Chartered Bank Plc respectively. A few international banks have established branches and subsidiaries in Kenya. Micro-finance institutions which were previously unregulated were in December, 2006 brought within the regulation regime. The Islamic banking market although nascent in Kenya is growing. Two fully fledged Islamic banks have been licensed to operate, and many other mainstream banks are opening Islamic banking windows. Work remains to be done on appropriate regulatory frameworks for Islamic banking

The banking industry is governed by the Banking Act (Chapter 488, Laws of Kenya) and the Central Bank of Kenya Act (Chapter 491, Laws of Kenya) (“CBK Act”). The banking industry is regulated by the CBK established under the CBK Act.

The Insurance Industry: There are approximately forty (40) insurance companies and three (3) re-insurance companies operating in Kenya. Foreign equity participation in an insurance company has a ceiling of 66.7%. The governing statute for insurance matters is the Insurance Act (Chapter 487, Laws of Kenya) (the “IA”).

Other Financial Sectors: Kenya has a few investment banks and venture capital funds. These are licensed and regulated by the Capital Markets Authority. These institutions are not however as yet active in provision of investment capital. Examples of investment banks include Kestrel Capital, Suntra Investment Bank and Dyer & Blair Investment Bank. Aureos and Actis are examples of venture capital funds.

The Capital Markets: The primary legislation dealing with capital markets is the Capital Markets Authority Act (Chapter. 485A, Laws of Kenya) (the “CMA Act”). The Capital Markets Authority (the “CMA”) is established under the CMA Act. The CMA licenses securities exchanges, investment banks, venture capital funds, stock brokers, investment advisors, fund managers, collective investments schemes and credit rating agencies.

The Nairobi Stock Exchange (the “NSE”) was formed in 1954. Over forty five (45) companies have listed their shares on the main segment of the NSE. 2007 and 2008 witnessed increased activity in the NSE with about seven (7) new listings. The Central Depository and Settlement Corporation provides central depository services for securities in Kenya.

The initial public offering in 2008 of the government's 25% stake in Safaricom Limited (a leading mobile service company) was a landmark transaction not only in Kenya's capital markets but also in the East African region. It raised approximately US\$ 1 billion and was oversubscribed by 532% by both regional and international investors.

The government is also considering tapping the international capital markets for the first time by listing a sovereign bond on an international exchange. The targeted amount is provisionally set at USD 300 million and will be used to finance infrastructure development in Kenya.

3.5 Competition

Kenya's competition law is regulated by the Restrictive Trade Practices Monopolies and Price Control Act (Chapter 504, Laws of Kenya) (the "RTPA"), which came into force on 1st February 1989. The RTPA provides for the control of restrictive trade practices, collusive tendering, monopolies and concentrations of economic power and for the control of mergers and takeovers.

The RTPA provides that where more than one third of a market is controlled by a single entity or there is vertical integration between manufacturing, wholesaling and retailing, the provisions relating to unwarranted concentrations of economic power become applicable. Such concentrations can be investigated at the request of the Minister.

It should also be noted that the RTPA provides control provisions that apply to certain mergers and acquisitions involving companies dealing in substantially similar commodities or engaged in supplying substantially similar services. There are no specified turnover or market share thresholds in the RTPA.

Mergers or takeovers falling within the ambit of the RTPA require an order from the Minister authorizing the transaction. Applications for an order are investigated by the Commissioner, who is required to consider broad public interest criteria and then make a recommendation to the Minister. The Commissioner is becoming increasingly vigilant about enforcing the RTPA.

The East African Community Competition Bill, 2006 (the "EA Competition Bill") was passed by the East African Legislative Assembly (the "EALA") about two years ago but is yet to receive the requisite head of state consent and, accordingly, does not as yet have the force of law in Kenya. However, the contents of the bill published for debate by the EALA indicates that the EA Competition Bill will have a significant effect on matters relating to competition law in East Africa.

3.6 Special Economic Zones

An Export Processing Zone ("EPZ") is a "special economic zone" and is established under the Export Processing Zones Act (Chapter 517, Laws of Kenya) (the "EPZ Act"). The Export

Processing Zones Authority (the “EPZ Authority”) was established under the EPZ Act to provide for the promotion and facilitation of export oriented investment and development of a conducive environment for such investments. The EPZ Authority acts as a “one-stop” centre through which the EPZ enterprises can channel all their applications for permits and licences.

The activities eligible to be carried out within EPZs include manufacturing activities, commercial activities or service activities. Real estate developers may set up their EPZs by obtaining a license to develop or operate a zone having land gazetted as an EPZ.

EPZ licensed businesses are granted certain tax exemptions including:

- payment of VAT and customs duties on raw materials, machinery and equipment, spare parts, tools, raw materials, intermediate goods, construction materials and equipment, office equipment and supplies, and transportation equipment;
- payment of income tax for the first ten (10) years from the date of first sale as an EPZ enterprise, except that the income tax rate shall be limited to twenty-five (25) per cent for the ten years following the expiry of the exemption;
- exemption from the payment of withholding tax on dividends and other payments made to non-residents during the period that the EPZ enterprise is exempted from payment of income tax; and
- exemption from stamp duty on the execution of any instruments relating to the business activities of an EPZ Enterprise.

3.7 Company Law

The principal statute dealing with company law is the Companies Act (Chapter 486, Laws of Kenya) (the “CA”) which is based substantively on the 1948 Companies Act of Great Britain. The CA sets out provisions dealing with all aspects of company law including the incorporation of companies generally, share capital provisions, shareholder, rights, offers to the public, the management and administration of companies, accounts, directors duties, consequences of winding up companies and the regulation of foreign companies based in Kenya.

The CA recognises three types of companies:

- a company limited by shares;
- a company limited by guarantee;
- an unlimited company.

Companies may either be private companies or public companies. Companies incorporated outside Kenya which have established a place of business in Kenya must apply to be registered as a foreign company pursuant to the CA.

4.0 Taxation

4.1 Individuals, Corporations and Trusts

Income tax in Kenya is chargeable pursuant to the provisions of the Income Tax Act (Chapter 470, Laws of Kenya) (the "ITA"). Personal income tax is paid by persons resident in Kenya. Pay As You Earn is the method for collection of income tax from persons who are gainfully employed as the employer is required to deduct the tax from the individual's salary or wages and remit the same to the Kenya Revenue Authority.

Income tax is charged directly on profits made by corporate bodies such as limited liability companies and trusts. The ITA sets out the matters to be considered in the determination of taxable income and also sets out the rates of taxation. The rate differs between resident and non-resident entities. The corporate income tax rates are currently as follows:

- Resident Company 30%
- Non-resident Company (branches) 37.5%
- Lower corporate income tax rates apply in the case of newly listed companies as follows:
 - with 20% issued shares listed first 3 years 27%
 - with 30% issued shares listed first 5 years 25%
 - with 40% issued shares listed first 5 years 20%

Withholding tax is payable on dividends, interest, royalties and management fees.

4.2 Other Taxation Issues

Thin Capitalization: The ITA contains provisions on thin capitalization of foreign controlled companies. Thin capitalization arises where a company incorporated in Kenya is controlled by a non-resident person alone or together with four or fewer other persons and the highest amount of all loans advanced to that company at any time during the year are more than three times the sum of the revenue reserves and the issued and paid up capital of that company. Where a company is thinly capitalised the Kenya Revenue Authority will disallow for tax part of the interest charged in proportion to the amount of debt that exceeds the prescribed ratio of debt to capital. In addition, the deductions of exchange differences are also restricted.

Capital Gains Tax: Capital gains tax was set to be re-introduced on 1st January, 2007 after a twenty one (21) year suspension and was to apply initially to disposals of immovable property. The rate of tax was fixed at 10 % of the gain on disposal of the immovable property. However, the National Assembly rejected proposal which sought to reintroduce capital gains tax. Many people believe that it is only a matter of time before the Government will seek to reintroduce capital gains tax.

Transfer Pricing: The ITA also contains provisions aimed at preventing transfer pricing. The Income Tax (Transfer Pricing) Rules, 2006 were enacted by the Minister of Finance under the

ITA to provide guidelines to multinational enterprises operating in Kenya and engaged in cross-border trade with related overseas companies to enable them comply with the provisions of the ITA. The Income Tax (Transfer Pricing) Rules, 2006 are substantially based on the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrators.

Double Taxation Arrangements: Kenya has double taxation relief agreements with the United Kingdom, Canada, Denmark, Norway, Sweden, Germany, Zambia and India. Kenya has signed a treaty with Italy but the treaty has not yet come into force. Kenya has also signed treaties with Uganda and Tanzania but the treaties are yet to be ratified by Uganda and Tanzania.

5.0 Labour Relations

5.1 Labour supply

Kenya is estimated to have a population of about 38 million, 52% of whom constitute persons of an employable age. Although the labour supply is high in Kenya, the demand does not match the supply as is indicated by the high levels of unemployment. The supply is at the younger age of the workforce as many people do not go on to higher education due to lack of school fees. Primary schooling is free while in secondary school, there is a cost-sharing scheme between the Government and parents.

However, Kenya is generally considered to have a highly educated work force.

5.2 Labour Laws

About a year ago, the Kenyan legislature enacted new legislation relating to employment and related matters. These comprise:

- a) The Employment Act, 2007 (which repealed the then Employment Act) which came into force on 20th December, 2007.
- b) The Occupational Safety and Health Act, 2007 (which repealed the Factories and Other Places of Work Act) which came into force on 26th October, 2007.
- c) The Work Injury Benefits Act No. 13 of 2007 (which repealed the Workman's Compensation Act) which came into force on 20th December, 2007.
- d) The Labour Institutions Act, 2007 (which repealed the Regulation of Wages and Conditions of Employment Act (Chapter 229, Laws of Kenya)) which came into force on 2nd June, 2008.

The new statutes make significant changes relating to labour law in Kenya which until then had been very employer-friendly.

The Employment Act, 2007: Some of the key changes under the new Employment Act are that it increases the amount of deductions that may be made on an employee's salary. The maximum deductions are two-thirds of the employee's wages or such other amounts as the minister may determine up from 50% under the old Act.

The new Act provides for increased maternity leave of three months (previously it was two months) with full pay for female employees. The new Act also offers increased protection for employees in the case of redundancy by requiring an employer to fulfill certain conditions before he can terminate a contract of service on grounds of redundancy.

The new Act expressly prohibits the use of forced labour and also prohibits employers from discriminating against or harassing an employee. The new Act also increases the age from when a person is considered a child from 16 years to 18 years.

A very new concept introduced by the Act requires an employer who employs 25 employees or more to give notice to the Director of Employment of every vacancy occurring in his establishment, business or work in the prescribed form giving the particulars of such vacancy and the type of work. When a post notified to the Director as vacant is filled or abolished, this fact should be notified to the Director.

An employer is also required to notify the nearest employment services office of any termination of employment within 2 weeks of such termination. In addition, an employer is required to keep a register of employees and a return of employees for each calendar year ending 31st December.

5.3 Immigration

Expatriates who want to work in Kenya are required to obtain an entry permit under the Immigration Act (Chapter 172, Laws of Kenya). These permits are categorized according to the areas of work to be undertaken. An entry permit holder can apply to be granted a dependant's pass for each of his dependants.

If the application is approved by the immigration officer, an entry permit will be issued subject to the payment of a fee which varies depending on the class issued. The period of validity of an entry permits or their renewals is at the discretion of the immigration officer but is restricted under the Regulations to the Act to a period not exceeding five (5) years from the date of issue or renewal. Typically a permit is for 2 years.

A person desiring to enter Kenya for the purpose of conducting any business, trade or profession can make an application to an immigration officer for a visitor's pass. The validity period for a visitor's pass is six (6) months from the date of the person's entry into Kenya.

The validity of a visitor's pass may be extended by an immigration officer for such further periods as the officer may determine. However, such an extension will at no time exceed six (6) months.

6.0 Other Issues Relevant to Foreign Investors

6.1 Investment Regulation

Apart from the restrictions discussed below in relation to "agricultural land", there are generally no laws that bar foreign investors from participating in any specific industry.

6.2 The Investment Promotions Act, 2004 (the "IPA")

The IPA was enacted by the National Assembly to encourage more inward investment to Kenya. The primary aim of the IPA is to reduce the bureaucracy faced by an investor in relation to licensing, immigration and negotiating tax incentives and exemptions from the relevant authorities.

The IPA established a corporate body known as the Kenya Investments Authority (the "Authority"). The Authority is mandated with the implementation of the stated goals of the IPA.

An investment is defined under the IPA as "the contribution of local or foreign capital by an investor, including the creation or acquisition of business assets by or for a business enterprise and includes the expansion, restructuring, improvement or rehabilitation of a business enterprise". Unfortunately "capital" is not defined and so, for example, it is not clear whether loans would be construed as investment for the purposes of the IPA.

Under the IPA, a "foreign investor" is defined as:

- a person who is not a citizen of Kenya;
- a company incorporated under the laws of any country other than Kenya;
- or a partnership in which the controlling interest is owned by a person or persons who are not Kenyan citizens.

Curiously, a company incorporated in Kenya which is owned by a foreigner appears to fall outside both the local investor and the foreign investor definitions. This material omission in the IPA although pointed out to the concerned parties is yet to be amended. The IPA further provides that for a foreign investor to qualify for an investment certificate, the minimum value of his proposed investment is US\$.100,000/= or the equivalent in another currency.

A "local investor" is defined as:

- a natural person who is a citizen of Kenya;

- a company incorporated under the laws of Kenya in which the majority of the shares are held by a person who is a Kenyan citizen; a partnership in which the controlling interest is owned by a person who is a Kenyan citizen; or
- a trust or trust corporation established under the laws of Kenya in which the majority of trustees and beneficiaries are Kenyan citizens.

A local investor who intends to make an investment of a minimum value of K.Shs.1,000,000/= (approximately U.S.\$14,400/= at current exchange rates) or the equivalent in another currency may apply to the Authority for an investment certificate. This notwithstanding, the IPA requires a local investor who does not hold an investment certificate to “register” his investment with the Authority.

The benefits that can be negotiated by or granted to the holder of an investment certificate are as follows:

- licenses appropriate to the business of the investor (those listed in schedule 2 of the IPA). However, schedule 2 excludes regulated businesses such as the banking, insurance and petroleum sectors;
- incentives or exemptions under the Income Tax Act, the Customs and Excise Act and the Value Added Tax Act; and
- a certain number of specific classes of entry permits for management and technical staff as well as for owners, shareholders or partners and their dependants.

In deciding whether to issue an investment certificate the Authority is required to consider the extent to which the investment will contribute to the Kenyan economy by either increasing the number and quality of jobs in Kenya, training of Kenyans in new skills or technology, contributing to economic development, the transfer of technology or increasing tax revenues and foreign exchange. However, the IPA is silent on whether the level of incentives and benefits to be granted is dependent upon the value of the “capital” to be invested.

Pursuant to powers granted under the IPA, the Minister for Trade and Industry enacted the Investment Promotion (Investment Registration and Certificates) Regulations, 2005 (the “Regulations”) which took effect from 13th January, 2006.

The Regulations set out the procedure for investment registration and the application for and grant of investment certificates as provided for under the IPA. The Authority is required to prepare a written report on the application within ten (10) days after a completed application is received, to make its decision within five (5) days of the report and to communicate its written decision to the applicant within five (5) days of making the decision. If the Authority decides not to grant an investment certificate, the reasons for so doing must be given in writing to the applicant and to the Minister. Thereafter the applicant may appeal to the Minister for Trade and Industry who is required to appoint a panel to review the Authority’s decision.

Under the Regulations, an investment committee has been established. Where environmental, health or security issues are raised in the application, then the investment committee will be involved in consideration of the application.

The Regulations provide that an investment certificate shall be subject to the conditions specified in the Regulations and such other conditions as the Authority may specify when issuing the investment certificate. The conditions specified in the Regulations include such conditions as may be required by any other government body in order to ensure that Kenyan licensing and permit requirements are satisfied. Such conditions are to address bona fide concerns based on laws affecting health, environment and security.

The Regulations also specify circumstances in which the investment certificate may be revoked, as well as providing procedures for transfer or amendment of an investment certificate.

6.3 Foreign Ownership of Shares and Land

Shares in companies incorporated in Kenya: As a result of the repeal of exchange control laws (in 1995) there are presently no restrictions on non-Kenyan residents or citizens owning shares in a private limited company incorporated in Kenya.

However, there are restrictions on non-Kenyan residents or citizens owning shares in companies whose shares are listed. Non-Kenyan residents or citizens cannot hold more than 75% of the voting power in a listed company.

Restrictions on land ownership: A private limited liability company incorporated in Kenya cannot by virtue of the Land Control Act (Chapter 302, Laws of Kenya) own agricultural land unless all its shareholders are Kenyan citizens. Briefly, the term “agricultural land” is defined as land which is outside the jurisdiction of Nairobi City Council, a municipal council or township, or where the user has not been changed to a non-agricultural user.

A non-Kenyan citizen may apply to the President for an exemption from the application of this Act. An exemption permits a non-Kenyan citizen to own “agricultural land”. There are presently no restrictions on ownership of commercial or industrial properties by non-Kenyan citizens.

6.4 The Foreign Investments Protection Act

The Foreign Investments Protection Act (Chapter 518, Laws of Kenya) (the “FIPA”) seeks to protect foreign investment made in Kenya. Although the FIPA is of less relevance now that exchange controls have been repealed, pursuant to the FIPA foreign nationals (that is persons who are not Kenyan citizens) can apply to the Government for a certificate of approved enterprise. Profits from such an approved enterprise may be freely transferred out of Kenya. Furthermore, property belonging to an approved enterprise cannot be compulsorily acquired

without the payment of compensation as provided in the Constitution of Kenya. Paragraph 75 of the Constitution limits the grounds on which land can be compulsorily acquired such as where it is necessary in the interests of defence, public safety or public morality and the provision further provides that “prompt payment of full compensation” must be made. The FIPA is generally considered to have no significant value with the removal of exchange controls as stated above.

6.5 Money Transfers outside Kenya

There are no exchange controls in Kenya after the Exchange Control Act was repealed in 1995. There are, however, certain regulations promulgated by the CBK relating to “hard” currency payments out of Kenya that are relevant. Pursuant to these regulations payments out of Kenya below US\$ 10,000.00 can be made freely. Payments out of Kenya between US\$10,000.00 and US\$ 499,999.00 require evidence of the purpose of the payment being made to be provided to the remitting bank. Payments out of over U.S\$ 500,000.00 have to be notified by the remitting bank to the CBK. The CBK collects this information for statistical purposes only.

In addition the Central Bank of Kenya Act (Chapter 491, Laws of Kenya) requires that payments out of the country must be effected through an authorised bank that is, a bank licensed by the CBK to conduct banking business in Kenya. Accordingly, and by way of example, any sale proceeds of a property would have to be remitted through a licensed bank in Kenya and it is not permitted for the sale proceeds to be settled offshore.