

Millennium Cities Initiative

Report on the Regulatory Framework for Foreign Direct Investment

MALAWI

Prepared by

DLA PIPER US LLP



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Introduction

I. Introduction

This report regarding foreign direct investment in Malawi addresses regulatory impediments to foreign investment and provides recommendations for practical ways to make the investment climate in Malawi more appealing to foreign investors. In preparing this report, we spent considerable time in country interviewing representatives from the national and local government, UNDP, the World Bank, numerous NGOs and the Blantyre Chamber of Commerce, and local investors, international investors, and large service providers.

A. National Issues

From a national perspective, those we interviewed consistently raised the following points related to foreign direct investment in Malawi:

- A major problem for foreign direct investment is the difficulty new investors experience in obtaining all of the business licenses and approvals that are required from the many national regulatory agencies. Indeed, it is not uncommon for a foreign direct investor to be required to pay rent (bribes) in order to complete the licensing process.
- Malawi is a land locked country. Because its infrastructure is poor, transportation costs are among the highest in this part of Africa. Thus, unless value is added in country, most locally produced agricultural products, with the notable exception of tobacco, are not exportable. The proposed Shire Zambizi waterway project may offer some relief, but will not take the place of good roads, rail and air transportation services.
- Communications systems in Malawi are also a problem. Land lines currently serve only 60,000 residents and businesses, and internet access is limited. Cellular providers are beginning to offer broader coverage, but are limited by the lack of electricity for recharging.
- On the plus side, foreign exchange control is being brought back under the banking system, which has now passed three IMF policy reviews. Malawi's rating is currently a B+, and the national economy is much improved as a result of international debt relief, a stabilized currency and relatively lower interest rates.
- Malawi's central location gives it access to regional markets. This is particularly true of Blantyre, which is close to northern Mozambique and has enjoyed much success as a major commercial center. Blantyre is also popular with residents of Zimbabwe, eastern Zambia and Tanzania.
- Malawi is a relatively stable, peaceful country with a low crime rate. It has a good supply of educated workers available at low cost, but many need task-specific skills training.
- Malawi might benefit from implementing a charter approach in key sectors. This approach focuses on industry alliances of 25 or more companies that work together for marketing, lobbying, and labor negotiations purposes. The bio-energy, sugar, and maize

industries are good initial candidates to test such an approach.

- The national government places too many restrictions on the number of foreign national employees it will allow in and on the types of positions that they may hold. The national government is also too slow to authorize foreign national employees, apparently in an attempt to make it less appealing for companies to hire them.

B. Local Issues

With respect to Blantyre, there are only a few “local” issues impacting foreign direct investment:

- Blantyre needs to hold municipal elections as soon as possible. Currently, Blantyre is operating without a local government. Ideally, the national government will amend the Malawi constitution to allow tri-partite elections in 2008 that would elect a new President, Parliament and local government. If not, Blantyre will be without a City government for at least another three years, when the next local elections can be held.

- Blantyre needs the authority and autonomy to provide local incentives commensurate with those that are being offered by its major competitors, *i.e.* the large metropolitan areas in neighboring countries. Today, Blantyre is unable to enter into independent contracts with foreign investors, precluding local incentives such as tax holidays or City land grants. There appears to be no statutory authority for the City to act on its own. Currently, all overtures to foreign investors are controlled by the national government and/or the Malawi Investment Promotion Agency (“MIPA”), including the establishment of investment parks and land grants.

- Blantyre needs to offer a higher quality of life (parks, security, and culture) and more housing, including affordable housing, which was made a City responsibility by the current national government. It also needs improved access to public/social services (water, electric, sewage, roads, and health care), especially for squatter residents, and improved traffic flow throughout the City. Unfortunately, the City has no bonding authority to allow it to issue construction bonds for infrastructure, and national government subsidies have not been forthcoming.

- Blantyre needs a reliable supply of water and power. At certain times of the year, these key services can be intermittent. Blantyre’s main source of electricity is hydro power. Its three generating stations are old, and spare parts are generally non-existent. During the rainy season, silt can cause major problems with the equipment. In addition, Blantyre’s water supply must all be pumped up hill. Blantyre has no storage reservoirs in the City that would allow it to take advantage of off-peak electrical rates. Worse, its pumps are old and prone to failure, and its leaking pipes are said to have loss rates of up to 50%.

- Blantyre needs more formal coordination between the various municipal boards, governmental agencies, and service providers. At a minimum, there is a need for communication and cooperation between the City Planning Department, the Water Board, the Malawi Housing Authority, Escom (electricity), the various land-based phone and cellular service providers, and

the City departments responsible for sewage and roads. There has been talk of privatizing water and sewage, with the City of Blantyre and the Water Board participating as major shareholders.

- It must be understood that this will all take time. There are simply no magic bullets to quickly resolve the “local” issues faced in Blantyre.

II. Executive Summary

In this report, we highlight those regulatory areas that are most likely to be of concern to foreign investors and make suggestions for ways to improve the environment for foreign investment in Malawi.

In the first section of the report, we focus on the structure of the national government. Because an independent, well-functioning judiciary is an important part of building investor confidence, we focus our analysis on the judiciary and ways that it could be improved. We identify the lack of specialized commercial courts, long trial delays and corruption as the biggest problems facing the Malawian judiciary.

The next section of the report reviews Malawi's foreign direct investment regime, including investment incentives such as the Export Processing Zone Regime. We recommend more funding for the Malawi Investment Promotion Agency (MIPA), which is supposed to be Malawi's "one-stop shop" for investors.

Taxes – including tariffs – and non-tariff barriers are addressed in Sections C and D of the report. Malawi is to be commended for its simple, moderate tariff regime and lack of significant non-tariff barriers, but needs to tackle its cumbersome, burdensome import and export procedures, which drag down its ability to compete in global markets.

Malawi also needs to focus on revising and updating its corporate governance and accounting practices with a view to strengthening them. Foreign exchange, on the other hand, seems to flow fairly smoothly on a day-to-day basis. Malawi has made some progress in its initiatives to introduce more competition into the economy, but much more remains to be done to make Malawi's markets competitive.

Two aspects of Malawi's regulatory regime that may deter foreign investment are (1) its poor enforcement of intellectual property laws, and (2) the prohibition on new acquisitions of property by foreign nationals since the enactment of the 2002 Malawi National Land Policy. The 2002 Policy did, however, make clear that owners of expropriated land are entitled to fair and adequate compensation.

Malawi suffers from low levels of employment, poorly-educated workers and deteriorating occupational safety and health services. Additional funding is necessary to jump-start Malawi's stagnant economy. Corruption is also a problem, although the Anti-Corruption Bureau has actively pursued major corruption cases in recent years.

What follows is a more detailed description of each of the areas discussed above.

III. The Regulatory Framework

A. Overview of the National and Local Regulatory Framework

Malawi gained independence on July 6, 1964 and was declared a republic on July 6, 1966. The Executive, Legislative and Judicial branches form the tripartite of the government of Malawi (the “Government”) and are governed by the 1994 Constitution of the Republic of Malawi (the “Constitution”).

1. Executive Branch

The Office of the President along with his cabinet form the executive authority of the Government. The president and vice president are popularly elected for a maximum of two five-year terms. The president can appoint a second vice president from a different political party as well as the 46 members of his cabinet, who do not need to be members of the legislature. The president serves as chief of state, head of the Government, and commander in chief of the country’s armed forces. President Bingu wa Mutharika was elected to his first term as president in May 2004.

2. Legislative Branch

All legislative powers are vested in Parliament, which consists of the unicameral National Assembly, the Senate and the president as chief of state. The National Assembly has 193 seats, 177 of which are popularly elected to a term of up to five years, with the remainder nominated by the president. The National Assembly is presided over by the speaker, who is elected by majority vote of the National Assembly members. The speaker does not need to be a member of Parliament.

An eighty-member Senate is provided for by the Constitution but has never been constituted. It was intended to provide representation for traditional leaders, the districts and various special interest groups.

To become law, legislation must be passed by the National Assembly and have the assent of the president. The president may withhold his assent, in which case the bill returns to the National Assembly. If the bill then receives a majority vote in the National Assembly, the president must assent to the bill.

3. Judicial Branch

Malawi’s judicial system, like those of many former colonies, is based on a mixture of British law and local customary law. The Judiciary constitutes the third branch of the Malawian Government and derives its power from the Constitution. The Judiciary is charged with interpreting, protecting and enforcing the Constitution and Malawian law in an independent and

impartial manner.¹ Defendants have the right to a trial that is open to the public but not necessarily to a trial by jury.²

Foreign court judgments that are registered in accordance with established legal procedure are enforceable in Malawi. Foreign judgments originating in a Commonwealth country are enforceable in Malawi without registration; judgments that originate in U.S. courts must be registered to be enforceable in Malawi.³

Court Structure

The Supreme Court of Appeals, the High Court and the Subordinate Courts are the main components of the court system in Malawi. The Supreme Court of Appeals is tasked with hearing appeals from the High Court and such other courts and tribunals as an act of Parliament may prescribe, and can only rule on matters of law. It is composed of the Chief Justice and at least three other Justices of Appeal.⁴

The High Court has jurisdiction to review any law and any action or decision of the Government as well as to review decisions from the Industrial Relations Court (as described in further detail below) on points of law and jurisdiction. It is also tasked with ensuring the constitutionality of laws and actions or decisions of the Government, and has such other jurisdiction and powers as conferred on it by the Constitution or by law. At least three judges serve on the High Court.⁵

The Subordinate Courts are presided over by professional and lay magistrates and are otherwise known as the Magistrate Courts. Notably, these courts have jurisdiction over corruption cases.

Malawi has also established specialized courts. These courts include the Constitutional Court, which is an *ad hoc* court convened, when needed, to interpret the Constitution. It consists of at least three members and is required, under the Constitution, to be subordinate to the Supreme Court of Appeals. The Industrial Relations Court is composed of a Chairperson, who is a judicial officer, the Chairperson's deputy, five individuals nominated by the employee representative organizations and five others nominated by the employer representative organizations. The Industrial Relations Court is a tribunal subordinate to the High Court, but appeals from the Industrial Relations Court are handled by the Supreme Court.

Malawi has also created a popular Ombudsman position. The Ombudsman is appointed by the Public Appointments Committee and handles public complaints and cases of injustice. The Ombudsman reports to Parliament on a yearly basis. Unfortunately, the success of the

¹ Constitution, Section 9.

² AfriMAP and Open Society Initiative for Southern Africa, "Malawi – Justice Sector and the Rule of Law" (2006). Note that juries are required for murder trials.

³ *Id.*

⁴ An act of Parliament may increase the number of Justices of Appeal.

⁵ An act of Parliament may increase the number of judges on the High Court, as well.

Ombudsman's office due to its accessibility and ease of use has led to it being overwhelmed by cases.

Parliament is authorized to create traditional or local courts presided over by lay persons or Chiefs, provided that the jurisdiction of such courts is limited exclusively to civil cases at customary law and such minor common law and statutory offenses as prescribed by an act of Parliament.⁶ In the recent past, however, traditional courts did not observe these limits on their jurisdiction and murder cases were tried by persons with no formal legal training. As a result, these courts were abolished in 1994, which had the unfortunate consequence that a large number of civil and family law cases that had previously been heard by these courts were forced into other venues or were not adjudicated.⁷

Appointment of Judges and Magistrates

Malawian Justices and judges are appointed rather than elected. The Chief Justice is appointed by the President and must be confirmed by the National Assembly. The Chief Justice also serves as a judge of the High Court, but may not preside over a case at the Supreme Court of Appeals that he presided over at the High Court. All other judges are appointed by the President on the recommendation of the Judicial Service Commission, a body created by the Constitution and charged with regulating judicial personnel. Professional and lay Magistrates are appointed by the Chief Justice on the recommendation of the Judicial Service Commission. All judicial officers are entitled to a salary, the amount of which is set by the Legislature, subject to adjustment for inflation. Through the appointments system, judicial officers are accountable, at least indirectly, to the people, the President, the National Assembly and the Judicial Service Commission.

Judges may be removed from office on the basis of incompetence or misbehavior. The Judicial Service Commission is responsible for recommending the removal of a judge. The removal process mirrors the appointment process. For instance, the Chief Justice will not be removed unless a motion to dismiss the Chief Justice is passed by the National Assembly and submitted to the President.

Alternative Dispute Resolution

The Government has adopted legislation, including the Trade Disputes (Arbitration and Settlement) Act of 1952 and the Arbitration Act of 1968, to provide alternative means for resolving disputes and to ease the overburdened court system. These acts provide for the establishment of arbitration tribunals, the rules for fact-finding in commercial disputes, and the settlement of such disputes (including those involving essential services). With USAID's assistance, the country now has a Center for Advice, Education, and Research on Rights which develops alternative dispute resolution methods and provides legal services to the poor and

⁶ Constitution, Section 9.

⁷ U.S. Agency for International Development, "USAID/Malawi Triennial Review Report – Country Strategic Plan FY 2001-05" (October 31, 2003).

women. By mid-2003, the number of cases resolved through alternative dispute resolution in the USAID target districts had increased to 400 for the first six months of 2003.⁸

Issues

The judicial system in Malawi must be further strengthened before it will be able to function reliably, independently, and effectively, and therefore address several issues including:

- The lack of commercial courts, which discourages investors since commercial cases currently take a long time to resolve. Malawi failed to meet two deadlines in January and July 2006 to establish more commercial courts.⁹
- Long trial delays because of budget and administrative problems combined with an overburdened system. Malawi also lacks qualified candidates to serve as lawyers and judges, and adequate funding for regular training of magistrates and judges.
- The corruption in lower courts and some in the higher courts. A study in 2004 indicated that forty percent of the respondents believed that prosecutors demanded or expected bribes, and the same number believed judges demanded or expected bribes.¹⁰
- The political interference in the judicial system by both the executive and legislative branches. Members of the judiciary fear political reprisal should their rulings be perceived as being pro-opposition. On the other hand, members of the judiciary have on occasion let their personal political affiliations interfere with their judicial duties.¹¹
- The weak Judicial Service Commission. The judiciary is not able to successfully oppose the executive and legislature branches. Furthermore, despite its role and authority in disciplinary matters involving judicial officers, the Judicial Service Commission is not always able to maintain control of such matters.

B. Entry, Protection and Standards of Treatment of Foreign Direct Investment (including Employment of Foreign Workers)

The Government of Malawi generally encourages both domestic and foreign investment in most sectors of the economy. Malawi does not restrict the percentage of foreign ownership in a company, the size of foreign investment or the source of foreign funds, or the destination of goods produced by foreign-owned businesses.¹² Foreign-owned businesses are not compelled to use local products or hire Malawian employees,¹³ but often find it inefficient to import foreign-made inputs due to Malawi's poor infrastructure, and also often encounter delays in their

⁸ U.S. Agency for International Development, "Raising Awareness of Malawian Rights" (September 8, 2004).

⁹ Patrick Msowoya, "Lack of commercial courts scary away investors" (Daily Times, November 20, 2006).

¹⁰ *Id.*

¹¹ Transparency International, "National Integrity Systems - Transparency International Country Study Report - Malawi" (2004) (hereinafter, "National Integrity Systems").

¹² "Investment Promotion – Malawi Confederation of Chambers of Commerce & Industry," available at http://www.mccci.org/investment_promotion.asp (hereinafter, "MCCC").

¹³ Note that governmental policy statements and guidelines appear to limit the employment of foreign personnel to areas where there is a shortage of "suitable and qualified" citizens. However, this restriction does not seem to be enforced.

attempts to bring in expatriate staff. Apart from a privatization program, the Government's overall economic and industrial policy is favorable toward foreign investors.¹⁴

1. Law

Entry and Establishment

Business incorporation procedures in Malawi are governed generally by the Companies Act of 1984, and are addressed in Section E below. In addition to business incorporation requirements, foreign investors are subject to the following further procedures.

First, to invest US\$50,000 or more, an investor must apply for an investment license from the Malawi Investment Promotion Agency ("MIPA"). The application must be accompanied by a non-refundable US\$200 fee and a business proposal providing full details of the project and its staffing (including expatriate staffing), land and other requirements. After MIPA processes the application, the investor must send it to the Investment Approval Committee, which has the authority to approve the application and to issue an investment license. Upon approval, the investor is required to pay an additional fee of US\$800 (or the equivalent in Malawi Kwacha (MK)) for an investment certificate.

Second, investors of US\$50,000 or more are eligible to receive the number of Business Residence Permits ("BRP") and/or Temporary Employment Permits ("TEP") approved in its investment license for its expatriate employees. For each work permit, the investor must submit an application to MIPA for processing, then to the Investment Approval Committee for approval or rejection. Upon approval of the application, the investor is required to pay, per permit, a processing fee of MK 3,500 and an issuance fee of MK 50,000 for a BRP or MK 60,000 for a TEP.¹⁵ In practice, while it is possible to receive residence and work permits for an investor's ex-patriot employees, it is often a difficult, frustrating, and time-consuming process. For example, TEP applications are supposed to be processed within 40 working days, but in reality delays as long as four months are commonplace, apparently in an attempt to make the placement of ex-patriot employees less likely.¹⁶ In addition, there is a general feeling among foreign investors that the national government is too restrictive on the number of ex-patriots it will allow in to the country, and on the types of positions that it will exempt.

MIPA is a statutory body, created by the Investment Act of 1991. The agency is responsible for promoting inward investment by providing relevant services to investors.¹⁷ However, MIPA sees itself as a facilitating agency rather than as the investor's sole interlocutor. Investors are required to apply directly to the various government agencies and departments that grant required approvals.¹⁸

¹⁴ U.S. Department of State, "2006 Investment Climate Statement – Malawi," available at <http://www.state.gov/e/eb/afb/2006/62362.htm>. (hereinafter, "Investment Climate")

¹⁵ See Malawi Investment Promotion Agency, "Procedures for Various Applications," available at <http://www.malawi-invest.net/application.html>.

¹⁶ See Human Rights Report.

¹⁷ "Malawi – Integrated Framework – Diagnostic Trade Integration Study" (December 20, 2002.) (hereinafter "Integrated Framework")

¹⁸ *Id.*

It should also be noted that the government intends to merge MIPA with the Malawi Export Promotion Council (“MEPC”). This body was established in 1971, and its primary function is to promote exports of agriculture and manufactured goods from Malawi.¹⁹

Treatment and Protection

Both domestic and foreign investors must obtain a license to produce certain items and engage in certain manufacturing activities. Licensing requirements are directed at environmental, health, and national security concerns, and affect production of firearms, ammunition, chemical and biological weapons, and explosives, as well as manufacturing involving hazardous waste treatment/disposal or radioactive material.²⁰ These requirements do not impede investment, limit competition, protect domestic interests, or discriminate against foreign investors at any stage of investment.

Foreign investment is, however, impeded by some of the rules of the Malawi Stock Exchange. Stock exchange regulations limit participation of an individual foreign portfolio investor to 10% of any class or category of security, and limit maximum total foreign investment in any portfolio to 49%. Moreover, Malawian nationals enjoy discounted share prices and subsidized credit for the purchase of stocks. In July 2000, the maximum subsidized credit amount was increased from MK 20,000 (about US\$160) to MK 50,000 (about US\$400) and the minimum income threshold of MK 10,000 per month (about US\$80) was removed. Subsidized credit carries a precondition that the shares or assets be retained for at least two years. These preferences do not, by and large, prevent foreign investors from entering the Malawian stock market. Malawian nationals tend to invest through public tenders for the sale of shares of state-owned enterprises, while foreign investors tend to dominate the share-holding of large MSE-listed companies requiring significant technical and financial resources.

Foreign and domestic investors are protected from being deprived of investment opportunities by inside traders by the Privatization Act of 1996. This Act prohibits members of the Cabinet, or employees of the Privatization Commission or its consultants, from participating in any divestiture except if an offer is made to the general public.

Protection against Expropriation

Foreign and domestic investors are protected from deprivation of property without due compensation by the Constitution.²¹ Expropriations have been extremely rare since the repeal of the Forfeiture Act in 1992.

At present, expropriations are governed by the Land Acquisition Act of 1971, which requires the government to justify an expropriation as being in the public interest and to pay fair market value for the land. Fair market value is assessed by summing the amount the owner originally paid for the land, the value of any permanent improvements, and any appreciation of

¹⁹ *Id.*

²⁰ *Id.*

²¹ Constitution, Section 44(2)(4)

the land value. If the private landowner objects to the level of compensation, he may obtain an independent assessment of the land value. According to the Act, however, such cases may not be challenged in court; the Ministry of Lands, Housing, Physical Planning, and Surveys is the final judge.²²

Investment Incentives

The Export Processing Zone (“EPZ”) Regime was established in 1995 to provide incentives to companies exporting 100% of their production. There are no specific geographic areas designated as export processing zones; rather, individual firms are designated as Export Processing Firms (EPF) and may operate wherever the investor chooses.²³ Companies operating under the program are exempt from corporate tax, value added tax, and withholding tax on dividends, as well as from taxes on raw materials and packaging purchased locally. These companies may also import production inputs, including items such as machinery, office equipment, utility vehicles and raw materials, without paying any duties or taxes.

As of April 2007, 17 EPF’s were registered under the program, in such industries as garment assembly, rubber processing, agro-processing, and cut flowers. Investment inflows into the EPZ Regime from 1996 to 2004 are estimated at US\$40.93 million, with an estimated 14,122 jobs created. Traditional industries such as tobacco, tea, coffee and cotton are excluded from the EPZ Regime.²⁴

A manufacturing under bond (“MUB”) program offers slightly less attractive incentives to companies that export some, but not all, of their goods.²⁵ Companies operating under the MUB program are entitled to an allowance of 12% of export revenues for products other than tobacco, tea, sugar and coffee, and may claim a transport allowance of 25% of all international transportation costs. In addition, MUB companies pay no import duties on capital equipment, no import duties or surtaxes on raw materials, and no excise tax on local purchases of raw materials and packaging material.

A foreign investor must submit an application to participate in either of these investment incentive programs to MIPA, along with a project proposal or business description of the level of investment, including projected local employment. MIPA processes the application and presents it to the Investment Approval Committee, which must notify the applicant of its decision within 10 calendar days.

Relevant Treaties and Conventions

Malawi’s policy is to negotiate bilateral investment treaties with countries whose nationals invest in Malawi. At present, there is neither a bilateral investment treaty nor a

²² U.S. Foreign Commercial Service and Department of State, “Malawi – Country Commercial Guide” (December 2005).

²³ Vincent Nkhoma, Government of Malawi, Ministry of Industry, Trade and Private Sector Development, “Export Processing Zones – Is it a Regime Worth the Sacrifice? – The Case of Malawi” (April 2007), p. 4. Note that any foreign or domestic company engaged exclusively in manufacture for export may apply for EPF status; however, the majority of companies participating in the program are foreign-owned.

²⁴ *Id.*, at pp. 4, 6, 8.

²⁵ “Official SADC Trade, Industry and Investment Review 2006,” South African Development Community, http://sadcireview.com/country_profiles/malawi/mal_business.htm.

taxation treaty between Malawi and the United States; the United States-Malawi Double Taxation Agreement, which was entered into during Malawi's colonial period, was canceled by the United States in 1983.

Malawi acceded to the Multilateral Investment Guarantee Agency ("MIGA") in 1985/86. Since MIGA provides mechanisms for the settlement of investment disputes, Malawi has not renewed several investment treaties that lapsed after 1986. Malawi still maintains a bilateral investment treaty, however, with the Netherlands.²⁶ Malawi also maintains double taxation treaties with the United Kingdom, the Netherlands, Denmark, South Africa, Norway, Sweden and Switzerland.²⁷

Malawi is a member of the International Center for Settlement of Investment Disputes (ICSID). Members of ICSID must accept binding international arbitration of investor-state disputes if the contract between the investor and the state provides for arbitration.²⁸ There have been no investment disputes between Malawi and a U.S. company since 1996.²⁹

Malawi has also had a U.S. Overseas Private Investment Corporation ("OPIC") investment guarantee agreement since 1967. In August 1999, the U.S. Export-Import Bank included Malawi in its new Africa Short-term Export Credit Insurance Program. Malawi is also a member of the African Trade Insurance Agency, which provides insurance products and services customized to support African related investments and trade transactions.³⁰

2. Practice

MIPA has suffered from inadequate funding, and this has to some extent affected the agency's ability to carry out some of its core functions.³¹ For example, there is currently no consistent monitoring of new investors to ensure that they are meeting the goals for investment and local employment set out in their initial investment proposal.³²

C. Taxation

Malawi's corporate income tax rate is 35%. There is a depreciation allowance of 40% for new buildings and machinery and up to 20% for used buildings and machinery. There is also a 100% deduction for manufacturing company operating expenses incurred during the two years prior to the start of operations. There are no withholding taxes imposed on the payment of dividends.

²⁶ See United Nations Conference on Trade and Development, Investment Instruments Online, Bilateral Investment Treaties, http://www.unctadxi.org/templates/DocSearch____779.aspx.

²⁷ See Investment Climate.

²⁸ Tripartite Committee Organization of American States Trade Unit, "FTAA-Negotiating Group on Dispute Settlement – International Conventions Governing Private Commercial Arbitration: Panama, New York, Montevideo and ICSID Conventions" (December 7, 2004).

²⁹ See Investment Climate.

³⁰ See <http://www.africa-eca.com>.

³¹ See Integrated Framework.

³² See Integrated Framework.

There are reduced corporate taxes for certain new investments. Also, there are special tax incentives for exporters, particularly for those in EPZ's. Exporters are also allowed to exempt from taxation 12.5% of export revenues for products other than tobacco, tea, sugar and coffee, and 25% of all international transport costs.

Companies operating in priority industries so designated by the Minister of Trade and Private Sector Development may be eligible for tax holidays consisting of either 10% for a period not to exceed 10 years, or 15% throughout the period of operation. However, because no industries have been designated as a priority to date, no tax holidays are currently operational.

Finally, there is duty free importation of qualifying capital goods used in manufacturing, agriculture, horticulture, mining, telecommunications, and tourism. For manufacturing, the duty free benefit also applies to raw materials.

D. Import and Export Procedures and Tariffs³³

Recently, Malawi has been working to lower its tariffs and non-tariff barriers to encourage imports and exports. In addition, Malawi has established an export processing zone regime ("EPZ") to provide additional incentives for manufacturers exporting 100% of their production.

1. Law

Tariff and Non-Tariff Barriers

Malawi has moderate tariffs, with a maximum tariff rate of 25% and an average tariff of 13.6%. The number of tariff rates is minimal (0%, 5%, 10%, 20% and 25%). High tariff rates are concentrated in areas with large local production such as coffee, tea, nuts and consumer goods. Imports of consumer products are subject to an average tariff rate of 19%, while imports of capital goods are assessed an average tariff of 5%. Malawi also applies a surtax and an excise tax to imported goods.

There is no import duty imposed on raw materials used in manufacturing industries. However, this policy is implemented at the discretion of the Customs and Excise Department, and there have been reports of delays and denial of claims for duty-free treatment. There are no import duties imposed on computers and computer accessories. In June 2000, the government reduced tariff rates for all imports into Malawi on intermediate goods and raw materials from 15% to 10%, but included a 20% tax on commercial transport fees for intermediate goods where those goods are used by another entity to produce a finished good.

With regard to non-tariff barriers, import licenses are required for thirteen categories of goods, and export licenses are required for six categories of goods. The Ministry of Commerce and Industry issues all required import and export licenses, and the licenses are valid for six months. Import licenses are required for military, naval, air force or police uniforms, radioactive substances, nests for wild birds, wild animals, trophies and products of wild animals, live fish,

³³ This section is based primarily on the Country Commercial Guide for Malawi prepared in December 2005.

compound products for use in animal feed, live poultry and eggs, meat, dieldrin, aldrin and salt. (Goods in transit, used personal and household effects, temporary imports by bona fide tourists, goods worth less than MK 10,000, sample products and advertising materials are exempted from import licensing.) Export licenses are required for implements of war other than arms and ammunition, petroleum products, wild animals, trophies and products of such animals, maize and maize meal, unprocessed tobacco and tea.

Relevant Treaties/Conventions

Malawi is a member of the Common Market for Eastern and Southern Africa (“COMESA”), which was established in 1994. COMESA, which evolved from an earlier trade association, is made up of 18 African states that seek to promote regional integration through trade development. COMESA members agreed to create and maintain (i) a free trade area guaranteeing the duty-free movement between COMESA members of goods and services produced by COMESA members (11 of the 18 member states currently participate in the free trade area), (ii) a customs union under which the import of goods and services from non-COMESA countries into the COMESA region are subject to a single tariff structure, (iii) free movement of capital and investment throughout the COMESA region, (iv) the gradual establishment of a COMESA Clearinghouse for processing payments, (v) the eventual establishment of a common currency, and (vi) the adoption of common visa arrangements leading eventually to the free movement of persons throughout the region. COMESA members eliminated duties on trade between member states in 2000.

The United States has entered into a Trade and Investment Framework Agreement (“TIFA”) with COMESA. Under the TIFA, the United States and COMESA agree to cooperate to expand trade and investment, and to meet regularly to discuss specific trade- and investment-related issues. The TIFA last met on February 13, 2007. The meeting addressed U.S.-COMESA trade, implementation of the African Growth and Opportunity Act (AGOA), the latest round of negotiations at the World Trade Organization (“WTO”) – commonly called the “Doha” negotiations, trade capacity building activities, infrastructure issues, and investment.³⁴

Malawi is also a member of the Southern African Development Community (“SADC”).³⁵ SADC is comprised of 14 member states cooperating in the pursuit of economic and social development. To achieve its objectives, SADC has developed a number of protocols signed by the member states. Primary among these are the Trade Protocol which commits the region to establish a free trade area by 2008, and the Declaration on Productivity which commits members to increase productivity in order to meet the challenge of becoming globally competitive.³⁶ Starting in January 2001, the member states of SADC started a phased tariff-reduction program.

³⁴ Office of the U.S. Trade Representative, “United States Holds Trade and Investment Talks with Largest African Regional Economic Group” (February 14, 2007), available at http://www.ustr.gov/Document_Library/Press_Releases/2007/February.

³⁵ SADC, “SADC Review 10th Anniversary: 1997-2006;” available at http://www.sadcreview.com/country_profiles/malawi/mal_introduction.htm.

³⁶ SADC, “SADC: History, Evolution and Current Status;” available at <http://www.sadc.int/english/about/history/index.php>.

However, Malawi is reported to be falling behind on implementation of its tariff-reduction schedule.³⁷

Malawi has been a member of the WTO since 1995. In addition, Malawi has bilateral trade agreements with South Africa, Mozambique and Zimbabwe that allow duty-free trade between Malawi and those countries.³⁸ Further, under the AGOA, a U.S. program designed to encourage trade with sub-Saharan African countries, Malawi qualifies to export nearly 8,000 products to the United States duty free.³⁹ In 2006, Malawi exported US\$61 million worth of goods - primarily textiles and apparel - to the United States under AGOA.⁴⁰

Malawi is a signatory to the ACP-EU Partnership Agreement known as the Cotonou Agreement, a trade and aid agreement between 46 African, Caribbean and Pacific (ACP) countries and the EU. The Cotonou Agreement, which replaced the Lomé Convention, guarantees duty-free entry into EU countries for a number of commodities and manufactured goods produced by ACP members, including Malawi.

2. Practice

Import Procedures

The first step in importing a standardized cargo of goods into Malawi is the preparation of documentation, which takes approximately 28 days. The documents include the following:

- Bill of Lading;
- Cargo manifest;
- Certificate of origin;
- Commercial invoice;
- Consular invoice;
- Customs import declaration form;
- Customs transit document;
- Packing list;
- Pre-shipment inspection clean report of findings;
- Ship arrival notice; and
- Technical standard/Health certificate.

Customs clearance and technical control take approximately seven days, port and terminal handling nine days, and inland transportation and handling 16 days on average. Therefore, for a typical import, the total duration of the import process is around 60 days. By contrast, the average import time in the rest of Malawi's region is 51.5 days, and 12.2 days in

³⁷ Office of the U.S. Trade Representative, "2007 Comprehensive Report on U.S. Trade and Investment Policy Toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act - Malawi," available at http://www.ustr.gov/assets/Trade_Development/Preference_Programs/AGOA/asset_upload_file762_11294.pdf. (hereinafter, "2007 USTR Report - Malawi").

³⁸ WTO, "Malawi and the WTO: Member Information;" available at http://www.wto.org/English/thewto_e/countires_e/malawi_e.htm.

³⁹ tralac, "AGOA.info: Country Information - Malawi;" available at http://www.agoa.info/?view=countryu_info&country=mw.

⁴⁰ See 2007 USTR Report - Malawi.

OECD countries. The cost of this delay to Malawi's economy is evident: while it costs US\$1,590 to import a container of goods into Malawi, it costs only US\$883 to import the same container into an OECD country.⁴¹ In essence, Malawi's consumers and businesses pay a much higher "delay tax" on the imported goods they purchase than do OECD consumers and businesses.

Export Procedures

As with import, the first step in exporting cargo is the preparation of documentation, which takes approximately 27 days. The documents include the following:

- Bill of lading;
- Certificate of origin;
- Commercial invoice;
- Customs export declaration;
- Export permit or licenses;
- Shipping Note; and
- Packing List.

Inland transportation and handling take approximately ten days, customs clearance and technical control four days, and port and terminal handling three days. In total, it takes 44 days to move a good for export from the factory onto a ship. By contrast, it takes an average of 40 days to move goods bound for export from factory to ship in the rest of Malawi's region and only 10.5 days in OECD countries.⁴²

Malawi would benefit from, in the first place, reducing the administrative burdens on its exporters and, secondarily, modernizing its roadway and port infrastructure. The cause of the delays in Malawi's export regime align almost exactly with World Bank research showing that fully 75% of delays are caused by administrative hurdles, while only 25% of delays are caused by poor infrastructure.⁴³ Reducing these delays would greatly improve Malawi's ability to trade with its neighbors and the rest of the world. A recent World Bank study found that, "on average, each additional day that a product is delayed prior to being shipped reduces trade by at least 1 percent. Put differently, each day is equivalent to a country distancing itself from its trade partners by 85 km on average. Delays have an even greater impact on developing exports and exports of time-sensitive goods, such as perishable agricultural products. In particular, a day's delay reduces a country's relative exports of time-sensitive to time-insensitive agricultural goods by 7 percent."⁴⁴

The focus of the Doha round of WTO negotiations has been on import barriers in developed countries, especially agriculture subsidies. Malawi's exporters would certainly

⁴¹ *Id.*

⁴² *Id.*

⁴³ World Bank, "Trading on Time" (January 26, 2006), available at http://www.doingbusiness.org/documents/trading_on_time_full_report.pdf (hereinafter, "Trading on Time").

⁴⁴ *Id.*

benefit from greater access to the markets of its major trading partners, and could thereby integrate more completely into the multilateral trading system.⁴⁵ At the same time, Malawi should be encouraged by its own ability to develop its exports through lessening the administrative burdens on exporters and improving its export infrastructure. The World Bank concludes that, “Reducing export times by 10 days is likely to have a bigger impact on exports (expanding them by about 10 percent) than any feasible liberalization in Europe or North America.”⁴⁶ For agricultural goods, reducing export times by 10 days would expand exports by about 70 percent.

Lastly, Malawi needs to better protect itself from smugglers and those who engage in tactics to evade paying full customs duties, such as undervaluation of imports, the re-labeling and repacking of expired goods, and other schemes. Those who trade illegally introduce unfair competition into the market by flooding the market with cheap goods. Malawi can remedy this problem in part by lowering its higher import duties, which cause high cross-border price differentials that create an incentive for illegal trading.

E. Corporate Governance and Accounting

Malawian corporate law is in need of revision and updating. Furthermore, the principles of corporate governance that have become the norm globally in the last several years have not yet (for the most part) been transposed into either law or practice in Malawi. In addition, even where the laws themselves are adequate, there are serious impediments hampering efforts to narrow the gap between theory and practice. These result not just from weaknesses in the institutional and enforcement capacity of the Malawian regulatory bodies, but, probably more importantly, from the serious problems of infrastructure, corruption, poverty and education that affect not only corporate law but every other aspect of Malawian life as well. Efforts are underway to improve both corporate law and corporate governance practices, but these continue to be hampered by the wider problems facing the country.

1. Law and Regulatory Framework

The primary sources of corporate law and corporate governance rules in Malawi are as follows:

- The Companies Act of 1984;
- The Capital Market Development Act 1990 (under which the Malawi Stock Exchange, which opened in 1995, operates);
- The Malawi Stock Exchange Listing Requirements (which apply only to listed companies, which number eight); and
- The 1998 Code of Best Practice for Corporate Governance in Malawi (a purely voluntary code developed by the Society for Chartered Accountants).

⁴⁵ WTO, “Malawi: February 2002;” available at http://www.wto.org/english/tratop_e/tpr_e/tp189_e.htm.

⁴⁶ See Trading on Time.

Incorporation and Related Requirements

Starting a business in Malawi is a ten-step process that takes an average of 35 days to complete, and – far worse – costs on average 139.6% of Malawi’s per capita gross national income.⁴⁷ The cost and complexity of the process need to be addressed in order to encourage development of local businesses. The procedure includes the following:

- name search;
- application to the Registrar General (a department of the Ministry of Justice) for a Certificate of Incorporation;
- registration for payment of income tax with the Malawi Revenue Authority;
- obtaining a corporate seal;
- application for a license from the Ministry of Trade & Industry;
- inspection of premises by the city;
- payment of license fee and obtaining of a license from the city’s Director of Finance or the Ministry of Commerce and Industry;
- application for registration of the workplace with the Occupational Safety, Health and Welfare Department;
- inspection of the premises by the Occupational Safety, Health and Welfare Departments; and
- registration for tax purposes.

The Companies Act requires standard articles of association to be attached to the application to the Registrar General. These articles of association provide basic information about the company, including the name of the company, any restrictions on the business to be carried out, the number of shares, the rights and privileges of each class of shares, whether the company is public or private, whether the liability of the members is limited or unlimited, and the full name, address and occupation of each subscriber of shares. The articles of association must be accompanied by a statement naming the company’s first directors and secretary.

There are three kinds of companies under the Companies Act. First, a “company limited by shares” limits the liability of its members to the amount paid for their shares. Second, a “company limited by guarantee” limits the liability of its members to such amount as the members collectively undertake to contribute in the event of dissolution. Finally, an “unlimited company” has no limit on the liability of its members.

Companies are also characterized as either private companies or public companies. A “private company” is one that restricts the transfer of its shares, limits the total number of its members to fifty (not counting employee members), and cannot invite the public to subscribe for its shares. All other companies are “public companies”. To become a listed company, a company must be a public company.

Companies are required to keep registers of their members, which registers are to be available for inspection and must contain the name and address of each registered member.

⁴⁷ World Bank “Doing Business - Starting a Business in Malawi,” available at www.doingbusiness.org/ExploreTopics/StartingBusiness.

Corporate Governance

The African Peer Review Mechanism's report on Malawi notes that "[l]egislation on corporate governance *per se* is still in its developmental stages."⁴⁸ For the most part, review of not only the Companies Act but the Malawi Stock Exchange Listing Requirements reveals a dearth of modern corporate governance regulation.

In 1998, the Corporate Governance Task Force ("CGTF") of the Society of Accountants in Malawi published a "Code of Best Practice for Corporate Governance in Malawi," which the CGTF encourages companies to adopt, but which remains voluntary. The discussion below focuses primarily on the Companies Act, which applies to all Malawian companies, and secondarily to the requirements that apply only to the tiny number of listed companies.

Investor Protection and Shareholders' Rights

In theory at least, basic shareholder rights are provided for (somewhat imperfectly) under the Companies Act. A company may provide for different classes of shares with different voting, dividend, repayment or other rights. The rights of holders of a class of shares may be modified only with the written consent of the holders of three-fourths of the shares of that class, or by special resolution at a meeting of the holders of shares of that class. Additionally, the holders in the aggregate of at least 5% of the shares of that class may apply to the court to have the change cancelled. In future revisions to the Companies Act it would clearly be preferable to require the unanimous consent of the holders of the shares of a class in order to modify the rights of that class.

Every company is required to hold an annual general meeting not more than 15 months after the date of the previous years' meeting. Extraordinary general meetings may be convened at any time by the board of directors, and must be called upon the request of members holding in the aggregate at least one-twentieth of the total voting rights. Voting members must be provided with 21 days' written notice for annual general meetings and fourteen days' notice for extraordinary meetings.

Shareholders have the right to propose resolutions at general meetings, and companies are required, upon written request of a voting member, to include the proposed resolution, as well as a meeting agenda, in the notice of meeting. Minutes of shareholder meetings are required to be kept at the registered office of the company and be open to members, officers, auditors, receivers and liquidators of the company.

However, there are limits to the protections provided by these statutory requirements. First, the statutory quorum consists of only two members. Second, the board of directors may apply to the courts to exclude from the agenda shareholder proposals that are deemed "abusive." Third, while a director or directors may be removed from office by ordinary resolution at a

⁴⁸ Final Report to the Malawi Ministry of Economic Planning and Development By the South African Institute of International Affairs, "Malawi and the African Peer Review Mechanism – A Review of National Readiness and Recommendations for Participation" (August 23, 2004), page 43 (hereinafter, "APRM Report").

general meeting, the Companies Act does not seem to require that subsequent directors be elected by shareholders.⁴⁹ Fourth, the Companies Act requires only an “ordinary resolution” of the shareholders to permit disposing of all or substantially all of the assets of the company. No majority is specified, but presumably an “ordinary resolution” refers to a simple majority. These are simply a few examples of the gaps in shareholders’ rights under the Companies Code.

Disclosure and Transparency

The disclosure requirements for non-listed companies (the vast majority of Malawian companies) are extremely weak. The Companies Act (Section 181) requires that companies deliver an annual return to the Registrar General for registration. However, the contents of this annual return are extremely limited.⁵⁰

Companies are also required to send to shareholders and debenture holders, once a year, basic financial statements including a profit and loss account and balance sheet (each meeting certain requirements of the Companies Act), an auditors’ report and, for public companies, a report of the directors on the state of the company’s affairs.

For listed companies the requirements are considerably more stringent. Prior to listing, companies must file a prospectus consisting primarily of listing particulars meeting the requirements of the Malawi Stock Exchange Listing Requirements, which are much more significant than the requirements of the Companies Act.

Ongoing reporting requirements are also more stringent for listed companies. The Malawi Stock Exchange Listing Requirements provide that companies must provide continuous disclosure of circumstances or events that are likely to have a material effect on the company’s financial results or position or on its stock price. Also, announcements of dividends and interest payments must be notified to security holders immediately. Semi-annual preliminary reports are required to be published in the press and distributed to security holders within three months after the end of the first half of each fiscal year, and annual financial statements must be distributed to shareholders within six months of the end of the fiscal year and at least 21 days before the annual general meeting.

Company Oversight and the Board

Under the Companies Act, there is no distinction made between the board of directors and management. “Directors” is defined as “those persons, by whatever name called, who are appointed to direct and administer the business and affairs of the company.” Directors are given

⁴⁹ Note that Section 11 of the Companies Act provides that a company *may* register articles of association, which must be in accordance with a form included in a Schedule to the Companies Act. This form of articles of association includes a provision for rotation of directors requiring one-third of the directors to retire from office. However, it does not appear that companies are required to have articles of association. Furthermore, neither the form of articles of association nor the Companies Act makes mention of how directors are to be nominated. In addition, retiring directors are eligible for re-election. The Malawi Stock Exchange Listing Requirements call for directors to retire by rotation every three years, and requires that the Board of Directors of a listed company be so constituted that “the interest of the general body of shareholders in the company is represented.” These provisions apply only to the tiny number of listed companies.

⁵⁰ They are as follows: name, address and nature of the business of the company; names and addresses of the directors and secretary; the address at which the company register and register of debenture holders are kept; amount of indebtedness; basic information concerning the company’s subsidiaries; basic information with respect to the company’s share capital; and a list of members and the numbers of shares held.

wide latitude in their ability to run the affairs of the company. The standard articles of association provide that a company's directors may from time to time appoint one or more directors to the office of "managing director" for the period and on such terms as they see fit. While serving as managing director, a director is not subject to retirement by rotation, and he may receive such remuneration as the directors may determine.

As a result, there is no "company oversight" by the directors in any meaningful sense. The concept of board independence does not exist in Malawian law. Related party transactions are permitted, although loans by the company to a director are prohibited. For listed companies, the Malawi Stock Exchange Listing Requirements contain significantly stricter provisions on related party transactions. The Listing Requirements also provide that at least one director should be an "independently elected, non-interested director to represent the general public.

Stakeholders play essentially no role in corporate governance in Malawi.

Enforcement and Redress

The Registrar of Companies is charged with the administration of the Companies Act, but does not have significant enforcement powers. Where necessary, the Registrar of Companies is to apply to the courts for an order. The Companies Act provides that a person who makes a false statement in any document required under the Act shall be liable to two years' imprisonment and a fine. Persons who engage in fraud on behalf of a company may also be declared by the courts to be personally liable for the company's liabilities.

The Committee of the Malawi Stock Exchange does not appear to be vested with significant enforcement powers. Its primary tool is the ability to suspend listing, temporarily or permanently. The Malawi Stock Exchange is regulated by the Reserve Bank of Malawi. There is no Malawian equivalent of the Securities and Exchange Commission.

Accounting

The Companies Act contains the accounting requirements for registered companies, which are not extensive. The Third Schedule to the Companies Act provides that a company's "accounts shall give a true and fair view of the state of affairs and operations and results thereof of the company, together with any material matters not specifically described by the Act or this Schedule which have affected or are likely to affect the business of the company, both by way of figures and by narrative report complementing and explaining where necessary figures in financial statements." The Third Schedule goes on to provide more specific requirements with respect to the various elements making up the financial statements. These are not detailed, and no mention is made of use of a particular system of accounting principles.

Companies are required to have an auditor or auditors appointed by the annual general meeting to hold office until the next annual general meeting. Each auditor must be eligible for appointment under Malawi's Public Accountants and Auditors Act. Annual reports include auditors' reports.

Section 5 of the Malawi Stock Exchange List Requirements contains specific requirements as to the content of the auditor’s report to be included in the prospectus of a company to be listed. Section 7 contains requirements for auditors reviewing a company’s periodic reports. Interim reports are not required to be audited unless the auditors’ opinion on the most recent audited financial statements was qualified or adverse. If a company’s auditors have issued an audit qualification or disclaimer with respect to an annual report, a special meeting of the Committee of the Malawi Stock Exchange is convened to consider delisting. Auditors of listed companies must be registered as practitioner public accountants with the Society of Accountants of Malawi and Malawi Accountants Board.

2. Practice

As discussed above, the legal corporate law and corporate governance framework is in great need of strengthening. This is even more true of corporate practice. The African Peer Review Mechanism’s review of Malawi’s preparedness to participate in the program notes several particular impediments to the development of corporate law and practice, including the following:⁵¹

- high costs related to basic infrastructure, including transport, electricity, telecoms and water utilities;
- low level of knowledge of new entrants into the market, resulting in even higher costs than necessary (including abnormally high legal fees);
- inconsistent application of the law;
- undue time and expense necessary to enforce contracts;
- the Registrar General’s lack of capacity to follow up on enterprises that do not comply with the provisions of the Companies Act;
- government-owned entities consistently flout the law;
- an under-resourced Industrial Court (citing in particular lack of capacity, non-computerization and general incompetence);
- a central bank that lacks independence.

Obviously, principles of good corporate governance depend upon investors and other stakeholders who are able to “police” corporations. In addition to the lack of regulatory and physical infrastructure, it is difficult to imagine how such a system can thrive where many investors do not speak the language used for government and business (English), and poverty and corruption are entrenched. Any significant attempt to revise and improve corporate governance and accounting practices of Malawian companies will depend on the simultaneous improvement of much wider-reaching societal problems.

F. Foreign Exchange

Exchange controls are managed by the Reserve Bank of Malawi (“RBM”). The Exchange Control Act and the Exchange Control Regulations (the “Exchange Control Regulations”) govern foreign exchange transactions in Malawi. Commercial banks act as

⁵¹ APRM Report, page 44 *et seq.*

authorized dealers and apply the Exchange Control Regulations as agents of the RBM.⁵² There are no restrictions on the remittance of foreign investment funds provided that the capital was obtained from foreign sources and registered with the RBM.

In February of 1994, the Government eliminated exchange controls on current account transactions (trade in goods and services) and introduced a market-based exchange rate system.⁵³ Since then, the currency has been relatively stable and inflation decreased from 17.1% in 2005 to 13.6% in 2006.

The monetary unit is the Malawi Kwacha (MK).

1. Law

The Exchange Control Regulations are structured in such a way that virtually all transactions involving the transfer of funds into or out of Malawi are prohibited without the prior consent of the RBM (e.g., buying, selling, borrowing or lending foreign currency, making a payment to or for the credit of a non-resident of Malawi, or the creation in favor of any person of a right to receive payment outside of Malawi). Penalties for violation of the Exchange Control Regulations involve substantial fines and even incarceration. To complicate matters, applications to the RBM take four to six weeks to process.⁵⁴

2. Practice

Exchange Controls

Despite the seemingly onerous regulatory scheme, business people report no major problems with foreign currency remittances.⁵⁵ Once an investment is registered, profit or dividend remittance approval may be obtained directly from a commercial bank, and need not be processed through the RBM. Subsequent remittances do not require further approval. However, RBM approval is required for transactions relating to royalties and technical and management fees.⁵⁶

All commercial banks that are authorized by the RBM to approve remittances and approvals appear to grant such approvals automatically provided that the applicant's accounts have been audited and sufficient foreign exchange is available. Foreign exchange is generally plentiful from April through September, when tobacco sales generate inflows, and scarce from October through March.⁵⁷

⁵² German Ministry of Foreign Affairs, "Doing Business with Malawi," available at http://www.malawi-botschaft.de/ueberlick_investitionsbedingungen.html. (hereinafter, "Doing Business").

⁵³ See Integrated Framework.

⁵⁴ Sacraire, Gow & Co (2nd Floor, Realty House, Churchill Road, Limbe, Malawi), "Malawi."

⁵⁵ See Investment Climate.

⁵⁶ See Doing Business.

⁵⁷ See Investment Climate.

Foreign-owned companies may borrow funds from abroad with RBM approval. Loans must bear interest at the prevailing rate for the currency in which the loan is denominated. No exchange control approval is required for local currency borrowing.⁵⁸

Exchange Rates

Since May 2000, the RBM has used an auction system to regulate the foreign exchange market in Malawi. In practice, however, the RBM still exerts considerable control over exchange rates, often creating distortions in the value of the Malawi Kwacha and limiting the availability of foreign currency.

Importers do not need to obtain RBM approval to place international orders or to pay for imports. RBM-set exchange controls allow exporters to retain 60% of their foreign exchange earnings in Foreign Currency Denominated Accounts (FCDA) with local banks. The remainder of export foreign-exchange revenues must be converted into Malawi Kwacha.⁵⁹

G. Competition

Over the last decade, Malawi has started to make some progress in this area by enacting legislation dealing broadly with all aspects of competition.

1. Law

In January 2000, Malawi implemented the Competition and Fair Trading Bill of 1998 (“Competition Act”), which seeks to promote unfettered competition in the economy.⁶⁰ The Act prohibits anti-competitive trade practices, establishes the Competition and Fair Trade Commission (“Commission”), regulates and monitors monopolies and other concentrations of economic power, protects consumer welfare, strengthens the efficient production and distribution of goods and services, secures the best possible conditions to advance the freedom of trade, and facilitates the expansion of entrepreneurship.⁶¹

Individuals found guilty of violating the Competition Act are subject to a fine of MK 500,000 (approximately US\$3,550) or an amount equal to the financial gain generated by the offense, if such amount is greater, as well as five years’ imprisonment. In addition, persons suffering injury, loss or harm as a result of any act or omission prohibited by the Competition Act may recover damages by way of civil proceedings in the High Court.

In 2003, the Parliament passed the Consumer Protection Bill of 2003 (“Consumer Act”) which was promptly signed by the President. It is unclear whether it has become law, or if it is still in the bill stage.⁶² The Consumer Act provides for the establishment of a Consumer

⁵⁸ See Doing Business.

⁵⁹ See Integrated Framework.

⁶⁰ University of Malawi Centre for Social Research, “Competition Regime in Malawi: Preliminary Paper” (May 2005), available at <http://64.233.161.104/search?q=cache:axAuVyFtNe8j:www.cuts-international.org/7up3/M> (hereinafter, “Competition Regime”); see also Maxton G. Tsoka, “Competition Regimes in the World – A Civil Society Report, Chapter 47 – Malawi”, available at <http://www.competitionregimes.com/pdf/Book/Africa/47-Malawi.pdf> (hereinafter, “Competition Regimes in the World”).

⁶¹ International Bar Association, “Global Competition Forum: Malawi;” available at <http://www.globalcompetitionforum.org/africa.htm>.

⁶² See Competition Regime; see also Competition Regimes in the World.

Protection Council charged with protecting consumers from a host of unfair trading practices, many of which are also addressed in the Competition Act.

Anti-Trust

Under Part V of the Competition Act, it is an offense for business enterprises and trade associations to engage in any of the following anti-competitive trade practices: (i) making the supply of goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods, or on the provision of competing or other services, (ii) imposing restrictions as to where, to whom, or in what form or quantities goods may be supplied, or other goods may be sold or exported, (iii) resale price maintenance, (iv) collusion and price fixing, and (v) predatory behavior towards competitors including the use of pricing to damage, hinder or eliminate competition. The Competition Act also provides express criteria under which the Commission will allow mergers and takeovers. Finally, the Competition Act prohibits the misuse of market power by a dominant player for the purpose of: (i) eliminating or damaging a competitor in that or any other market, (ii) preventing the entry of a person into that or any other market, or (iii) preventing another from engaging in competitive conduct in that or any other market. Orders of the Commission are enforced as judgments of the High Court.

Consumer Protection

Part V of the Competition Act protects consumers from the following unfair practices, among others: (i) excluding liability for defective goods, (ii) claiming payment for unsolicited goods or services, (iii) engaging in unconscionable conduct in carrying out trade in goods or services, (iv) engaging in pyramid selling, (v) engaging in bait and switch selling, (vi) offering gifts or prizes with no intention of fulfillment, and (vii) placing misleading and/or deceptive advertising.

Also illegal under Part V are the following: (i) withholding or destroying consumer goods, or the means of producing and distributing such goods, with the aim of bringing about a price increase, (ii) making a warranty that is limited to a particular area, or falsely represents the style, model or origin of the goods, or falsely represents that the goods are new or of specified age, or represents that the goods have any sponsorship, approval, performance and/or quality characteristics, components, materials, accessories, uses or benefits which they do not have, (iii) engaging in conduct that is likely to mislead the public as to the nature, price, availability, characteristics, suitability for a given purpose, quality or quantity of any products or services, or (iv) supplying any product which is likely to cause injury or harm to consumers when used as intended, or which does not comply with existing consumer safety standards and regulations.

While the Consumer Act provides essentially the same protections as the Competition Act, in theory it goes further by establishing a Consumer Protection Council which is authorized to: (i) investigate consumer complaints and refer them to the proper authority, (ii) maintain a record of complaints, (iii) formulate legislative proposals in the interest of consumers, (iv) provide advice to consumers on their rights under the Consumer Act, (v) implement consumer education programs, (vi) create conflict resolution mechanisms on consumer issues, (vi) regulate standard form contracts and cancel or alter any such contract which implicitly abuses consumer

rights, and (vii) otherwise advocate on behalf of consumer rights. The penalty for violating the Consumer Act is identical to the penalty for violating the Competition Act (*i.e.*, MK 500,000).⁶³

Relevant Treaties/Conventions

As discussed above, Malawi is a member of SADC and COMESA, and is a signatory to the Cotonou Agreement.

In order to ensure fair competition and transparency among business enterprises, COMESA is in the process of formulating a regional competition policy. Developed in collaboration with SADC, the first sector covered by COMESA's competition rules is air transport.⁶⁴

Article 45 of the Cotonou Agreement addresses competition directly, compelling member states to “undertake to implement national or regional rules and policies including the control and under certain conditions the prohibition of agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition.”⁶⁵

2. Practice

Competition law and its implementing policy guidelines have yet to take root in Malawi. Perhaps as a consequence, very few of Malawi's markets are truly competitive. Further, little progress has been made in establishing either the Competition and Fair Trade (“CFT”) Commission or the Consumer Protection (“CP”) Council. Although the CFT commissioners were appointed in February 2005 and its interim secretariat in April, the government has yet to adequately fund the Commission's enforcement activities.⁶⁶ The appointment of CP Council members and the setting up of its secretariat is not even under discussion. Malawi should consider modifying the law to expressly connect these two Acts (and to ensure that the Consumer Protection Act is in full force and effect), thereby allowing a single Commission/Council to do the work of two at a reduced cost. Nonetheless, the CFT Commission has adjudicated three proposed mergers and acquisitions, stopping one proposed by Mobil Oil before it could be consummated.⁶⁷

Finally, although Malawi is a member of COMESA, there is no link between Malawi's Competition Act and the competition law of the COMESA common market. Indeed, it is unclear whether under current Malawi law cases involving businesses from other COMESA states may be dealt with by Malawi's CFT Commission, COMESA's Competition Commission, or both. Such jurisdictional uncertainties must be clarified as Malawi's competition law becomes finally and fully implemented.

⁶³ See Competition Regime; *see also* Competition Regimes in the World.

⁶⁴ COMESA, “COMESA In Brief” (2006); available at <http://www.comesa.int/index.html/view>.

⁶⁵ The European Commission, “Cotonou Agreement,” available at http://ec.europa.eu/comm/development/body/cotonou/agreement_en.htm.

⁶⁶ UNCTAD, “Report on Malawi,” available at <http://www.unctad.org/Templates/Search.asp?intItemID=2068&lang=1&frmSearchStr=malawi&frmCategory=doc§ion=whole>.

⁶⁷ See Maxton Grant Tsoka, “Competition Scenario in Malawi” (July 2006), available at http://www.cuts-international.org/7up3/Malawi_CRR.doc (hereinafter, “Competition Scenario”).

H. Intellectual Property

Malawi's intellectual property statutes are generally consistent with intellectual property statutes elsewhere.

Relevant Conventions and Treaties

Malawi has been a signatory to the Paris Convention for the Protection of Industrial Property (the "Paris Convention") since 1964, the Nice Agreement Concerning the International Classification of Goods and Services since 1995, the Patent Cooperation Treaty (PCT) since 1978, the Locarno Agreement (concerning the international classification for industrial design) since October 1995 and the Strasbourg Agreement (concerning international patent classification) since July 1996. Malawi is also a member of the Harare Protocol on Patents and Industrial Designs within the Framework of the African Regional Industrial Property Organization (ARIPO), which has been effective in Malawi since 1984. Malawi has been a member of the World Intellectual Property Organization (WIPO) Convention since 1970 and has been a member of the Berne Convention for the Protection of Literary and Artistic Works (the "Berne Convention") since October 1991. Malawi became a member of and signatory to the World Trade Organization's (WTO's) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in May 1995.

Copyright

Copyright law in Malawi is governed by the Copyright Act of 1989 (the "Copyright Act"). The Copyright Act provides that an author of any work shall, by the mere fact of its creation, enjoy exclusive property rights in the work against all persons provided the work is original in character or a derivative work. The Copyright Act applies retroactively to works created before the enactment of the Copyright Act.

Copyrights are generally protected for the following durations:

- during the life of the author and for fifty years after his death;
- in the case of any audio-visual work, fifty years from the date on which such work is created or fifty years from the first communication to the public;
- for work owned by the Government, fifty years commencing from the date on which the work was first made available to the public;
- for computer programs, ten years from the date when the program is first used or first sold, leased or licensed; and
- in the case of photographic work or a work of applied art, twenty-five years from the date on which the work was first published or made.

Any right protected under copyright may be transferable by assignment, testamentary disposition or by the operation of the law. An assignment must be in writing and signed by the author or by the person authorized by him. A license to do any act falling within the copyright may be oral or in writing. An assignment, license or testamentary disposition may be made or

granted for a future or existing work. The Copyright Act provides for compulsory translation licenses and compulsory reproduction licenses for productions of recordings of musical works under certain conditions.

Any person who infringes on a copyright may be subject to fines and/or imprisonment. In addition, the owner of the copyright may bring suit against the infringer and the relief may include damages, injunction, account of profits or otherwise as in other corresponding proceedings for infringements of other proprietary rights.

Trademark

Trademarks are governed by the Trade Marks Act 1958 and the Trade Descriptions Act 1987. The first use of a trademark confers proprietary rights, but no action can be taken for infringement of an unregistered mark. An application for registration of a mark may be filed by a manufacturer, a trading agent or by a person, legal entity or authority having a business. Use of the mark is not a prerequisite for registration, but an applicant must have at least a bona fide intention to use the mark. Applicants not residing in Malawi must elect an address for service in Malawi.

The trademark register includes Part A (ordinary marks) and Part B (trademarks). To be registered under Part A, a mark must contain at least one of the following: (i) the name of the company, individual or firm; (ii) the signature of the applicant or a predecessor; (iii) an invented word or invented words; (iv) a word or words that have no direct reference to the character or quality of the goods and are not a geographical name or surname; or (v) any other distinctive mark. A mark may be registered under Part B as a trademark if it is distinctive or capable of becoming distinctive, and if applicant is or may be connected to it in the course of trade.

A trademark initially lasts seven years from the date of application (or seven years from the priority date if priority is claimed), but the trademark is indefinitely renewable for periods of fourteen years. A registered trademark should be used in order to prevent the trademark from being removed from the Registry.

A trademark may be assigned with respect to all or only part of the goods for which it is registered, and either with or without the goodwill of the business. If a mark is assigned without the goodwill of the business, the Registrar may require that the assignment be advertised. Assignments should be recorded.

Available remedies for trademark infringement include an injunction and damages. The owner of the trademark may not institute proceedings to recover damages for trademark infringement unless the mark is registered. The High Court of Malawi hears all trademark infringement cases.

Patent

Patents are governed by the Patents Act of 1958. In order to establish a patent in Malawi, a patent application must be filed directly in Malawi, through either an ARIPO patent application that designates Malawi or a PCT application that designates Malawi.

Patents may be filed with either a complete or a provisional specification. To file a patent with a complete specification, the applicant must submit the following:

- an application signed by applicant or his agent;
- a Power of Attorney signed by applicant (does not need to be notarized);
- a specification with claims in English in duplicate;
- drawings in duplicate;
- a deed of assignment if the applicant is an assignee; and
- a certified copy of any priority document, if priority is claimed.

A patent filed with a provisional specification does not require claims or drawings. Claims and drawings must be filed within 12 months or the provisional specification will lapse.

The duration of a patent is 16 years from the date of filing of the complete specification, subject to the payment of annual renewal fees. The owner of the patent must use the patent within three years from the date of issuance or four years from the date of filing of the application (whichever is later).

If the applicant for a patent is not the inventor, then a notarized deed of assignment of patent rights from the inventor to the applicant must be filed with the application. A granted patent may be assigned, but must be recorded to be effective against third parties. Either the applicant or the inventor may license the rights to a patent to a third party, which license must be registered to be effective.

Practice

Although Malawi's intellectual property statutes purport to offer strong protection, the actual protection provided to the holder of a patent, copyright or trademark in Malawi is limited by Malawi's sub-standard enforcement of intellectual property rights in general. Because actual protection is minimal, certain types of foreign investors may be discouraged from investing in Malawi.

When intellectual property rights have been infringed, the patent, copyright or trademark owner or exclusive licensee may bring an action before the High Court of Malawi. Available remedies include the issuance of an injunction, an award of damages, and/or a court ordered accounting of profits or inspection.

I. Property Rights and Land Use

Malawi has a complex land tenure system mixing pre-colonial traditional laws and colonial laws. The 2002 Malawi National Land Policy (the “2002 Policy”) is Malawi’s first comprehensive policy on land matters. It places significant restrictions on foreign ownership of land, which clearly could have a negative effect on foreign investment.

1. Law

Currently, in accordance with the 2002 Policy, all land in Malawi is either Government land, public land, customary land, or private land. Government land is land acquired and privately owned by the government and dedicated to a specified national use or made available for private uses at the discretion of the government. Public land is land held in trust and managed by the Government or traditional authorities and openly used or accessible to the public at large, including national parks, recreation areas, forest reserves, conservation areas, historic and cultural sites, etc. Customary land is all land falling within the jurisdiction of a recognized traditional authority, which has been granted to a person or group and used under customary law. The Ministry of Lands and Housing (the “Ministry”) is the primary authority for land administration.

Private land is governed by the Registered Land Act of 1967, which covers the registration and security of title; the creation and transfer of interest in lands; real estate agents and brokers; the rights of borrower and lender, and lessor and lessee in property financings and leaseholds, respectively; the indefeasibility of title; and the creation of the Land Registry, which provides the final and only proof of title.

The Adjudication of Title Act of 1971 regulates the settlement of rights and interests in land (other than customary land), and enables adjudicated titles to be entered into the Land Registry. The Planning Subdivision Control Act of 1967 governs the subdivision of land outside town planning areas.

In addition, the Government has passed the Environmental Management Act of 1996 which controls urban waste management, the protection of sensitive areas, and the conservation and management of agricultural resources, land, community forests and woodlands, dependence on fuel wood, water resources, wetlands, mining and minerals. The Environmental Management Act also establishes forestation programs and seeks to coordinate multiple land uses.

2. Restrictions on Ownership under the 2002 Policy

Under the 2002 Policy, land administration will be decentralized and district land registries established in each district will record all land transfers, conveyances and title registrations, and will offer surveying and land management services. The goal of the 2002 Policy is to extend land use planning by requiring landowners in areas subject to planned land use to comply with approved planning and development regulations. In addition, the 2002 Policy seeks to end Malawi’s boundary disputes with Tanzania, Zambia and some parts of Mozambique.

The 2002 Policy sets guidelines for allocating public land and customary land to investors. Potential investors must have an ability to develop the land and must protect the interests of citizens while developing the land. An investor is also subject to limits on the size of the individual parcels of land it may control in certain areas and for certain activities.

Furthermore, the 2002 Policy limits freehold ownership of private land to Malawi citizens. In addition, non-citizens in possession of registered freehold assets of publicly traded corporations are permitted to transfer those assets to other non-citizens only when necessary to preserve the investment value of such companies.

Non-citizens and foreign companies interested in acquiring land for industrial and commercial investment purposes may enter into renewable leasehold contracts for a term of 50 years or less, or a term determined on the bases of specific industry requirements for sensitive industries such as mining and forestry. Investors acquiring land for residential investment purposes may enter into a leasehold contract with a renewable term of 99 years. In addition, foreign investors must submit a feasibility study of the proposed investment and evidence of ability to develop the land in question. The Government will strictly monitor the planning and development of the investment and will punish speculative development of both agricultural and urban land.

Foreign investors' leasehold rights may be revoked in order to implement expressed and implied development conditions. The 2002 Policy prohibits foreign investors from acquiring undeveloped urban leasehold plots unless all development conditions have been complied with (the investor may, however, purchase the land with a mortgage obtained for purposes of complying with development conditions). Undeveloped urban plots that do not meet development conditions are subject to forfeiture.

3. Expropriation

A landowner whose land is expropriated by the Government is entitled to fair and adequate compensation under the 2002 Policy. The valuation of customary land is based on the open market value of the land and all permanent improvements to it. If the Government takes and then leases the land, the landowner will have the right to land rent payable by the Government based on the economic value of the land in question. Customary land taken and then offered as contribution to a joint venture or investment project will be valued based on the use, location and intrinsic quality of the land. However, the Government will take vacant or undeveloped urban land and property in urban central business districts that falls below building quality standards for its location *without compensation* and will assess the owner Vacant and Under Utilized Land Taxes, which are taxes against speculation and real estate hoarding used to stimulate development.

Government land may be leased and then repossessed by the Government. Compensation to the leaseholder in such an event is limited to the negotiated value of unexhausted improvements made by the leaseholder that are permanently attached to the land. No compensation will be paid for the termination of private use rights granted in connection with

a lease. If customary land is leased, upon termination of the lease, the land will revert to the Government, rather than to customary status.

4. Blantyre

Blantyre is the main commercial city in Malawi, and also the country's largest city. Property owners may only use their land for specific urban uses, and are subject to development control arrangements. If there is no evidence of development, the former owner or any other party with claim to the land may sell it to a third party. These land use regulations are intended to ensure that development within Blantyre is in accordance with the country's land use plan. Blantyre has a planning committee that is responsible for ensuring that development within the City conforms to the requirements of either the local Urban Structure Plan or an Outline Zoning Plan.

In August 2007 the City launched an action plan entitled "Cities without Slums", or CWS, covering the period 2007 through 2015. This action plan was prepared, with the assistance of UN-HABITAT, to help the Blantyre City Assembly facilitate the improvement of living conditions in the City's informal settlements through the use of specific strategies to guide the development of infrastructure and services.

In order to enhance the quality of life in the City in general, the Blantyre City Assembly also initiated urban greening projects on land zoned as conservation areas, *i.e.* communal land that is "owned" by the City.⁶⁸ Such projects help the environment, and help the City to maintain these communal lands in public trust. Last but not least, the City is enlisting the help of donors like GTZ and JICA from the Cities Alliance to work directly on other environmental problems, especially in the City's slums.

5. Practice

From a national perspective, the 2002 Policy froze the amount of private land owned by non-citizens on January 17, 2002, and non-citizens are now unable to acquire title to any new freehold estates. An existing foreign landowner must apply for Malawian citizenship within seven years or partner with a Malawian in the ownership of land, or title to its land will automatically be converted to a renewable leasehold contract with the reversion to the state. In addition, the Government has a right of first refusal on sales of all freehold estates.

On a more local level, Blantyre is plagued by chaotic development and sub-standard living conditions due to the lack of implementation and enforcement of the national and City planning regulations.⁶⁹ In addition, the current expansion of urban housing into rural settings is resulting in conflicts between customary laws governing rural areas and national laws governing urban areas. To date, the Blantyre City Assembly has been struggling to provide essential services to its unplanned settlements, most of which are best characterized as slums. Pollution and disease rates are higher in these areas than in the rest of the City.

⁶⁸ *Id.*

⁶⁹ *Id.*

Despite the difficulties, progress is being made. For example, the Blantyre City Assembly, Unicef and certain NGOs have been successful in establishing communal water stations in the slums where residents can obtain fresh water, and do their wash. In addition, the City has been working within these areas to upgrade dirt roads, paths and foot bridges, and to construct at least a few new public health clinics, primary schools and training centers.

J. Labor

Although Malawi has a large pool of inexpensive, unskilled, English-speaking labor, employment opportunities in the formal sector are limited. Malawi's economy is dominated by small business and subsistence agriculture, so the average income is quite low. As a result, domestic demand is low, so large companies do not see economic advantage in investing in local manufacturing, and Malawi's economy remains stagnant.⁷⁰

1. Law

Malawi's labor laws were updated by the Employment Act of 2000 ("Employment Act"). This new law was intended "to establish, reinforce and regulate minimum standards of employment with the purpose of ensuring equity necessary for enhancing industrial peace, accelerated economic growth and social justice." It requires the appointment of a Labor Commissioner ("Commissioner") responsible for the effective administration and application of the Act. Complaints alleging the infringement of rights under the Employment Act are heard by the Industrial Relations Court, which is established pursuant to the Constitution. If a complaint is proven, the Court may order reinstatement, the restoration of a benefit or advantage, or the payment of just compensation.

Malawi has been a member of the International Labour Organization ("ILO") since 1965, and has ratified 29 ILO Conventions to date, including all eight core ILO Conventions. Thus, it is likely that Malawi's new Employment Act was intended to modify existing labor laws to bring them into conformity with the ILO's core principles. Nonetheless, a lack of capacity in the Government and in the unions reduces the effectiveness of Malawi's worker rights protections.⁷¹

For a discussion of the impediments faced by foreign investors seeking to hire ex-patriot workers, see section "B" above.

Employment and Termination Practices

Employment discrimination is prohibited "on the grounds of race, color, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth, marital or other status or family responsibilities in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment relationship." Violators are guilty of an offense and liable for a fine of MK 10,000 (approximately US\$71) and imprisonment for two years.

⁷⁰ See Competition Scenario.

⁷¹ See 2007 USTR Report – Malawi.

Employers are prohibited from employing workers under the age of fourteen. Workers between the ages of fourteen and eighteen may not be employed in any activity that could be harmful to them or prejudicial to their attendance at school. Violators are subject to a fine of MK 20,000 (approximately US\$142) and imprisonment for five years. Forced labor is expressly prohibited, and violators may be fined and imprisoned.

Within one month of reporting to work, employers must provide employees with a written contract that includes a statement of the particulars of employment. Employment contracts may not be transferred from one employer to another, unless the business enterprise is sold or transferred. Employment contracts for an unspecified period may be terminated by either party upon giving the other party a minimum period of notice in writing, currently one month for employees with over five years employment. In lieu of providing notice, an employer may pay the worker a sum equal to the amount that would have been earned during the notice period. Upon termination of employment by mutual agreement or unilaterally by the employer, an employee is entitled to receive severance pay in accordance with a fixed schedule, currently two week's wages for each year of service if employed less than 10 years, and four week's wages for each year of service if employed 10 years or more.

Workers may not be terminated absent a valid reason connected with either the capacity or conduct of the employee or the operational needs of the enterprise. An employee fairly dismissed for a reason related to his conduct is not entitled to severance pay. Employers are prohibited from terminating or otherwise retaliating against workers for actions taken pursuant to the provisions of the Employment Act, such as filing a complaint, participating in a conforming strike, or removing oneself from a dangerous work situation. Complaints for unfair dismissal must be made to a Labor Officer within three months.

Wages

Employees are entitled to equal pay for equal work. Wages are to be paid in accordance with the terms of the employment contract, and must include an itemized statement setting out gross wages and deductions. The work week must not exceed 48 hours, excluding overtime. Employees may not be required to work more than six consecutive days without a rest period of at least 24 consecutive hours. In addition, workers who agree to work extra hours must be paid overtime. Employees who agree to work on their days off or on public holidays must be paid at a rate not less than twice their normal pay. Workers are entitled to be paid for public holidays. With respect to seasonal employment, employees engaged by the same employer in consecutive seasons are deemed continuously employed for the aggregate of all the time the worker has performed work for the same employer.

The Minister sets urban and rural minimum wage rates based on recommendations from the Tripartite Wage Advisory Board, composed of representatives of labor, government and the private sector. In 2004, the urban minimum daily wage rate was MK 56 (US\$0.52). The rural minimum daily wage rate was MK 41 (approximately US\$0.37.). These rates are considered inadequate to provide workers with a decent standard of living.⁷² Collective bargaining

⁷² U.S. Department of State, "Malawi: Country Reports on Human Rights Practices" (2003), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27737.htm> (hereinafter "Human Rights Report").

agreements may provide for wages in excess of the minimum daily wage rates set by the Minister.

Unions

The Employment Act makes only incidental provision for free association, authorizing a trade union or an employer's organization to represent (i) a person having a question, difference or dispute as to the rights or liabilities of any person, employer or employee under the Act or a contract of employment, or (ii) any person alleging a violation of a provision of the Act.

However, the Labor Relations Act of 1996 ("Labor Act") provides directly for freedom of association. It prohibits requiring a worker to join a trade union, or discriminating against the worker for joining one, just as it prohibits trade unions from discriminating against workers. In addition, it provides for the national registration of trade unions. If an employer refuses to enter into a collective bargaining agreement, the Labor Act empowers the Minister to establish an Industrial Council, and it provides for referral of disputes to the Industrial Relations Court. Should the Court fail to effect a settlement, the Labor Act permits the parties to engage in a strike or lockout. Persons engaged in a lawful strike or lockout are immune from civil proceedings, and employers may not replace striking workers during a lawful strike.

Benefits

Employers must provide workers with fifteen days of paid vacation per year if the employee works five days a week, and eighteen days of paid vacation if he or she works six days a week. Workers with one year of service are entitled to at least four weeks of sick leave at full pay, or eight weeks at half pay, each year. Female employees are entitled to at least eight weeks of maternity leave at full pay every three years. Upon expiration of maternity leave, the worker has a right to return to the same job. An employer who terminates a worker because of pregnancy is guilty of an offense punishable by a fine of MK 20,000 (approximately US\$142) and imprisonment for five years. An employee's continuous employment status shall not be treated as interrupted if the employee is absent due to vacation, maternity leave, sick leave or any other leave provided by statute, or if due to a lawful strike or lockout.

Health Insurance

The Employment Act does not require employers to provide health insurance. Accordingly, out-of-pocket payments amount to almost half the private expenditure on health.⁷³ Although Malawi's governmental health services are largely free, many rural people live near health units that charge user fees, causing many of the rural poor to delay treatment. Private health facilities providing specialized services in urban areas charge fees that are unaffordable to most residents. Worse, basic services are unavailable at many government health facilities due to shortages of trained personnel and the unavailability of essential drugs, supplies and equipment.⁷⁴ Nonetheless, the World Health Organization reports that the government "has

⁷³ World Health Organization, "Malawi" (June 2006), available at <http://www.who.int/hac/crises/mwi/en/>.

⁷⁴ Harry I. Thomson, Minister of Health and Population, "Fourth National Health Plan," available at <http://www.malawi.gov.mw/MoHP/Information/Information.htm>.

made strides in improving Malawi's health care system" through implementation of a Sector-Wide Approach Program (SWAP) that promises to decentralize healthcare services, and deliver more services to areas of need.⁷⁵

Worker Safety

Section 13(d) of the Malawi Constitution requires a healthy work environment.⁷⁶ The principal statute is the Occupational Safety, Health and Welfare Act of 1997 ("OSH Act"). It empowers Labor Officers, acting under the supervision of the Commissioner, to inspect any workplace without prior notice, at any hour of the day or night, to enforce provisions relating to working conditions and safety, and to investigate accidents and occupational diseases. Labor Officers must treat as absolutely confidential the source of any complaint, and must avoid any conflict of interest.

The primary focus of the OSH Act is on the duties and responsibilities of employers, welfare facilities and workplaces. For example, the OSH Act contains provisions to control dangerous substances, prevent explosions and fires, regulate workplace conditions such as inadequate lighting, dangerous machinery, and excessive noise and vibration, and make sure employees are provided with protective clothing, radiation protection, and ventilation. The OSH Act also requires employers to notify the Commissioner of accidents and diseases and allow labor inspectors the freedom to inspect, and sets up penalties for those who fail to comply with the OSH Act's provisions.

In 2000, the Parliament enacted the Workers' Compensation Act of 2000, but it is unclear whether this Act was ever given legal effect. This Act provides for compensation for injuries suffered or diseases contracted by workers in the course of employment, and also provides for the establishment of a Workers' Compensation Fund.

2. Practice

With over 80% of Malawi's workforce employed in agriculture, much of which is subsistence farming, only a small percentage of Malawi's workers actually work in the formal sector and are therefore able to benefit from the new labor laws. Despite legal prohibitions, forced or bonded labor and child labor remain an ongoing problem. Malawi has stepped up its enforcement of child labor laws recently, though child labor remains problematic, particularly on tobacco farms.⁷⁷ Further, limits on working hours and minimum daily wage rates are often violated and rarely enforced.⁷⁸

Workers have the right to join a union. However, as a result of the lack of awareness of the rights and benefits of workers, only 12% of workers in the formal sector belong to a union.

⁷⁵ UN Office for the Coordination of Humanitarian Affairs, "MALAWI: Interview with WHO representative Dr. Matshidiso Moeti," available at <http://www.irinnews.org/print.asp?ReportID=50944>.

⁷⁶ Finnish Institute of Occupational Health, "Challenges to and opportunities for occupational health and safety in Malawi," available at <http://www.ttl.fi/Internet/English/Information/Electronic%2bjournals/African%2bNewsletter/2000-03/03> (hereinafter, "Challenges to Occupational Health and Safety").

⁷⁷ See 2007 USTR Report – Malawi.

⁷⁸ See Human Rights Report.

Further, the implementation and enforcement of labor laws has been hampered by the general lack of knowledge of employers, labor unions and government of the legitimate roles of each in labor relations and dispute resolution. For example, the law allows the Minister to establish an Industrial Council when parties are unable to reach a collective agreement. The Industrial Council's functions include wage negotiation, dispute resolution, and development of industry-specific labor policy. Unfortunately, this option is seldom used.⁷⁹

The Minister has a duty to refer unresolved labor disputes to the Industrial Relations Court ("IRC"). However, due to a lack of funding and a two-year case backlog, this forum is not very helpful in resolving disputes. Moreover, the IRC lacks the resources to monitor a case after a decision is entered, or to be of assistance to the Minister in his overall efforts to enforce the labor laws.⁸⁰

Occupational safety and health services continue to deteriorate. Today Malawi is far below minimum standards, due largely to a lack of enforcement resulting from limited governmental resources and the low priority placed on the issue. Consequently, safety inspections are infrequent. Industrial workers often lack basic safety equipment and clothing. Under Malawi's OSH Act, employers who violate the Act can be sanctioned. In practice, however, employers are never charged, unless a fatal accident occurs. Although workers have the right to remove themselves from a dangerous workplace, given the low level of education of workers in general and the high level of unemployment, this right is seldom exercised. In 2004, the ILO's Committee of Experts suggested that Malawi request "international cooperation with the support of the ILO, if necessary, to seek the necessary funds." Additional funding is a critical next step.⁸¹

K. Corruption

Observers are unanimous in concluding that corruption is a major, pervasive problem in Malawi, affecting both the public and private sectors at every level of society. Furthermore, in the decade preceding the election of the new president in 2004, the problem of corruption in Malawi had by all accounts worsened rather than improved.⁸²

The APRM Report makes several concrete recommendations, including, for example, implementing a code of conduct for public officials, instituting a transparent public tendering process, assuring the effective independence of the judiciary, strengthening the Malawian Anti-Corruption Bureau and improving government financial reporting regulations.⁸³

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*; see also Challenges to Occupational Health and Safety and ILO, "CEACR 2004/75th Session," available at <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-displaycomment.cfm?hdroff=1&ctry=1340&year=2005&type=R&conv=C045&lang=EN>.

⁸² APRM Report, p. 39. Importantly for the topic at hand, the APRM Report also notes that "[i]n several international surveys, investors rank levels of corruption as the biggest deterrent to investment in Africa. Equally, donors rank corruption as a top concern[.]" *Id.*, p. 40.

⁸³ However, as Jeffrey Sachs pointed out in the course of a January 3, 2007 meeting with DLA Piper, corruption is a frequent symptom of extreme poverty; and to eradicate corruption requires first improving the economy. This, unfortunately, is a "Catch-22," as investors and donors hold back, waiting for signs of reduced corruption before providing funds that could begin to alleviate the country's severe impoverishment. The

1. Practice

Although corruption is still a major problem in Malawi, an important, albeit recent, goal of the Malawi government has been to strengthen the Malawian Anti-Corruption Bureau by giving it additional resources and support to pursue public and private sector corruption. As a result, the Anti-Corruption Bureau has become one of the bright spots in Malawi's fight against corruption. Indeed, since the new President took office in May 2004, there have been a number of major convictions of Malawi government officials.⁸⁴

Transparency International Country Study Report on Malawi makes this dilemma clear, listing poverty among both the causes and the effects of corruption. *See* National Integrity Systems.

⁸⁴ *See* 2007 USTR Report – Malawi.

IV. The OECD Policy Framework for Investment

This section compares Malawi's business laws, analyzed in Section III, with the Organization for Economic Co-Operation and Development's (OECD) "Policy Framework for Investment," adopted in 2006. These policy guidelines identify key measures that, according to the OECD, are crucial for attracting foreign private investment. Each guideline is listed below followed by a brief comparison to Malawi's current legal investment framework.

A. Investment Policy

The quality of investment policies directly influences the decisions of all investors, be they small or large, domestic or foreign. Transparency, property protection and non-discrimination are investment policy principles that underpin efforts to create a sound investment environment for all.

In Malawi, the laws and regulations related to business formation and the treatment of foreign direct investments are readily accessible. The national government advertises the Malawi Investment Promotion Agency ("MIPA") as the primary source of information and assistance for foreign investors; however, MIPA falls far short of being the one-stop shopping experience that certain neighboring countries provide. As a consequence, many foreign investors complain that business formation in Malawi is inordinately complex, costly and time-consuming. (See pages 1 – 2 & 9 – 10.)

In 2002, Malawi enacted the National Land Policy. It places significant restrictions on foreign ownership of land, which clearly has a negative effect on foreign investment. (See pages 30 – 33) On the other hand, Malawi's intellectual property statutes are reasonably comparable with intellectual property statutes in other countries. (See pages 27 – 30.)

Malawi law generally bars discrimination, including against foreigners, except with respect to land ownership and the purchase of stock listed on the Malawi Stock Exchange. (See pages 11 & 30 – 33.)

B. Investment Promotion and Facilitation

Investment promotion and facilitation measures, including incentives, can be effective instruments for attracting investment provided they aim to correct for market failures and are developed in a way that can leverage the strong points of a country's investment environment.

On a national level, Malawi established the Export Processing Zone ("EPZ") Regime in 1995 to provide incentives to companies exporting 100% of their production. There are no specific geographic areas designated as export processing zones; rather, individual firms are designated as Export Processing Firms (EPF) and may operate wherever the investor chooses. Companies operating under the program are exempt from corporate tax, value added tax, and withholding tax on dividends, as well as from taxes on raw materials and packaging purchased locally. These companies may also import production inputs, including items such as machinery, office equipment, utility vehicles and raw materials, without paying any duties or taxes. As of April 2007, 17 EPF's were registered under the program, in such industries as garment assembly,

rubber processing, agro-processing, and cut flowers. Investment inflows into the EPZ Regime from 1996 to 2004 are estimated at US\$40.93 million. (See pages 11 – 12.)

A manufacturing under bond (“MUB”) program offers slightly less attractive incentives to companies that export some, but not all, of their goods. Companies operating under the MUB program are entitled to an allowance of 12% of export revenues for products other than tobacco, tea, sugar and coffee, and may claim a transport allowance of 25% of all international transportation costs. In addition, MUB companies pay no import duties on capital equipment, no import duties or surtaxes on raw materials, and no excise tax on local purchases of raw materials and packaging material. (See page 12.)

A foreign investor must submit an application to participate in either of these investment incentive programs to MIPA, along with a project proposal or business description of the level of investment, including projected local employment. MIPA processes the application and presents it to the Investment Approval Committee, which must notify the applicant of its decision within 10 calendar days. (See page 12.)

On the city level, investment incentives are almost non-existent, which puts Blantyre at a significant competitive disadvantage compared with the large metropolitan areas in neighboring countries. Blantyre needs the authority and autonomy to provide local incentives commensurate with those that are being offered by its major competitors. Today, Blantyre is unable to enter into independent contracts with foreign investors, precluding local incentives such as tax holidays or city land grants. Further, there appears to be no statutory authority for the city to act on its own. All overtures to the foreign investors are controlled by the national government and/or MIPA, including the establishment of investment parks and land grants. (See pages 2 – 3.)

C. Trade Policy

Policies relating to trade in goods and services can support more and better quality investment by expanding opportunities to reap scale economies and by facilitating integration into global supply chains, boosting productivity and rates of return on investment.

Malawi is a member of SADC, a coalition of fourteen states cooperating in the pursuit of economic and social development. To achieve its objectives, SADC has developed a number of protocols, including the Trade Protocol, which commits the region to establish a free trade area by 2008. The SADC Declaration on Productivity commits members to increase productivity in order to meet the challenge of becoming globally competitive. In January 2001, member states began a phased tariff reduction program. However, Malawi is purportedly falling behind on implementation of its tariff reduction schedule. (See page 15.)

Malawi has been a member of the WTO since 1995. In addition, Malawi has bilateral trade agreements with South Africa, Mozambique and Zimbabwe. Malawi also participates in AGOA, a U.S. program that encourages trade between the United States and sub-Saharan African countries. In 2006, Malawi exported US\$61 million in goods - primarily textiles and apparel - to the United States quota- and duty-free under AGOA. (See pages 15 – 16.)

Malawi is a signatory to the ACP-EU Partnership Agreement known as the Cotonou Agreement, a trade and aid agreement between 46 African, Caribbean and Pacific (ACP) countries and the EU. The Cotonou Agreement guarantees duty-free entry into EU countries for a number of commodities and manufactured goods produced by ACP members like Malawi. (See page 16.)

While Malawi is doing well on the policy side of trade, it is hampered when it comes to procedure. It takes 60 days for import a good into Malawi. By comparison, the average import time for the rest of the region is 51.5 days, and 12.2 days in OECD countries. Export timelines are similarly lengthy, with 44 days being required to move a good for export from the factory onto a ship. This compares with 40 days in the rest of the region, and 10.5 days in OECD countries. Reducing these delays would greatly improve Malawi's ability to trade with its neighbors, and with the rest of the world. (See pages 16 – 17.)

D. Competition Policy

Competition policy favors innovation and contributes to conditions conducive to new investment. Sound competition policy also helps to transmit the wider benefits of investment to society.

Malawi has implemented competition laws with legal concepts that are very similar to U.S. antitrust law concepts, like prohibitions against price fixing, abuse of market power and price discrimination. Artificial impediments to market forces affecting free competition are, with certain typical exceptions, unlawful. In addition, Malawi competition law includes consumer protection provisions relating to truth in advertising, unfair pricing, and invoicing for unsolicited goods. While Malawi's laws mandating free market competition and consumer protection are good, governmental enforcement action is necessary to improve compliance. (See pages 25 – 27.)

E. Tax Policy

All governments must collect taxation revenue in order to function and carry out their duties. However, the level of the tax burden and the design of tax policy, including how it is administered, directly influence business costs and returns on investment. Sound tax policy enables governments to achieve public policy objectives while also supporting a favorable investment environment.

Malawi's corporate income tax rate is 35%. There is a depreciation allowance of 40% for new buildings and machinery and up to 20% for used buildings and machinery. There is also a 100% deduction for manufacturing company operating expenses incurred during the two years prior to the start of operations. There are no withholding taxes imposed on the payment of dividends. (See page 13.)

There are reduced corporate taxes for certain new investments. Also, there are special tax incentives for exporters, particularly for those in EPZ's. Finally, there is duty-free importation of qualifying capital goods used in manufacturing, agriculture, horticulture, telecommunications,

mining, and tourism. For manufacturing, the duty-free benefit also applies to raw materials. (See pages 13 – 14.)

Generally, Malawi's tax system is similar to the tax systems in place in Western countries and should not constitute a deterrent to foreign direct investment.

F. Corporate Governance

The degree to which corporations observe basic principles of sound corporate governance is a determinant of investment decisions, influencing the confidence of investors, the cost of capital, the overall functioning of financial markets and ultimately the development of more sustainable sources of financing. These questions provide a brief introduction to some of the key corporate governance issues that policy-makers and others should address to promote a sounder environment for investment. For a more complete assessment, policy-makers should turn to the OECD Principles of Corporate Governance and the assessment methodology developed by the OECD Steering Group on Corporate Governance, and if possible ask the World Bank for an assessment under the program of the Reports on Observance of Standards and Codes (ROSC) for Corporate Governance.

Malawian corporate law is in need of revision and updating. Furthermore, the principles of corporate governance that have become the norm globally in the last several years have not yet (for the most part) become either law or practice in Malawi. In addition, even where the laws themselves are adequate, there are serious impediments to narrowing the gap between theory and practice. These result not just from weaknesses in the institutional and enforcement capacity of the Malawian regulatory bodies, but also from the serious problems of infrastructure, corruption, poverty and education that affect not only corporate law but every other aspect of Malawian life. Efforts are underway to improve both corporate law and corporate governance practices, but these continue to be hampered by the wider problems facing the country. (See pages 18 – 23.)

G. Policies for Promotion of Responsible Business Conduct

Public policies promoting recognized concepts and principles for responsible business conduct, such as those recommended in the OECD Guidelines for Multinational Enterprises, help attract investments that contribute to sustainable development. Such policies include: providing an enabling environment which clearly defines respective roles of government and business; promoting dialogue on norms for business conduct; supporting private initiatives for responsible business conduct; and participating in international co-operation in support of responsible business conduct.

Malawi's stable democratic system undoubtedly fosters a healthier business environment than exists in certain neighboring countries, where civil war is commonplace.

The role of the government and its various ministries is very well defined. It is clear, for example, that the Minister of Trade and Public Sector Development is responsible for facilitating foreign investment by, among other things, the designation of tax holidays, and that the Minister of Labor has responsibility for most labor issues including setting daily wage rates, ensuring that the workplace is safe, and dealing with disputes between management and workers. (See pages

13 & 33-38.) Regional and international treaties are respected and provide predictability, transparency and governance to Malawi's economy. The 1998 Competition and Fair Trade Act ("CFT") fosters free market practices, and the CFT commissioners appointed in February 2005 will hopefully one day have the funding to ensure compliance. (See pages 25 – 27.)

Nonetheless, enforcement of key laws like competition, labor, health and safety, and intellectual property is currently weak. Moreover, the over-burdened commercial courts are slow to respond to the needs of business. (See page 8) There is also a large informal economy that government regulation is unlikely to reach and where improper practices do in fact flourish today. (See page 18.)

H. Human Resource Development

Human resource development is a prerequisite needed to identify and to seize investment opportunities, yet many countries under-invest in human resource development due in part to a range of market failures. Policies that develop and maintain a skilled adaptable and healthy population, and ensure the full and productive deployment of human resources, thus support a favorable investment environment.

Malawi's labor laws were modernized with the enactment of the Employment Act of 2000, intended "to establish, reinforce and regulate minimum standards of employment with the purpose of ensuring equity necessary for enhancing industrial peace, accelerated economic growth and social justice." Complaints are heard by the Industrial Relations Court, which was established pursuant to the Constitution. If a complaint is proven, the Court may order reinstatement, the restoration of a benefit or advantage, or the payment of just compensation. (See page 34.)

This new law provides for (i) employment protection against dismissal without cause in the form of regulated (and relatively high) severance payments, (ii) minimum wages, (iii) freedom of unionization, (iv) maximum work hours, and (v) paid vacation and sick leave. It does not require employers to provide health insurance; but Malawi's governmental health services are largely free. (See pages 34 – 37.) Possibly as a consequence of this law, Malawi has a huge informal labor market and relatively high unemployment. With respect to foreign direct investment, swifter judicial resolution of labor disputes would help to reduce the uncertainty that exists today. (See pages 37 – 38.)

I. Infrastructure and Financial Sector Development

Sound infrastructure development policies ensure scarce resources are channeled to the most promising projects and address bottlenecks limiting private investment. Effective financial sector policies facilitate enterprises and entrepreneurs to realize their investment ideas within a stable environment.

The Introduction to this report highlights the deficiencies in both Malawi and in Blantyre, in particular with respect to the infrastructure, including roads, railways, waterways, electricity, water and telecommunications. These deficiencies necessarily act as disincentives to foreign investment. Both the national and local government have made certain progress in addressing key categories of infrastructure, such as the national government's Shire Zambizi waterway

project currently underway, and Blantyre's project to widen the main thoroughfare through the heart of the city, which will begin shortly. (See pages 1 – 3.)

With respect to the financial sector, Malawi is doing very well, except for the cost of borrowing which, while significantly lower today than in the past, is still too high to meet the needs of many local businesses. Foreign exchange control is being brought back under the banking system, which has now passed three IMF policy reviews. Malawi's overall financial rating is currently a B+, and the national economy is much improved as a result of recent international debt relief, a stabilized currency and lower interest rates. (See page 1.)

J. Public Governance

Regulatory quality and public sector integrity are two dimensions of public governance that critically matter for the confidence and decisions of all investors and for reaping the development benefits of investment. While there is no single model for good public governance, there are commonly accepted standards of public governance to assist governments in assuming their roles effectively.

Investors continue to express concern about corruption, and there is a discrepancy between written laws and regulations and what investors experience in practice given the generally inadequate level of enforcement.

Corruption in Malawi is a major, pervasive problem, affecting both the public and private sectors at every level of society. A bright spot has been the performance of the Anti-Corruption Bureau, which has actively pursued public and private sector corruption. Indeed, there have been a number of major convictions of government officials since the new President took office. (See page 39.)

With respect to the lack of enforcement of existing laws and regulations including, among others, labor, health and safety, and corporate governance, the biggest problem facing Malawi today is inadequate resources. In 2004, the ILO's Committee of Experts suggested that Malawi request "international cooperation with the support of the ILO, if necessary, to seek the necessary funds." Such funding is a critical next step, without which this unacceptable discrepancy will inevitably continue. (See pages 37 – 38.)

V. Conclusion

Malawi is making important efforts to create a more dynamic economy by not discriminating against foreign investors and by taking other steps to improve the climate for foreign investment. The country does suffer, though, from many wide-reaching societal problems that are both a cause and effect of low levels of economic development. Malawi can take several steps to improve its economic lot that are completely within its own administrative power, as highlighted above. Foreign investors can also contribute to the reform process by bringing needed money and know-how into the economy and by demanding more from the Government in the way of transparency and accountability. The goal of both the Government and the foreign investor should be to turn the vicious cycle of low development and poverty into the virtuous cycle of economic growth and individual empowerment.

VI. Appendix – DLA Piper/New Perimeter Team

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