Chapter 2

Investment policy in Mauritius

Mauritian laws and regulations dealing with investments and investors provide for a predictable and transparent regime. Mauritius' investment climate is generally open, although several restrictions apply in various sectors to both domestic and foreign investors. Investors' rights are soundly protected both by domestic law and through international commitments. Over the last decade, the government has also updated its Intellectual Property Rights framework to enable the country to become a leading knowledge-based economy. Access to dispute settlement by investors has been facilitated with the establishment of a Commercial Division of the Supreme Court. There have thus been a wide range of laudable efforts to modernise and streamline the regulatory framework for investment. Nevertheless this framework is still dispersed over various legal and regulatory instruments, and sectoral regulations are administered by distinct public agencies. A number of recommendations can therefore be made to further improve and clarify the investment policy framework.

The quality of investment policies directly influences the decisions of all investors, be they small or large, domestic or foreign. Property protection and non-discrimination are investment policy principles that underpin efforts to create a sound investment environment for all. Policy coherence has the strongest impact on the investment environment and standards for investment protection and openness must be of wide applicability to international as well as domestic investors – including small- and medium-sized enterprises (SMEs). Transparency is another key principle for fostering a favourable environment for investment. Transparency reduces uncertainty and risk for investors as well as the transaction costs associated with making an investment, and facilitates public-private dialogue. Over the last decade, Mauritius has undertaken multiple reform measures to improve its business climate and to create the most favourable regulatory environment for the private sector.

2.1. Legislative and regulatory framework for investment in Mauritius

Enabling legislation for private investment emerged in 2000 and has gained momentum since 2006

Over the past decade, Mauritius has built a safe regulatory environment, and the country has prided itself as a business-friendly jurisdiction on the trade corridor to Asia and Africa. Mauritius has a modern and flexible commercial and company legislation that was strengthened through regulatory initiatives and efficient implementation of measures and policies by government. Reform efforts have paid off and Mauritius is now recognised by international observers as a well-suited jurisdiction for setting up investment vehicles to structure cross-border investments. Mauritius is ranked 54th out of 144 countries in the 2011-12 Global Competitiveness Report, second country in the region after South Africa. The report highlights the country's strong and transparent institutions and the sophistication of its regulatory framework for business. Mauritius features in the top twenty countries in the 2013 *Doing Business* Report for the protection of investors, the strongest performer in the region. Such a favourable regulatory framework has allowed Mauritius to attract more FDI during the past decade than it had done over the previous 40 years.

The regulatory framework governing investments is provided in different sector-specific legislations. Relevant legislations include, among others, the **Investment Promotion Act**, the **Tourism Authority Act**, the **Financial Services**

Act, **Securities Act**, and the **Non Citizens (Property Restriction) Act**. Mauritius has a sophisticated legal infrastructure for business activities and does not have an all-encompassing investment law.

In 2000, government, with the support of private sector, enacted the **Investment Promotion Act (IPA)** whose objective, as set out in the preamble, was not only to make better provisions for the promotion and facilitation of investments in Mauritius, but also to streamline the legal framework for investment. Established through this act, the Mauritius Board of Investment (BOI, see Chapter 3) notably acts as a focal point for voicing investors' views on improving business related policies when they are being developed and revised.

In 2001, the **Companies Act 2001**, which provides for several forms of business structures and facilities, underwent a major revision from its 1984 version. The amended version was specifically tailored to businesses willing to use Mauritius as a hub for their international activities. The act is largely based on the New Zealand Company Act, which is widely recognised as providing a model of liberal and efficient regulatory framework for businesses. It is a forward-looking piece of legislation and seems to have successfully achieved its goal of providing an investor-friendly and a flexible regulatory framework. It strongly illustrates Mauritius' commitment to establish itself as a modern offshore (or "Global Business") jurisdiction and provides specific business structures to encourage and facilitate investment activities through the local stock exchange.

In addition to this enabling regime for companies, the parliament has planned to review and modernise the legal framework regulating the co-operative sector in order to enable co-operatives to become a robust alternative way of doing business.

Following the update of the Companies Act, the Parliament enacted the **Financial Services Development Act 2001** (since replaced by Financial Services Act 2007), to regulate the non-banking financial services sector. The 2001 and 2007 Acts clearly separate regulatory activities and promotional activities and therefore provide for a regulatory authority, the Financial Services Commission (FSC), responsible for the administration of all legislation governing financial services, and for the establishment of a Financial Services Promotion Agency. The FSC has supervising powers and issues rules and guidelines for the conduct of non-banking financial businesses. The FSC also issues licenses and may grant GBC1 and GBC2 to applying offshore companies (see Chapter 3). Following consultations among the Ministry of Finance and Economic Development (MOFED), FSC, the Stock Exchange of Mauritius, the Central Depository and Settlement Company and other stakeholders of the industry in the context of preparing the US Bilateral Investment Treaty, most recently the FSC has repealed the Stock Exchange

Box 2.1. **Salient features of the 2001 Companies Act**

The Companies Act provides for several types of companies and contains regulations governing their incorporation. In addition to domestic companies, two types of offshore companies have been specifically created to provide international investors with modern vehicles to invest in and from Mauritius: **Corporations holding a Global Business License Category 1** (GBC1) and **Corporations holding a Global Business License Category 2** (GBC2). Investment incentives provided to these companies are listed in Chapter 3.

A **GBC1** is tax resident in Mauritius and can therefore benefit from the provisions of Mauritius DTAAs and is liable to tax under Mauritian laws. It is most often used as a vehicle for investing from Mauritius into countries with which Mauritius has ratified a double tax treaty. A GBC1 can carry out any type of business activities, including those involving capital raising from the public. A GBC1 can be established by incorporation and by having its central control and management in Mauritius. Any corporate body, trust or partnership, including limited partnerships, may apply for a Global Business License.

As for **GBC2**, it is considered as a non Mauritian resident only for tax purposes. Therefore, it cannot benefit from Mauritius' DTAAs network benefits. A GBC2 can conduct any type of business activity except for banking and financial services, dealing with a collective investment fund or scheme, providing directorship and secretarial services or other services to corporations, and providing trusteeship services. GBC2 is the preferred type of structure for companies engaged in international trade activities. Any person wishing to conduct global business requires a license from the Financial Services Commission, which is the regulatory authority for all non-banking financial services and global business.

The Act also innovated in permitting the incorporation of one-person companies, Limited Life Companies, and hybrid companies, both limited by shares and by guarantees. It has also introduced the concept of dormant companies, which permits companies that have no recent significant accounting transactions to be subject to lowered fees if they declare themselves to be dormant by passing a special resolution which must be filed with the Registrar of Companies.

As for foreign limited-liability companies, they must locally register a branch within one month of their establishment in Mauritius with no minimum capital requirement. If the company invests a capital exceeding USD 10 000 000, the investment is considered a "qualifying investment" under the Investment Promotion Act, and the foreign company must then apply to the Board of Investment for an Investment Certificate.

Under the act, all companies, be they domestic or foreign, must register with the Registrar of Companies before their incorporation can be lodged. Information on forms and registration of companies is available online. Once the incorporation process is completed, companies must register their business activities with the BOI to be then entitled to apply for occupation permit, when necessary.

(Foreign Investment) Rules 1994 and replaced these with the **Securities (Investment by Foreign Investors) Rules 2013** (see below).

Another milestone in the economic reform process was the promulgation of the **Business Facilitation (Miscellaneous Provisions) Act 2006**, which aimed at eliminating bureaucratic obstacles to start a business and eliminating trade licenses (see Chapter 3). The new legal framework set out in the act allows business to start operating on the basis of self-adherence to the guidelines, with an *ex post* control exercised by competent authorities. According to the Budget Speech 2013, the Business Facilitation Act is expected to be amended in order to reflect a more holistic approach to investment facilitation and to remove bottlenecks to investment in Mauritius. In addition to the Business Facilitation Act, the Companies Act has been supplemented by securities and insolvency legislation through the **Securities Act 2005**, the **Insolvency Act 2009**, which gives companies greater flexibility to restructure, the **Finance (Miscellaneous Provisions) Act 2009**, and the **Economic and Financial Measures (Miscellaneous Provisions) Act No. 20 of 2011**. The latter amendment was aimed to provide for company licensing by the Financial Reporting Council (FRC), which has been established under the Financial Reporting Act. As announced in the Budget Speech 2013, Mauritius will also introduce a Limited Liability Partnership (LLP) legislation that is expected to encourage attract high value-added services (such as tax advisors, accountancy practices, law and audit firms) to set up base locally. The future LLP structure should allow more international service providers to serve the local and regional markets by limiting the liabilities and exposures of partners of these professional firms.

Overall, the investment regime is considered transparent and regulatory information is easily accessible by stakeholders. Relevant laws and regulations are readily available to foreign investors on the BOI website. Mauritius is held up in the international community as a model of compliance with investment policy international best practices and performs well in terms of transparency of its investment rules. However, in the absence of an overarching investment law, the national regulatory framework described above is dispersed across diverse laws and regulations. Such a dispersion of provisions relevant to investors reduces predictability and clarity of the investment regime. Although strong protection standards are contained in the regulatory framework, it still lacks clarity in the sense that investors have to look into a number of distinct laws and regulations to be aware of the applicable legal regime. In addition, the government would be well advised not only to focus on promotion and facilitation, but also to clearly set out core principles of investor protection such as the guarantee of a free transfer of funds and a fair and equitable treatment. It should also set out a national treatment standard of protection, with a negative list of exceptions in an Annex.

The government has started addressing this issue in order to make the laws and the ways of accessing standards of protection more comprehensible. It is currently working on crafting an **all-encompassing, cross-sectoral national investment policy** to enable all parties – government and governmental agencies, the business community and foreign investors – to benefit from a single document for investing in Mauritius that would take the form of a **compendium of investment regulations**. Centralising all relevant regulations in a single body, be it under the form of a Code or a practical Guide for investors, is a welcome step towards greater coherence, transparency, openness and predictability. Gathering all provisions that pertain to foreign investors' activities would also have promotional benefits to attract prospective investors. Parallel with the current creation of a consolidated FDI policy document, and following India's example, the government could establish specific guidelines under which the FDI policy would be constantly reviewed and adjusted.

Principle of Non-Discrimination on Laws Relating to Investment

According to various international rankings, Mauritius is one of the world's most open economies to foreign ownership. The majority of economic sectors are open to foreign investment. In addition, all IPPAs signed by Mauritius contain a number of non-discriminatory treatment provisions (see Section 2.6). There is no restriction in Mauritius regarding transfer of capital and profits, and foreign investors have full access to local credit markets. No approval is required for the repatriation of profits, dividends, and capital gains earned by a foreign investor. In addition, Mauritius has suspended, in 1994, foreign exchange controls.

The government has no economic or industrial strategy that discriminates against foreign investors. A foreign investor in export-oriented manufacturing is permitted 100% equity, although the government does encourage local participation. Foreign participation may be limited to 50% in investments serving the domestic market. Foreign investors do not need approval to trade shares on the stock market, with some exceptions in the sugar sector. In March 2013, the Financial Services Commission developed the **Securities (Investment by Foreign Investors) Rules 2013** which came into force on 1 April 2013. These Rules require that prior written consent from the FSC is secured whenever a foreign investor makes an investment in a Mauritian sugar company (whereby the foreign holding of voting capital exceeds 15%). Securities exchanges are moreover required to notify FSC and all investment dealers whenever 10% or more of the voting capital of a Mauritian sugar company is being held by foreign investors. Whereas previously foreign investment for the purpose of obtaining legal or management control of a local sugar company was also entirely barred, the amended 2013 rules allow broader exemption of certain investors from these restrictions by FSC (if they are passive investors,

established only with the objective of spreading investment risk and managing assets for the benefit of shareholders and participants).

Under the 2000 Investment Promotion Act, which is aligned with the WTO's Agreement on Trade Related Investment Measures, foreigners apply for occupation (formerly work and residence) permits if the following conditions are met:

- For an investor: the proposed business activity should generate an annual turnover exceeding MUR 4 million (approx. USD 126 000) annually, with an initial investment of USD 100 000 or its equivalent in freely convertible foreign currency. If there is more than one investor in the same company applying for an Occupation Permit, the turnover criteria should apply in respect of each applicant (i.e. MUR 8 million for two applicants, MUR 12 million for three applicants, etc.).
- For a professional: the basic monthly salary should exceed MUR 45 000 (approx. USD 1 430), except for professionals in the ICT Sector where basic salary should exceed MUR 30 000 (USD 950) monthly. And
- For the self-employed: the annual income from the proposed business activity should exceed MUR 600 000 (approx. USD 19 000) with an initial investment of USD 35 000 or its equivalent in freely convertible foreign currency.

Some market segments, however, remain restricted for foreign investors. Such restrictions are not subject to any benchmark against those in neighbouring countries. Restrictions are either contained in the law or in administrative practices, in which case they are decided by relevant Ministries, depending on the sectors. It is worth noting that such restrictive sector-specific policies are not unusual, including in OECD countries. The main restrictions, screening requirements and threshold criteria applying to foreign investors are as follows:

- In **television broadcasting**, foreign capital in a company or body corporate must be less than 20%. A maximum of 20% of foreign national directors is allowed. The Independent Broadcasting Authority is responsible for the screening of applications for licenses.
- A certificate of authorisation from the Prime Minister's Office is required for non-citizens to acquire **real estate property** in Mauritius, or to acquire shares in a company that owns immoveable property in Mauritius. Such purchases must be financed with funds transferred from abroad through the banking system. Investment approvals are not issued for a limited period of time. However, investment approvals may contain a condition that the project has to be started within a set period of time, failing which the approval can lapse. However, approval is not required when property is acquired under a lease agreement not exceeding 20 years, or under the Real

Estate Development Scheme, or when the investor has obtained the approval of the BOI for business purposes investments.

- Approval from the Prime Minister is also required for investments in **banks** that hold immovable property in Mauritius.
- In the **legal services sector**, a foreign law firm can provide legal services only in relation to arbitral proceedings, mediation, conciliation and other forms of consensual dispute resolution, or in relation to proceedings before bodies other than courts, and in relation to foreign law or international law. In addition, the foreign law firm must be licensed in accordance with the Law Practitioners Act. However, the legal services market is currently being liberalised and enables foreign law firms to establish local offices or joint ventures alongside Mauritian lawyers under the Law Practitioners Act 1984 (last amended in 2008), which also allows Mauritian law firms, joint law ventures and foreign law firms to practice foreign law and international law in Mauritius.
- In the **fisheries sector,** licenses to operate a Mauritian fishing vessel can only be granted to vessels registered under the Merchant Shipping Act to Mauritian nationals or to bodies incorporated in Mauritius and having a place of business in Mauritius, or to maritime entities as defined in Section 2 of the Fisheries and Marine Resources Act 2007.
- In the **tourism sector**, several limitations apply to foreign investors (in addition to general requirements for both domestic and foreign investors to invest a minimum of MUR 10 million in pleasure craft operations). Foreign investment is restricted to a maximum equity participation of 30% in stand-alone diving centres. Tourist guide services are restricted to Mauritian nationals, except where the relevant language is not spoken by Mauritian nationals. Activities requiring low level of investment, such as beach hawking, are reserved to Mauritians only.

In addition, Box 2.2 lists reforms undertaken to modify restrictions for foreign participation in the financial sector – while some of these measures facilitate operations by foreign investors, others may have a mixed effect as they introduce new restrictions or requirements on foreign participation (often in the interest of stimulating more engagement by domestic companies in the sector).

Moreover, despite the absence of *de jure* restrictions, it is difficult to invest in some sectors such as electricity generation and distribution, waste management and port and airport management markets, due to their monopolistic structure and the significant presence of State-owned-enterprises in such sectors. Their dominant position in these sectors, as well as in market segments such as broadcasting telecommunications and software development represents a serious barrier to the entry of private investors (this issue is discussed further in the infrastructure chapter).

Box 2.2. **Reforms to modify restrictions on foreign participation in the financial sector**

The following steps have recently been taken in Mauritius to modify restrictions on participation by foreign institutions in the development of the financial sector. While some of these measures facilitate operations by foreign investors, others may have a mixed effect as they introduce new restrictions or requirements on foreign participation:

- In the **global business sector**, the government introduced S 71(6) in the Financial Services Act – whereby holder of a Global Business Licence 1 (GBL1) can deal to a certain extent with residents of Mauritius.
- For the **Insurance sector**, there are no restrictions. Foreign investors, however, need the prior approval of the Prime Minister's Office. Following the 2012 Budget Speech, the provision of the Insurance Regulations 2007 that would have allowed local assets to be insured with insurance companies not registered or licensed in Mauritius in 2013 has been repealed. This aims to give a boost to local insurance and encourage new insurance companies to serve the sector. Moreover, the Budget speech for 2013 announced that in order to offer added security to exporters, foreign insurance companies will be allowed to offer export credit insurance. Hence, as the law stands now, except for reinsurance contracts and contracts relating to export credit insurance, no person may enter into an insurance contract with an insurer not registered or licensed in Mauritius.
- The **Stock Exchange of Mauritius** (SEM) amended the Listing Rules to allow Global Business Collective Investment Schemes (CIS, as defined under the Securities Act; this includes closed-end funds, global schemes, professional CIS and expert funds). Prior to these amendments, the Listing Rules catered only for investment companies, unit trusts and authorised mutual funds as these were the only legal forms of investment funds recognised under Mauritian law.
- The **Law Practitioners Act 1984** has been amended since 2008 to provide for the setting up and functioning of law firms, the status of a legal consultant, the registration of law firms, foreign law firms, joint law ventures and foreign lawyers, the framework for the regulation of the practice of foreign law and international law in Mauritius.
- As concerns **Capital Markets**, the Stock Exchange (Investment by Foreign Investors) Rules 1994 were detailed under the repealed Stock Exchange Act 1988. Rule 3(1)(a) of the Rules provides that: "no foreign investor shall, without the prior written consent of the commission, make any investment in securities for the purpose of or resulting in, the exercise of legal or management control of a Mauritian company".

Domestic regulations also contain some requirements pertaining to companies' **performances and key personnel**. Such requirements appear not to be reflected in Mauritius' bilateral investment treaties, which most often do not contain "key personnel and specific performances requirements clauses". In particular:

- A company incorporated in Mauritius must have at least one resident director. For companies holding a GBC 1, the requirement is to have at least two resident directors.
- Performance requirement: in the Freeport sector where Freeport operators are required to export at least 50% of their turnover value.

In 2008, the investment climate also became temporarily more restrictive for foreign workers – although foreign investors were not penalised. This was in reaction to the economic crisis, and in the aim of shoring up domestic resilience: the Additional Stimulus Package of December 2008 for instance states that for all public sector construction projects, a higher preference margin would be given to local and foreign companies employing Mauritian workers. The Ministry of Labour established guidelines in this regard and closely monitored the situation, and the private sector was urged to adopt a similar approach over the following two years. These preferences in public procurement have been renewed more recently, in particular to create more space for domestic SMEs in procurement: in 2013, the Public Procurement Act was being amended to grant a 15% preference margin to companies employing at least 80% local manpower, when competing for public works contracts.

2.2. Steps taken to improve processes of land ownership registration and other forms of property

Mauritius has limited land resources and the authorities are under great pressure to allocate land for a variety of uses. Issues relating to land ownership are crucial in particular with regards to the important share of property development, real estate and construction in total GDP. Before the recent implementation of legal reform plans, the land administration system was reported to be rather inefficient. Over the past years, the government has made continuous modernisation efforts towards a sound and clear registration system of immovable assets. Clear property and titling system is also crucial as it facilitates access to credit, because land rights are the main form of collateral pledged by firms that is accepted by banks. The recent reforms were therefore needed for business development purposes and to further improve the already well-advanced credit market in Mauritius. Partly thanks to these reforms, the legal framework for immovable property rights has been much improved – in fact, at the 24th Congress of African Notaries (CAAF-UINL, held in Cameroun in 2012) it was decided that legislation relating to immovable

property would be adopted by the 18 CAAF-UINL member countries, taking Mauritian legislation as a model.

Two institutions are in charge of land administration: **The Ministry of Housing and Land**, which has been responsible for land administration since independence and whose activities focus on the management of State Lands; and **the Registrar-General Department** (RGD), which operates under the aegis of MOFED. The RGD does not operate as a regulatory body but solely as a revenue collection and registration administration. Organisational means for the implementation of various policies on land taxation, valuation, registration and development remain fragmented and would benefit from greater co-ordination.

According to the 2012-13 Global Competitiveness Report, the country benefits from clear property right principles. In addition, the purchase, acquisition or holding of property by foreigners is clearly laid down in guidelines that provide foreigners with a great degree of legal predictability. The Constitution of Mauritius protects the right of land owners and the right from deprivation of property. Guarantee of an ownership title means that an owner may not be deprived of his ownership rights other than by a court decision. The Mauritian property law is based on a civil law system, with some elements borrowed from British law: land ownership and real estate assets transfer to the buyer at the moment there is an agreement on the property and price – vide Article 1583 of the Civil Code. Sale of immovable property is carried out by means of an "acte authentique", which must be notarised and registered in order to be binding to third parties. By virtue of Section 1 of the transcription and Mortgage Act, registration only operates to preserve third parties' rights. Moreover, besides entering into a purchase agreement, registration with the Registrar General is indispensable for acquisition of title. Ownership, therefore, is created by way of registration with the Registrar General, and extinguishes upon the person in title being removed from the Register. There is no dedicated Court that specifically deals with land related disputes.

Access to land for foreigners has been liberalised but remains subject to specific procedures

Access to land for foreigners remains rather complex and restricted. **The Non-Citizens (Property Restriction) Act** of 1975 covers the purchase, acquisition or holding of property by non-citizens, as well as disposal of property by non-citizens. In order to hold, purchase or acquire an immovable property in Mauritius, a non-citizen needs to obtain the approval to acquire the property from the Prime Minister's Office. Clear guidelines are readily available to investors wishing to acquire real estate property for business purposes: the application should include the precise location of the property, the nature of the interest to be purchased or otherwise acquired or held, and the reasons for

Box 2.3. **Statutes relating to property and process for sale and purchase in Mauritius**

Real estate relations are governed by laws pertaining to various branches – civil, land and planning. The statutes relating to property include:

- State Lands Act.
- Non-Citizens (Property Restriction) Act.
- Pas Géométriques Act.
- State Land (Alienation) Act.
- Landlord and Tenants Act.
- Planning and Development Act.
- Land Acquisition Act.
- Registration Duty Act.
- Land (Duties and Taxes) Act.
- Transcription and Mortgage Act.
- Cadastral Survey Act 2011.

which the application is made. Authorisation is not automatic if the concerned activity comes into competition with Mauritian-owned companies. With the promulgation of the Business Facilitation (Miscellaneous Provisions) Act 2006, where an immovable property is acquired by a non-citizen for business purposes, an investor who is registered with the Board of Investment (BOI) requires an authorisation from the BOI. An investor is a person who is carrying out or who intends to carry out an economic activity generating an annual turnover exceeding MUR 4 million in Mauritius and has invested an initial amount of USD 100 000. An investor cannot purchase any immovable property in his/her own name. An immovable property or part of a building can only be registered and transcribed in the name of a company incorporated in Mauritius under the Companies Act 2001. Where property is purchased or otherwise acquired or held in contravention of the act (that is, absent Ministerial authorisation via a Certificate, and when the non-citizen does not qualify from exemption from the certificate), or if the property acquisition contravenes a condition imposed in a certificate, the Curator is empowered to take possession of the property and cause it to be sold in accordance with the Sale of immovable Property Act.

Transfer of immovable property among foreigners requires prior approval from Prime Minister's Office. Approvals of land conversion and of environment impact assessment need to be sought from cabinet. If the approval for land conversion or morcellement is not obtained, the aggrieved investor has no recourse to an appeal tribunal. Once land is acquired or leased, enterprises

then need to apply for a Building and Land Use permit (BLP), for permission to carry out proposed development or building. Applications can be made online or at the planning department of any local authority. Enterprises will also have to pay an appropriate trade fee with the local authority (Municipality or District council) concerned, prior to starting operations.

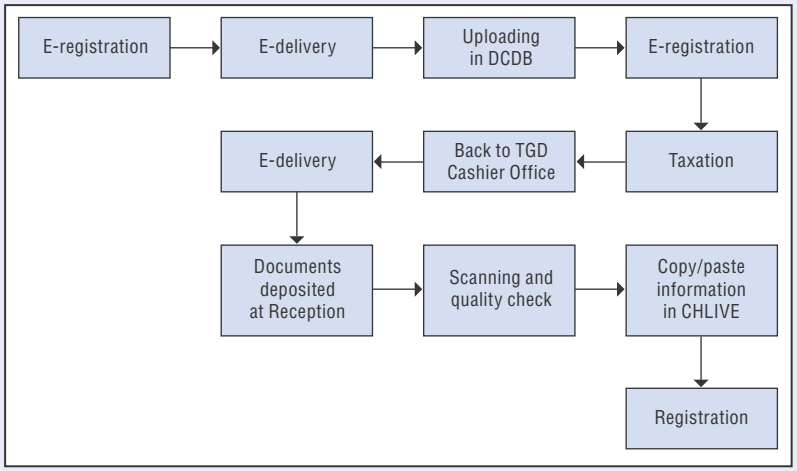
The Non-Citizens (Property Restriction) Act has since been amended several times. The current Act states that no certificate shall be required for: a non-citizen holding property in virtue of a lease agreement or tenancy agreement for a term not exceeding 20 years; or for acquisitions made under the Integrated Resort Scheme once the company holds an investment certificate in respect of a project as prescribed under the Investment Promotion Act. When the Integrated Resort Scheme was introduced in 2002, express provisions were made for the non-application of the act to allow the acquisition of luxury residences by high net worth foreigners. In 2006, in line with the stated objective of government to open the economy additional flexibility was introduced by the Business Facilitation Act 2006 to allow foreigners to acquire property in Mauritius for business purposes by applying directly through the Board of Investment.

Also now exempt are investor purchases of immovable property for business purposes, upon production of a certificate from the Board of Investment. When foreign companies intend to hold land for more than 20 years, they must obtain prior approval of BOI. Publicly held land is rarely sold but can be leased through public auction and for a maximum of 99 years. When public leases are granted for industrial or commercial purposes, their maximum duration is limited to 60 years. Further liberalisation of access to the land market should be implemented in the course of the year 2013. **The Business Facilitation Act** 2006 is expected to be amended to enable Permanent Residence holders to purchase an apartment, which should attract more foreign direct investment and boost the construction industry while making more economic use of residential land. As announced in the 2012 Budget, the "Code Civil Mauricien" will also be amended to allow for appropriate legal framework which would govern leasing of both immovable and movable property, especially finance leasing. This aims to provide more comfort to leasing companies and entice international leasing companies to enter the Mauritian market.

The government has initiated programmes to modernise land registration and administration

Mauritius has made one of the most important improvements in the ease of registering property, improving its ranking from 66th to 60th in the 2013 Doing Business Report (Box 2.4 highlights remaining processes for registration of land ownership). The Registrar General works closely with Notaries Public to ensure effective and secure transfer of properties. In 2005,

Box 2.4. **Current process for registration of land ownership**



Source: Registrar General Department, Ministry of Finance and Economic Development

duplicities in operations of the Registrar General were removed, a one stop shop was created, and a **Performance Management System** (PMS) was introduced. In 2007, an **Electronic Search Room**, equipped with 50 stations, was set up to facilitate search on land transactions by members of the public. Information on titles is now available within ten minutes from the time the title number is allocated to a deed, compared to 36 hours when recorded in the paper-based Register. In 2008, a project for the scanning of paper-based repertories was implemented. This project has facilitated search and eliminated tampering. As a result, a lower number of tampering cases have been reported to the police. In 2010, the scanned images were linked to the electronic repertory. This second phase of the project, which is due to be completed by December 2012, has completely eliminated search on paper.

A milestone in this reform process was the introduction of time limits at the land registry and the computerisation of procedures through the implementation of an electronic information management system at the General Department of the Registrar. This has drastically reduced, over the past year, the time required for registering transfer. Moreover, the current reform is expected to reduce the number of land disputes for both boundary and ownership in courts. The reformed land record system should also improve efficiency in collecting land and property taxes.

As announced in the 2012 budget, government has invested in a new system to cut time for registering property, which is operational since early in

the year. The **Land Administration, Valuation and Information Management System Project** (known as LAVIMS) is currently being implemented under the joint authority of the Ministry of Housing and Lands and MOFED to computerise and streamline land administration and management procedures. LAVIMS – which integrates the Land Registry of the Registrar general Department, the Valuation Department, and the Digital Cadastre – is composed of the following four sub-projects: development of the cadastre, implementation of a digital Deeds Management System, Valuation of properties and Information Management. Through the LAVIMS project, the Government of Mauritius aims to enhance the efficiency and security of the existing system in order to deter and prevent fraudulent practices, foster professional responsibility and duty of care, support a secure registration system and ensure confidence in Mauritius Land Transaction system. This is expected to efficiently address a serious problem of fraudulent practices in land transactions. All records and archives are now kept electronically, resulting in the elimination of a huge paper-based archive. Request for valuation of property is made electronically and reports from the Valuation Department are received electronically. Letters to be issued to parties are generated automatically. The cadastre is now fully digitalised and contains an index of land parcels based on existing survey plans and aerial photography.

With the effective implementation of the Deed Component of LAVIMS project since November 2011 and the creation of a computerised, parcel-based deed registration system, the RGD can now register a property within 48 hours instead of 15 days and the processes have been considerably streamlined. In addition, the creation of a Parcel Identification Number (PIN) has already proved to further secure the land market. The 2014 Budget announces that unique PINs will be distributed to all landowners in the course of the year, so as to facilitate real estate transactions through the Mauritius e-Registry Project. Such modernisation efforts were widely lauded by international observers, as reflected in the 2013 and 2014 *Doing Business* Reports. The Valuation component has encountered difficulties in identifying market value of residential and commercial properties, and its full completion has thus been delayed. In parallel with the implementation of the LAVIMS project, the Cadastral Survey Act 2011 has been enacted to update the legal framework for the maintenance of the digital cadastre and to set up new cadastral survey regulations.

Yet, even with the implementation of LAVIMS, RGD is still providing services using semi-automated systems that are outdated and are prone to delays and errors. In order to overcome such remaining obstacles, RGD has launched the **Mauritius eRegistry Project (MeRP)** to computerise the system and to transform RGD from a Service to an e-Service organisation. In this context, the RGD plans to introduce online services such as: eSubmission, eTaxation, ePayment, eDelivery for movable and immovable properties and to provide information to stakeholders and government agencies online. The

objective pursued through the implementation of the MeRP in year 2013 is to shorten the time taken to register property from 48 hours to 2-3 hours for immovables, and from 2 hours to 15 minutes for a movable property. This will be achieved by replacing the current sequential series of steps (taxation, payment, registration and delivery) to a parallel stepped process, by introducing a fully integrated online registration system. From 2013, valuation of property will be undertaken upfront in the registration process, instead of being done at a post-transaction stage. This is expected to eliminate revenue arrears, collect government revenue upfront, and give greater certainty to stakeholders and members of the public in land transactions.

Land use planning in Mauritius

The Town and Country Planning Division of the Ministry of Housing and Lands is responsible for land use planning, including policy formulation in respect to land development. The Ministry manages lands belonging to the State; it has powers under various legislations (e.g. the Pas Géométriques Act and the State Lands Act) to grant leases over such State lands to individuals. Mauritius has a "plan-led" system of development control. Development plans have two purposes: to describe the intended use of land in an area, and to provide an objective basis for the consideration of planning applications. There are two types of plans in Mauritius: the National Development Strategy, a 20-year framework which provides a strategic framework for national land use planning; and local plans known as Outline Planning Schemes, which are regional plans for a Municipal Council or District Council area. First elaborated in 1994 and since renewed in 2005, the National Development Strategy is designed to encourage economic growth in the conurbation (the urban areas), the countryside and the coast, while maintaining and enhancing the quality of the environment and striving for a more sustainable pattern of development.

Local authorities are empowered by the **Town and Country Planning Act**, 1954, to grant planning permits; a permit is required for the development of land and development is defined as involving building operations, change in the use of land or buildings, or the subdivision of land. The law also makes provision for an administrative appeal against the decisions of the local authorities – notably where development permits are refused or where conditions attached therein are considered as being unacceptable. A new **Planning and Development Act** was passed in 2004, to replace the 1954 Act. As per this act, the current National Development Strategy is active as of 22 June 2005. It provides a spatial framework for public sector investment programmes, including for housing, various productive sectors (agriculture, tourism, etc.), and infrastructure (transport and physical infrastructure, including water and energy utilities). The 2006 Business Facilitation Act states that authority for execution and enforcement of the Building Act and Town

and Country Planning Act shall be the local authority of the respective town or district where the relevant building, structure or tenement is to be found or where the land is to be developed. It moreover requires every person who intends to commence construction of a building or carry out development of land to apply to the local authority for a Building and Land Use Permit, in accordance with the guidelines issues under the Building Act, the Town and Country Planning Act, and the Planning and Development Act 2004. The Business Facilitation Act sets a two-week limit for the subsequent issuance of permits to large companies, once the applications have been approved at central level by the Permits and Business Monitoring Committee. For SMEs this limit is only three days long.

More flexibility to land management introduced with the Additional Stimulus Package

Several references to land allocation and use frameworks are made by the Additional Stimulus Package, announced by government in 2008 to complement the earlier stimulus package in shoring up the economy's resilience to the economic crisis. The package recognised that certain aspects of the land allocation framework in Mauritius were insufficiently flexible for the needs of stimulating particular economic sectors. Proposed modifications included:

- improving the process for the acquisition of land required for public infrastructure projects, particularly roads: instead of waiting for final project approval to acquire land, the government would henceforth begin the process as soon as a project is accepted in the PSIP, so as to reduce implementation delays;
- in the sugar industry, the system of land conversion did not allow for relocation of projects on different sites than initially approved; although the process for obtaining the land conversion permit would remain unchanged, applications for relocation of new projects would be entertained;
- also for the sugar industry, it was recognised that the current system of land valuation for conversion purposes was time consuming and imposed an undue administrative burden by requiring the valuation of each and every plot; the government would henceforth introduce a simple, transparent and rule-based method through the determination of an average net realisable value;
- in the construction sector, the requirement that land should have been purchased 5 years in advance before being used for development under the Real Estate Scheme (RES) was removed; and
- also for construction, as an exceptional measure the land transfer tax and registration duty were suspended for the period 1 January 2009 to 31 December 2010 for approved projects undertaken by developers registered with the MRA in respect of land for a development project; the land transfer

tax would also be allowed as a deduction for income tax purposes (since 2012, this land transfer tax has in fact been abolished in the case of sale by financial institutions when relating to debt recovery; and the 2014 Budget announces the streamlining of this tax to a single rate for all entities, at 5% instead of 5-10% previously).

In 1997, government published its Vision 2020, which – as stated by the Government Programme 2012-15 for Moving the Nation Forward – the country now needs to update so as to provide an overarching view of its development plans for the decades to come. Government notably proposes to set up a National Strategic Transformation Commission which will make recommendations on optimal use of resources, inclusive growth, sustainable development, urban planning, land zoning as well as on promotion of new sectors. This may have implication for sector land use in Mauritius. More recently, the Inter-Ministerial Committee on business facilitation (IMC, set up in August 2012) has also taken land management into its agenda – forthcoming initiatives for consideration by the IMC include developing a Land Conversion Permit, and enquiring on the allocation and management of State land in the Ebène province (for which a taskforce was set up in February 2013). This investigation may create precedents and guidance for land management in other provinces as well.

2.3. Protection of Intellectual Property Rights

Mauritius has enacted and updated a number of IPR related laws to meet international standards

Sound Intellectual Property Rights (IPRs) legislations are crucial for the development of an innovation-led industrial base in Mauritius and for FDI growth, as this will in turn act as a channel of technology transfer. Mauritius already has a long standing tradition of legal protection of patents and trademarks, and the government strengthened further its efforts and sent a strong positive signal to the business community by translating the provisions of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement into domestic laws to cope with its WTO obligations. The capacity to tap intellectual property is now widely recognised in Mauritius as a determining factor in the development of the economy, especially given the strategic role envisaged for several new knowledge-based industries and sectors that were identified by BOI, in particular biotechnology, medical tourism, renewable energy, and biomedical research. However, in order for Mauritius to diversify successfully and to become a knowledge-based economy and business hub for high value-added technologies, its stance in enforcing IPRs and combating piracy still needs to be further strengthened.

The main laws governing the protection of Intellectual Property Rights in Mauritius are the following:

- **The Patents, Industrial Designs and Trademarks Act 2002** (PIDT Act, supplemented by the PIDT Regulations 2004 and Amended Regulations No. 1 and 2 of 2011). This act clearly sets out all procedures and provisions for registering intellectual property, including with regards to the Unity of Invention, Right of Priority, and change of ownership. In line with the provisions of the TRIPs Agreement, it provides for the establishment of the Industrial Property Office and the Industrial Property Tribunal, with a view to curb the production of counterfeit products.
- **The Copyright Act 1997**, which covers the protection of artistic, literary and scientific works. The act created the Mauritius Society of Authors, which protects interests of copyrights' owners and licensees of works.
- **The Protection Against Unfair Practices (Industrial Property Rights) Act 2002** (PAUP Act) protects against unfair commercial and industrial practices.
- **The Geographical Indications Act 2002** protects against practices misleading the public in suggesting that a product originates from a geographical area differing from its actual place of origin.
- **The Layout Designs (Topographies) of Integrated Circuits Act 2002** protects original and recent layout designs of integrated circuits.

However, both the Geographical Indications Act 2002 and the Layout Designs (Topographies) of Integrated Circuits Act 2002 are still pending ratification.

In order to give full efficiency to the updated and amended legal framework, several public outreach campaigns were launched over the past few years to sensitise the business community and the public on the need to protect and enforce IPRs and to tackle counterfeiting. In parallel with these awareness-raising activities, the Mauritius Chamber of Commerce and Industry (MCCI) provides businesses with detailed legal advice on intellectual property rights (as well as on company law, laws related to the business environment, and to fair competition and trading practices) in Mauritius. Moreover, the Ministry of Arts and Culture operates a **Copyright Desk** responsible for information to the public.

Mauritius is also a party to all of the most important international conventions on IPRs. Among other international commitments related to IPR protection, such as the Geneva Universal Copyright Convention, it has acceded to the WIPO Convention and the Paris Convention for the Protection of Industrial Property in 1976. Since 1989, the country is also bound by the provisions of the Berne Convention for the Protection of Literary and Artistic Works. As a WIPO Member State, Mauritius has also signed the recently-

concluded Beijing Treaty on Audio-visual Performances, which is expected, after its entry into force, to strengthen the protection provided to performers in the audio-visual industry. In addition, Mauritius is a party to the Cultural Charter for Africa, which puts strong emphasis on protection of African intellectual goods and rights, since 1990. In addition, the promotion and protection of IPRs are key pillars of the US – Mauritius trade and Investment Framework Agreement (TIFA).

Government has initiated action for the review of the current IPR framework

In order to create an enabling environment for the efficient and effective use of the intellectual property system as a tool for the socio-economic development of the country, the government has started reviewing the current intellectual property framework. Since 2009, it has worked towards the adoption of an **Intellectual Property Development Plan (IPDP)** in co-operation with WIPO. The IPDP aims at ensuring that all institutions involved in IP enforcement, IP users and generators have the technical capacity and know-how to use IP as a tool to promote research, innovation and investment growth. One of the main recommendations of the IPDPD is to put in place a comprehensive national IP policy and to establish a national policy forum involving stakeholders from both the public and the private sectors. Another suggestion that has since been implemented is the establishment of a co-ordinating mechanism through an IP Council that will bring together all the various institutions and stakeholders dealing with IP.

IPDP also plans to revise the existing laws on intellectual property in order to better address the needs of all stakeholders. Trademarks, Patents, Industrial Design, and geographical Indications and Integrated Circuits Acts should soon be merged into one comprehensive piece of legislation. In addition, the consolidation of the laws is expected to help the country to meet its international requirements. IPR laws are notably being consolidated, in line with its WTO obligations, to promote innovative practices and inventions. Along with most African countries, Mauritius is notably a sponsor of the "W52" group in WTO negotiations – which proposes "modalities" in negotiations on geographical indications, and "disclosure" by patent applicants of the origin of genetic resources and traditional knowledge used in their inventions. Mauritius has also adopted a **Data Protection Act**, which safeguards the processing of personal data to build confidence for local and foreign investors in an age of information and communication. Over 2012-15, the Data Protection Act will be amended to incorporate new international data protection principles and attract further investment in the ICT sector through a free and secure flow of personal data between investors and local agents.

Institutional capacity for enforcing IPR laws in Mauritius needs further improvement

Mauritius has enacted various legislations for the enforcement of IPRs in order to send a positive signal to prospective investors and to the overall international business community. However, the effective protection of IP remains one of the areas where Mauritius obtains some of its weakest results in international rankings. Further efforts in terms of capacity building must be undertaken to strengthen supervising and enforcing institutions.

The institutional framework for IPR enforcement and administration is made of several bodies and the enforcement mechanisms are thus scattered among various institutions:

- The **Industrial Property Office** (IPO) under MoFARIIT, was set up by the PIDTA ACT 2002. The IPO is administered by a Controller mandated to examine patent and trademark applications, and to grant the patents and register the marks, industrial design, geographical indication or Layout Designs. The Controller has investigative powers and can apply to a Judge for a right to search premises, either on his own initiative or upon a complaint made. He is also responsible for the compliance of the policies and procedures of the office with international standards and guidelines concerning industrial property.
- Meanwhile, the **Mauritius Society of Authors**, created by virtue of the Copyrights Act, is in charge of defending and representing copyright owners and exclusive licensees, grants authorisation for the use of protected works and is responsible for the collection and distribution of royalties.
- Under the aegis of the Police, the **Anti-Piracy Unit**, set up in 2001, is responsible for investigating cases of breaches of copyrights and trademarks. Over the last decade, the unit has continuously combated and seized counterfeit materials, as frequently reported by the press.
- The **Customs Department of the Mauritius Revenue Authority** can intercept the entry of goods suspected of being counterfeits, provided that the trademark owner has undertaken prior registration procedures. Action can be taken against IPR infringement only in cases where the IPR owner has an official representation in the Mauritian jurisdiction.
- PIDTA also established an **Industrial Property Tribunal**, which rules on cases such as rejected applications for registration. The tribunal, among various functions, may also hear appeals of decisions of the Controller and give binding interpretation of provisions of any IPR law. Under Section 51 of the act, any person who knowingly performs any act in breach of the rights conferred by the act shall commit an offence and shall, on conviction, be liable to a fine not exceeding MUR 250 000 and imprisonment for a term not exceeding five years.

Despite the establishment of such a comprehensive supervising and enforcing framework, the IP infrastructure could be further strengthened in order to improve Mauritius' record on IP enforcement. This need is acknowledged by the Mauritius Chamber of Commerce itself as well as by the International Trade Division of MoFARIIT. Views within the government on the need to address these challenges by establishing a single, all-encompassing IP Office appear to be split. Although the Ministry of Arts and Culture appears to be aware of the need to have a more coherent approach and is considering the establishment of an advisory council which would take on board all IP sectors, its view is that the specificity of each IPR sub-sector makes the setting-up of a single agency in charge of all IP issues undesirable, as it would supposedly not be likely to increase efficiency and coherence of the national IP framework.

It seems, however, that another approach has been favoured by the government, which has given due consideration to the recommendation towards the establishment of an **all-encompassing IP institution** that was issued in the context of the IPDP. The State Law Office is therefore currently finalising a bill that would establish an **Intellectual Property Council** with the responsibility of co-ordinating across government agencies, between government and the private sector and with international and regional bodies all matters relating to IP. The IP Council would involve all key stakeholders both from ministries and the private sector, under the Prime Minister's Office, in order to ensure a co-ordinated approach to IP management. In addition, in the context of the ongoing IP policy review, consideration is being given to the creation of an empowered **Mauritius IP Office (MIPO)** to better harness the potential of IPR as a development tool. MIPO would encompass both the regulatory and enforcement functions and therefore ensure a more co-ordinated and coherent approach. It would advise and administer IP legislation, be responsible for IP registration and work with economic agencies and the IP community to formulate and review IP policies and practices. For example, MIPO could be responsible for leading Free Trade Agreements negotiations on IP issues. In addition, MIPO is expected to carry out an important sensitisation role on the use of IP for the economic development of the country. The government could indeed usefully consider undertaking institutional arrangements to enhance the regulatory and operational functions involved in the governance of such a sensitive sector. A holistic approach across all institutions which participate in the administration of IPRs is necessary in order to achieve a streamlined and integrated management system. It can be best achieved through the establishment of an IP umbrella institution, for example under the proposed form of a supervising IP Council coupled with an empowered IP Office.

2.4. Expropriation procedures

Mauritius' Constitution provides strong protection against unfair expropriation or nationalisation

Protection against expropriation without fair compensation is one of the most crucial rights of investors and must be granted in the regulatory framework for investment through provisions providing for transparent and predictable procedures. Mauritius appears to provide high protection against arbitrary or uncompensated dispossession of their property, while maintaining sufficient policy space to regulate in the policy space. There are clear legal criteria that distinguish between the legitimate right of the State to regulate in the public interest and the legitimate right of investors to have their property rights duly protected. Moreover, expropriation appears to be unlikely in Mauritius: there is no known expropriation dispute between the government of Mauritius and an international investor and the government has never nationalised an industry.

The **Constitution of Mauritius** contains strong and clear safeguards against arbitrary expropriation of assets. Article 3 of the Constitution enshrines a general principle of non-discriminatory right to protection from deprivation of property without compensation. More specifically, Article 8 of the Constitution provides for a remarkably strong and clear protection against expropriation. It states that "no property of any description shall be compulsory taken possession of, and no interest on or right over property of any description shall be compulsory acquired", except for well-defined and limited cases where expropriation with compensation can legally occur. The scope of the constitutional safeguard extends from nationalisations to regulatory takings. Moreover, the Article contains very clear and detailed provisions on what constitutes a taking for public purposes: "The taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development or utilisation of any property in such a manner as to promote the public benefit or the social and economic well-being of the people of Mauritius".

In addition to these conditions relating to the purposes of the expropriation, there must be "reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property" for the compulsory taking of property with adequate compensation to be legal. Where an expropriation is conducted for public purposes, compensation mechanisms are governed by the **Constitution** and by the **Compulsory Land Acquisition Act**. The decision to compulsorily acquire property by government can either be the subject of an appeal before or of a judicial review by the Supreme Court. By virtue of Article 8 of the constitution, the Supreme Court is competent for the determination of the investor's right or interest, "the

legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining payment of that compensation". Where there is a dispute in relation to the quantum of compensation, the minister must, within 28 days of the claim, refer the matter to a board of assessment for enquiry and determination. A board of assessment typically consists of a judicial officer assisted by two assessors who have expertise in land valuation. Lastly, Article 8 of the constitution grants non-residents who have received compensation with a right to a free and timely transfer of funds received as compensation. There is no known dispute case related to expropriation in Mauritius.

An additional layer of protection from unfair expropriation is provided through Mauritius' BITs

In addition, all Investment Promotion and Protection Agreements (IPPAs) concluded by Mauritius contain a provision protecting against unlawful expropriation, in line with the international customary law "**Hull Rule**" and granting a prompt, adequate and effective compensation for investors in case of expropriation. The guarantee against expropriation included in Mauritius' IPPAs extends to indirect expropriations, and is typically provided for in the following terms: "Investments […] shall not be nationalised, expropriated or subjected to measures having effects equivalent to nationalisation or expropriation except for public purposes, under due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall be made without delay and be effectively realisable" (Mauritius-Pakistan IPPA). The protection against expropriation provided for both in Mauritius domestic legislation and through its treaty commitments is consistent, although it is understandably much more detailed in domestic legislation. It is also in line with international best practices, as it covers direct and direct expropriation, provides detailed guidance on compensation mechanisms, clearly delimitates the scope of events where the government is legitimate to take private property for public purposes, and grants investors with a right to judicial review of the decisions taken throughout the whole process of expropriation.

2.5. Access to justice for investors and alternative dispute resolution

Mauritius has a hybrid legal system, based on French civil law, with some elements of English common law. The country has a sound and independent judicial system, which has been continuously modernised, over the past years, in order to better manage the caseload. It has a single-structured judicial system composed of the Supreme Court, which is the highest judicial authority, and subordinate courts. As a member of the Commonwealth, Mauritius continues to refer legal and constitutional matters of undeterminable jurisdiction to the

Judicial Committee of the United Kingdom Privy Council, which is thus the highest court of appeal of the country.

Mauritius is endowed with a well-developed legal infrastructure, which is considered as transparent and non-discriminatory. The 1968 Constitution provides for an independent and impartial judiciary and the government respects judicial independence in practice. According to the World Bank's Governance Indicators, Mauritius ranks first in sub-Saharan Africa for its robust rule of law, and strong judicial independence is widely acknowledged by international observers. Disputes may be resolved before the courts, or through mediation or arbitration. Overall, the legal framework appears to be fairly efficient in settling disputes. In parallel with the judicial settlement of disputes, a whole chapter of the Constitution provides for the institution of the Ombudsman, whose mission is to investigate complaints against government institutions and seek redress as an alternative to the court system. The office of the Ombudsman has authority to make mere recommendations and has no power to impose penalties on a government agency.

Various modernisation initiatives were launched to boost judicial efficiency in Mauritius

However, Mauritius appears to progress rather slowly in terms of contract enforcement efficiency, according to the 2013 *Doing Business* Report, and still needs to boost efforts to improve its judicial caseload management system. Proceedings are reported to be rather slow. Although access to justice is ensured, delays for dispute resolution are often too lengthy due to extensive backlogs of cases. Over recent years, the Government of Mauritius has therefore undertaken various reforms to modernise its judiciary and further improve the commercial justice system. The reduction of delays in the disposal of cases and delivery of judgments was identified as a top priority objective to be provided for 2012-14. In 2009, a dedicated **Commercial Division** was set up within the Supreme Court to speed up the settlement of commercial disputes. The commercial division of the Supreme Court has jurisdiction to deal with all matters of bankruptcy; insolvency; matters arising out of the Companies Act; banking; insurance; bills of exchange; global business; industrial property; patents and disputes between traders in relation to dispute of commercial nature. There are two judges to hear the commercial court cases. In 2010, an additional impetus to the improvement of the judiciary was provided with the establishment of a **fast track procedure,** under the aegis of the new commercial division, to resolve run-of-the-mill cases within 100 days. In 2011, the judicial staff capacity was increased: more judges were recruited and more courtrooms were created.

In addition, the Supreme Court has adopted, in 2011, the **Mediation Rules**, and has created a **Mediation Division** to facilitate the litigation of civil

and commercial disputes and streamline judicial processes. Where a case for commercial contract enforcement is entered before the Supreme Court, the chief justice may refer the matter to a judge of the court for mediation; either of his own volition or at the request of one of the parties. As a result of the creation of dedicated and specialised divisions, cases are now reported to be disposed of more efficiently and speedily. In particular, the establishment of the mediation division resulted in a sustained decrease in the backlog of cases at the Supreme Court.

In order to boost judicial efficiency and transparency, Mauritius has also implemented an **e-judiciary programme** to facilitate access to justice and speed up the pre-trial procedures. The project is expected to enable the judiciary to move towards a paperless system, through the establishment of an e-judiciary platform that delivers e-filing and case management capabilities to computerise processes. As per the Doing Business Report 2013, the time taken to resolve a dispute is 645 days. With the implementation of the e-judiciary project, disputes would be settled within a timeframe of 100 days. Over the coming two years, the implementation Phase II of the E-judiciary is expected to be extended to all levels of the justice system. The number of procedures (36) that are needed for the enforcement of contracts has not changed over the past decade.

The judiciary has set up strategic directions for the coming two years. In this context, one of the main initiatives will be the creation of a Court of Appeal to hear appeals from every level of court in the country.

Mauritius has developed a comprehensive legal framework for international commercial arbitration

Mauritius has given due consideration to the fact that the business community generally prefers to settle its disputes through alternative dispute resolution means. In parallel with the traditional system of contract enforcement through courts, investors now have the possibility to resort to arbitration. Although the legislative and logistical framework for arbitration are still at an early stage, Mauritius is strongly committed to developing international arbitration and ambitions to position itself as a regional hub for international arbitration. The passing, in 2008, of a state-of-the-art **International Arbitration Act**, based on the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006, represented a milestone in this endeavour to make Mauritius a regional centre for arbitration.

The Act has the most innovative features and offers a sound framework to global businesses, which is unique in Africa. The legislation includes best-practices drawn not only from the UNCITRAL Model Law, but also from the English Arbitration Act and from the experiences of other Model Law

jurisdictions. The Mauritius legislature decided to establish, through this act, two distinct and entirely separate regimes for domestic arbitration and for international arbitration. Domestic arbitration remains regulated by the Code de Procédure Civile, on the basis of the French model of 1981. It has been widely used by the Mauritian business community, in particular in the construction industry. This already well-developed regime for domestic arbitration has prepared the ground for a pro-arbitration attitude in Mauritian courts. The legislation respects parties' autonomy and is in line with international arbitration standards. Under the provisions of the act, all court applications are made to a panel of Judges of the Supreme Court, with a direct right of appeal to the Privy Council. This is a very positive signal sent to international investors as it grants them that their case will be heard by the most eminent jurists.

A significant and innovative feature of the law is the specific provision pertaining to the arbitration of disputes arising out of the constitution of Global Business Companies (GBCs) incorporated in Mauritius. Before the entry into force of the act, any dispute arising under the constitution of such companies had to be litigated before Mauritian courts. Introducing the possibility to resolve such disputes through arbitration is an important step towards the creation of an even friendlier environment for GBCs. Moreover, the act, following the approach taken in the amended UNCITRAL Model Law, covers not only commercial arbitrations, but also investment arbitrations, as it explicitly mentions investment treaty arbitrations. The act also explicitly permits foreign lawyers to act as counsels or as arbitrators in arbitration proceedings. Parties may also appoint arbitrators of any nationality for both international and domestic arbitration proceedings. By virtue of the act, arbitral tribunals are given the power to grant interim measures and order specific performance of a contract or the payment of a sum of money. Thus, arbitral tribunals have the same powers as Mauritian domestic courts. Another innovative feature of the Mauritius International Arbitration Act is that it does not contain any requirement pertaining to confidentiality. This welcome policy choice will make the application of a future set of rules on transparency possible.

The International Arbitration Act is likely to further strengthen Mauritius as a safe place for conducting arbitration. It adds to other positive characteristics, such as the geographical position of the country, its extensive network of double taxation treaties and bilateral investment treaties, and its physical and telecommunications infrastructures. The recognition and enforcement of awards rendered under the act is regulated by the **Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001,** which translates into domestic law the provisions of the New York Convention to which Mauritius is a party. It takes around 16 weeks to enforce an arbitration

award rendered in Mauritius, from filing an application to a writ of execution attaching assets, and 11 weeks for a foreign award. The efficiency of foreign arbitral awards enforcement is crucial because many holding companies based in Mauritius are potential award-debtors who hold assets in the Mauritian territory, making the enforcement of awards more likely to be successfully conducted. As a Global Business jurisdiction, Mauritius is indeed a strategic place in which to enforce an award.

Another positive signal sent to the global business community is that all appointing functions under the act are given to The Hague **Permanent Court of Arbitration (PCA)**. This means that when an international arbitration is to take place in Mauritius, the PCA is in charge of appointment and administrative functions, thus ensuring a high level of credibility. In 2009, the Government of Mauritius has concluded a host country agreement with the PCA in order to appoint a permanent representative of the PCA in Mauritius. Any commercial or investment dispute held in Mauritius may now be determined in an arbitration administered by the PCA, which set up an office in Port Louis, in cooperation with the Mauritius Chamber of Commerce and Industry. The PCA was also mandated to support the implementation of the 2008 International Arbitration Act, in particular with regard to the enforcement of arbitral awards. The PCA had a rather subdued beginning but now seems to be active, although it has registered only one case since 2008.

In 2011, the Government of Mauritius also set up the **LCIA Mauritius International Arbitration Centre** (LCIA-MIAC), through a co-operation between the London Court of International Arbitration and the Government of Mauritius. The creation of the independent arbitration institution, in parallel with the enactment of the International Arbitration law, will allow Mauritius to further position itself as the first regional centre for arbitration in Southern Africa. LICA-MIAC, which is effective from December 2012, provides a venue for the conduct and administration of both domestic and international arbitrations, with a focus on the latter – especially for disputes related to the constitution of GBL companies. The Secretariat of LCIA-MIAC also holds, in co-operation with ICISD, UNCITRAL, the PCA, LCIA and the International Council for Commercial Arbitration, biennial conferences that are attended at the highest level. Endowed with a set of arbitration and mediation rules, MIAC ambitions to establish Mauritius as a first choice place of arbitration for the resolution of cross-border disputes in the SADC region.

Mauritius has not inserted in its domestic law any dispute settlement clause. Specifically, Mauritius legislative framework for investment does not contain a unilateral offer to arbitrate investment dispute. Consent to arbitration is given only through bilateral investment treaties. This is a useful illustration that consent to arbitration through national legislation is not necessary, as it is undeniable that even in the absence of such a dispute

settlement clause, the country still manages to provide a safe and attractive environment for investment. Although it is noted that Mauritius has never been involved in an ICSID case, it could nonetheless be useful to set up an investor-State dispute avoidance mechanism. Such early alert mechanism for the prevention of disputes is an increasingly common practice, notably in Latin America. The identification of potential disputes at an early stage could be the responsibility of the BOI.

2.6. International co-operation in the promotion and protection of investment

Mauritius is a signatory to major international arbitration instruments

In addition to its extended network of IPPAs detailed below, which provide access to international arbitration, Mauritius has committed itself to the most important international conventions for the settlement of investment disputes. Mauritius is a member of the Convention on the Settlement of Investment Disputes between States and National of Other States (ICSID Convention), which convention has been transposed into domestic law by the Investment Disputes (Enforcement of Awards) Act. The Supreme Court is competent for the recognition and enforcement of ICSID awards. Mauritius has also ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which provides a legal mechanism for enforcement of awards that are not rendered under the auspices of ICSID. Foreign arbitral awards may thus be enforced in Mauritius, in accordance with the provisions of the Recognition and Enforcement of Foreign Arbitral Awards Act, which transposes the New York Convention into domestic law. Moreover, Mauritius has followed the updated UNCITRAL Model Law on International Commercial Arbitration in its 2008 International Arbitration Act. To date, Mauritius has never been involved in an investor-State dispute before an ICSID arbitral tribunal.

Mauritius is also a member of the Multilateral Investment Guarantee Agency. MIGA provides political risk insurance guarantees to private sector investors and lenders and protects investments against non-commercial risks. It has been actively supporting Mauritian investors, as well as foreign investors using Mauritius as an investment platform, venturing abroad, particularly into sub-Saharan Africa. The agency is working to further strengthen relations with the local business community, creating synergies that will continue to support development in the SADC region and other regions of Africa.

Mauritius is expanding its network of bilateral investment treaties

When investing abroad, foreign investors face a risk related to the uncertainty of the type of treatment they will receive in the host country. In

such a context, bilateral investment treaties (BITs) guarantee certain standards of treatment to foreign investors and ensure transparency and stability. Since the mid-1990s, most BITs have introduced stronger investor-state dispute settlement (ISDS) mechanisms that allow for contracts to be enforced outside the host country, adding another guarantee to foreign investors. Despite the growing number of BITs worldwide, their impact on FDI inflows remains unclear (as detailed in Box 2.5). Nevertheless, empirical studies suggest that

Box 2.5. **Do bilateral investment Treaties promote FDI flows?**

Over the past two decades, the rise in FDI has been accompanied by a growing number of BITs between developed and developing countries and, increasingly recently, between developing countries. Treaty shopping cases, whereby one company invests in another country via a third country to benefit from an existing BIT, also reinforce the idea that BITs raise the level of FDI inflows into signatory countries.

Despite the growing number of BITs, their impact on FDI inflows remains unclear. Recent studies have found a positive relationship between BITs and FDI, but a number of other studies find little evidence supporting this:

- Effects of BITs in raising FDI flows to developing countries are conditional on host country institutional quality, as BITs are not always found to substitute for poor institutional environment (Neumayer and Spess, 2005). Nonetheless in cases where BITs do substitute for poor institutional quality, ratified BITs can significantly promote FDI flows to developing countries (Busse, Königer and Nunnenkamp, 2008). BITs therefore have little impact on FDI levels for countries with higher political risks, but are beneficial to low risk countries (Tobin and Rose-Ackerman, 2006).
- BITs with high-income countries raise FDI inflows, although the marginal benefit of an extra BIT is reduced as a result of worldwide BIT proliferation across competing countries (Tobin and Rose-Ackerman, 2006).
- Signing BITs with the US is associated with higher FDI inflows into developing countries but not BITs with other OECD countries, perhaps because US BITs are associated with stronger investor protection. US BITs tend to include FDI liberalising provisions through NT standards at the pre-establishment stage (Sachs, 2009).
- Berger et al. (2010) find no evidence that BITs with a provision on ISDS are more effective than those without it, or that BITs which liberalise market access through pre-establishment NT provisions induce more FDI. Only regional trade agreements (RTAs) which liberalise market access play a significant role.

Box 2.5. **Do bilateral investment Treaties promote FDI flows?** *(cont.)*

- Investors' lack of knowledge of the content of BITs and their lower public profile than RTAs might explain why investors do not respond to BITs in the same way they do to RTAs with stronger market access provisions. It is also possible that existing FDI may actually prompt the establishment of BITs rather than the other way round (Aisbett, 2007). The success of BITs in attracting FDI may also vary with the extent of political risk and institutional quality in signatory countries.

The overall conclusion is that BITs might play a secondary role after economic fundamentals in promoting FDI inflows, depending on the nature of the investment and other economic and regulatory factors.

BITs might be a more significant factor for efficiency-seeking investors than market and natural resource-seeking investors. For efficiency-seeking investors, BITs can more heavily influence the investment decision between equally attractive locations. This suggests that BITs can bring added value for countries like Mauritius in particular. Indeed, by offering a platform for regional investment facilitation rather than by building its investment promotion strategy on its market or on a specific natural resource, Mauritius seeks to attract predominantly efficiency-seeking investors. Empirical evidence also suggests that while BITs therefore have little impact on FDI levels for countries with higher political risks, they are beneficial to low risk countries – again reinforcing the case for a strong BIT network in Mauritius.

As a crossroad of trade and investment, Mauritius is pursuing its strategy of expanding its network of international treaties linked with the promotion and protection of investment. So far, Mauritius has signed **Double Taxation Avoidance Agreements** (DTAA) with a total of 43 countries, out of which 18 from Africa, including Kenya, Zambia and Nigeria, with which DTAAs were signed in 2013 (awaiting ratification), and with six more African DTAAs under negotiation. It also has built a sound network of **Investment Promotion and Protection Agreements** (IPPA) with a total of 37 countries, including 17 from Africa. This observation must however be tempered by the fact that the large majority of IPPAs concluded more recently between Mauritius and other African countries are still pending ratification as of June 2013: of the 26 IPPAs signed since 1999, only 11 have entered into force (see Box 2.6). Although Mauritius' record is well above the average ratification rate on the continent (44%), the government would be well advised to complete the ratification process to ensure that the totality of its BITs is turned into legally binding enforceable commitments. It would be particularly important to follow up on ratification with African counterparts, as these treaties can play a crucial role in strengthening the unique position of Mauritius as a gateway to investment in Africa.

Box 2.6. **Bilateral investment agreements concluded by Mauritius, as of 1 June 2013**

- 1971: Germany (ratified 1973).
- 1986: United Kingdom (ratified 1986).
- 1996: China (ratified 1997).
- 1997: Pakistan (ratified 1997), Portugal (ratified 1999), Indonesia (ratified 2000), Mozambique (ratified 2003).
- 1998: India (ratified 2000), South Africa (ratified 1998), Switzerland (ratified 2000).
- 1999: Czech Republic (ratified 1998), Nepal *(not ratified to date)*.
- 2000: Singapore (ratified 2000), Romania (ratified 2000), Zimbabwe *(not ratified to date)*, Swaziland *(not ratified to date)*.
- 2001: Burundi (ratified 2009), Benin *(not ratified to date)*, Cameroon *(not ratified to date)*, Chad *(not ratified to date)*, Comoros *(not ratified to date)*, Ghana *(not ratified to date)*, Guinea *(not ratified to date)*, Mauritania *(not ratified to date)*, Rwanda *(not ratified to date)*.
- 2002: Senegal (ratified 2009).
- 2004: Barbados (ratified 2005), Madagascar (ratified 2005), Sweden (ratified 2005).
- 2005: Belgium and Luxembourg (ratified 2009), Botswana *(not ratified to date)*.
- 2007: Finland (ratified 2008), Korea, Republic (ratified 2008).
- 2009: Tanzania *(not ratified to date)*.
- 2010: Congo *(not ratified to date)*, France *(not ratified to date)*.
- 2013: Turkey *(not ratified to date)*.

The BIT programme and the prospect to engage further into treaty negotiations is part of this strategy to establish Mauritius as a launch pad for investment. The existence of BITs – providing core protection standards and access to investor-State dispute settlement mechanisms – and double taxation avoidance treaties reinforce the country's position as a hub for channelling investments into Africa and Asia. By virtue of Section 28A of the Investment Promotion Act, the Board of Investment is the institution competent to enter into arrangements for the promotion and the protection of investments by citizens of Mauritius in the territory of other States and by investors of other States in Mauritius. Mauritius' extensive network of IPPAs reinforces Mauritius as a destination of choice to hold investments directed to Asian and African markets.

The government has made it a **priority to expand its network of IPPAs with African countries**, in order to reinforce the country's position as a major investment hub for FDI into Africa. The Multilateral Economic Directorate of MoFARIIT, which acknowledges that great potential benefits lay in speeding regional integration in Africa, aims at accelerating the process of removal of non-trade barriers in the form of both DTAs and BITs between African countries. Mauritius also took a step further in its endeavour to build up a sound network of investment treaties, with the signing, in 2006, of the Trade and Investment Framework Agreement with the United States. The TIFA established a regular forum to address a range of trade and investment issues. In addition, Mauritius and the United States have engaged, since 2009, in negotiations towards a Bilateral Investment Treaty that would further strengthen investor protection between the two countries. As a member of COMESA, Mauritius is also bound by the TIFA signed between COMESA and the US. The Economic Partnership Agreement currently being negotiated with the EU will also contain provisions on investment.

On a regional level, **Mauritius is also a member of SADC, IOC**, and IOR-ARC, and the country actively supports the establishment of the COMESA-EAC-SADC Tripartite Free Trade Area, which aims at establishing a single economic space in the region. Mauritius is part of the SADC Investment Sub-Committee and is actively involved in the implementation of the Finance and Investment Protocol. This includes the elaboration, since 2012, of the SADC Regional Investment Policy Framework (IPF), which will take the OECD Policy Framework for Investment as a reference with the objective of facilitating investment policy co-ordination and coherence among SADC member States. Meanwhile within COMESA, Mauritius has also contributed through BOI to a "Study on Cross-Border Investments in the COMESA Region", completed in June 2012 as a first step towards the establishment of a Regional Investment Observatory (RIO). Mauritius also adopted, in 2007, the COMESA Common Investment Agreement Multilateral Investment Agreement (CCIA Agreement), which is however still pending ratification and seems to have been abandoned.

Overall, **Mauritius' treaty practice appears to be rather homogeneous in the scope and content** of the investment protection standards contained in its BITs. However, Table 2.1, which applies to individual BITs but does not address in detail the Model BIT's provisions, highlights a few inconsistencies among treaties that do not appear to be justified by specific situations and that should therefore, for coherence purposes, be avoided in future treaties. In addition, it is noted that the approaches taken in the 2000 Model BIT appear not to be automatically reflected in individual treaties ratified so far. It is crucial to ensure the greatest consistency possible among all international commitments taken by Mauritius. The government could otherwise find itself in a position where foreign investors can potentially do some "treaty

Table 2.1. **Main features of Mauritius investment treaties and options for treaty drafting**[1]

Key provisions	General description	Salient features of Mauritius' BITs and recommendations
Scope issues		
Investment	Defines assets to which the treaty applies, i.e. assets that qualify as protected investments. The scope of the treaty depends on the definition of the term "Investment".	All of Mauritius BITs, as well as the Model BIT, follow the dominant approach in global BIT practice: a broad-asset based definition, followed by a non-exhaustive illustrative list of the forms the protected investments can take. Under Mauritius BITs, the investment can thus take a wide variety of forms and is typically defined as "every kind of asset established or acquired under the relevant laws and regulations and […] includes movable and immovable property […]; shares and any other form of participation in a company […]; claims to money, or to any performance under contract having an economic value; intellectual property rights […]; business concessions conferred by law or under contract, including any concession to search for, extract or exploit natural resources." (Article 1 of Mauritius India BIT). This language means that portfolio investments, as well as assets used for non-business purposes, can also benefit from the protection accorded by virtue of Mauritian treaties. The implicit inclusion of portfolio investment under the umbrella of its investment treaties might be part of Mauritius' strategy to become a hub for capital flows and therefore to bring under the scope of its treaties all types of investments. If such is Mauritius' strategy, the inclusion of portfolio investment could be more explicitly stated in the definitional section of BITs. There are, however, variations among BITs signed by Mauritius. Some of them exclude assets not acquired in the expectation or used for the purpose of economic activities from the definition of investment. For example, the Mauritius-Swaziland treaty, signed in 2000, defines covered investments as "every kind of asset admissible under the relevant laws and regulations of the contracting party in whose territory the respective business undertaking is made […]." Such limitations are sometimes inserted by countries to target more precisely investments that must be protected. If the authorities wish to exclude investments made for non-business purposes from the scope of the treaties, they should then consider adopting this treaty language more automatically in its future BITs. It would give them more flexibility to regulate non business related investments through domestic regulations.
Investor	Defines those persons and legal entities benefiting from the treaty provisions. Nationality of juridical persons for the purposes of BITs is typically determined according to place of incorporation, principal seat of the enterprise, or alternatively, through the notion of control.	According to Mauritius BITs, which appear to be rather homogeneous in this regard, the nationality of covered companies must be determined through the criterion of their incorporation. No reference is made to the nationality of ownership or control as a condition for defining nationality. This approach, which is found in the majority of all BITs globally, reflects the determination of the government not to limit the benefit of the treaty to the sole entities that have genuine ties with the home country. This is coherent with Mauritius' investment strategy to position itself as a platform for international investment.

Table 2.1. **Main features of Mauritius investment treaties and options for treaty drafting**[1] *(cont.)*

Key provisions	General description	Salient features of Mauritius' BITs and recommendations
Admission and treatment		
Admission of foreign investment	Provides for relative standards of protection, namely national treatment (NT) and most-favoured-nation treatment (MFN). Determines whether NT and MFN apply at the admission phase, or only at post-establishment stage.	All of the reviewed BITs follow the traditional admission approach: they provide for core standards of investment protection only at a post-establishment phase and do not extend the protection to the admission of investment. It means that MFN, NT and FET standards apply only after the investment has entered the country.
Most-favoured-nation treatment	Provides investors from the contracting party the best treatment given to investors from any other country.	All of Mauritius' treaties grant the MFN standard of treatment to investors from treaty partner countries. They provide for the MFN and the NT standards within the same article, such as follows: "Each contracting party shall accord to the investment of investors of the other contracting party made in its territory a treatment which is no less favourable than that accorded to investments of its own investors or of any third country, if the latter is more favourable." (Mauritius-Zimbabwe BIT, 2000). The vagueness of the MFN provision language potentially would potentially leave great leeway to arbitrators in the interpretation of its scope of protection. Mauritius might wish to have greater control on its treaty commitments by using a more detailed and explicit language. For example, there is no clarification as to whether the scope of the MFN extends to procedural matters. Mauritius could consider limiting the scope of the MFN and NT standards to substantive rights only and clearly exclude procedural matters, which is a good practice in light of recent high profile arbitration cases (in particular, the Maffezini case). More generally, it is advisable to further clarify and update the content of such core treaty provisions in order to better protect Mauritius' interests, both as a host and a home country.
National treatment	Grants foreign investors, in like circumstances, treatment no less favourable than the treatment of nationals. Like MFN, NT is a contingent, or relative standard of treatment, as its content varies according to how other investments are treated by the host State.	See above. Although no NT standard is provided for in the Model BIT, Mauritius' individual BITs appear to provide for the National Treatment standard after the entry of investments, with no list of exceptions or safeguards.
Provision on key foreign personnel	Permits or regulate entry and sojourn of key personnel in connection with the investment	The entry and sojourn of foreign personnel appears to be rarely addressed in Mauritius' treaties and the matter is therefore left to domestic legislation.

Table 2.1. **Main features of Mauritius investment treaties and options for treaty drafting**[1] *(cont.)*

Key provisions	General description	Salient features of Mauritius' BITs and recommendations
Investment protection		
Fair and equitable treatment, full protection and security	Fair and Equitable Treatment (FET), and Full Protection and Security (FPS) are absolute standards of protection, i.e. the required level of treatment is nit contingent on treatment accorded to third parties by the host State. FET (which encompass, inter alia, an obligation not to deny justice) and FPS (of which the scope has recently been extended and is therefore uncertain) are almost always provided for in BITs. However, their meaning and the level of protection they grant remain unclear and subject to debate.	All of Mauritius' BITs provide for the FET and FPS standards of treatment. Such provisions remain succinct and rather vague as they do not clarify what level of protection is given through these standards. When negotiating future BITs, Mauritius could usefully consider adopting a clarified approach to FET and FPS standards. Given some difficulties in the interpretation of these notions, and their potential consequences in terms of legal liability towards foreign investors, some countries now use more precise language in the text of the BITs. For example, some recent BITs of the US and Canada provide that FET "includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process […]".It would be recommended for Mauritius to follow a careful approach when providing these standards of treatment in its treaties, in order to minimise potential controversies as to the content of the standards.
Expropriation and compensation	States have a sovereign right to expropriate under certain conditions. Most BITs condition the exercise of this right on being: – non-discriminatory; – taken under due process of law; – for a public purpose; – and against payment of compensation. Almost all BITs provide for "Hull Rule" type compensation, i.e. a "prompt, adequate and effective" compensation.	All of Mauritius BITs follow the most common approach with regard to the protection granted against expropriation. Consistent with customary international law, they subject the right to nationalise or expropriate private properties to a number of conditions (it must be non-discriminatory, taken under due process of law and for legitimate public purposes, and against payment of fair compensation). The expropriation clause extends its scope to measures tantamount to an expropriation – thus covering both direct and indirect expropriation – and enshrines the principle of a prompt, adequate and effective compensation. Mauritius BITs do not contain detailed guidelines to determine when an expropriation has taken place and what amount of compensation is due. Mauritius might wish to adopt the emerging good practice of clarifying in an annex what criteria should be used to determine when an indirect expropriation takes place, in line with the Expropriation provisions contained in the Constitution. Such treaty language grants investors further predictability and legal certainty on expropriation matters. However, all investors, regardless of their nationality, benefit from a sound constitutional protection against unlawful expropriation (see Section 2.4). Such a strong safeguard is balanced with the inclusion, in some of Mauritius recent treaties, of provisions explicitly affirming the State's right to protect certain public interests (see below, Special provisions).

Table 2.1. **Main features of Mauritius investment treaties and options for treaty drafting**[1] *(cont.)*

Key provisions	General description	Salient features of Mauritius' BITs and recommendations
Transfer of funds	Provisions of this type reduce – or eliminate – restrictions on monetary transfers arising in connection with investments. Free transfer of funds is a key condition for the proper operation of investments. However, the host country can keep some leeway to administer its monetary and financial policy. This later concern is usually expressed through the inclusion of a list of exceptions.	BITs concluded by Mauritius include a provision granting foreign investors a free and timely transfer of funds related to their investment, in a freely convertible currency and a specified rate of change. The transfer clause covers all funds related to an investment and provides for an illustrative list of covered funds. For example, Article 8 of the Mauritius-Singapore BIT grants the free transfer, on a non-discriminatory basis, of the capital and returns from any investment: "The transfers shall be made in a freely convertible currency without any restriction or undue delay. Such transfers shall include, in particular though not exclusively: a) profits, capital gains, dividends, royalties, interest and other current income accruing from an investment; b) the proceeds of the total or partial liquidation of an investment; c) repayments made pursuant to a loan agreement in connection with an investment; d) license fees […]; e) payments in respect of technical assistance, technical services and management fees; f) payments in connection with contracting projects; g) earnings of nationals of a Contracting Party who works in connection with an investment in the territory of the other contracting Party […]." The adoption of this open-ended illustrative list approach in Mauritius' BITs is in line with the most common approach among recent treaties. It aims at ensuring foreign investors the broadest possible coverage. Most of the treaties that were reviewed do not subject the guarantee of a free transfer to the domestic laws and regulations and do not contain any exception to the transfer of funds. In particular, they do not provide for a balance-of-payment safeguard. Given that this provision may potentially affect the government flexibility to properly administer its monetary and financial policies and hence limits its policy space for capital controls, Mauritius may wish to consider introducing some exceptions to the guarantee of free transfer of funds.[2] For example, in case of a currency crisis, a BOP exception could allow the country to temporarily restrict transfers under certain conditions without legal liability towards foreign investors protected by its BITs. Other exceptions that are often found in investment treaties are linked to the fact that the transfer provision should not prevent a party from ensuring compliance with other measures related to matters such as bankruptcy, insolvency or criminal offences.
Umbrella clause	Elevates certain other undertakings by host States into treaty breaches. It can therefore give access to arbitration in the event of a contractual dispute.	The Model BIT contains an umbrella clause, but individual treaties do not appear to follow this approach. This absence from most of Mauritius' BITs is in line with global treaty practice, of which the umbrella clause has not been a prominent feature for many years. It is a cautious and good practice not to include it into treaties; since this clause has given rise to a large number of investment disputes (in particular, SGS v. Pakistan; SGS v. Philippines).

Table 2.1. **Main features of Mauritius investment treaties and options for treaty drafting**[1] *(cont.)*

Key provisions	General description	Salient features of Mauritius' BITs and recommendations
	The umbrella clause grants investors the most favourable treatment resulting from the application of the host state's domestic legislation or international obligations. For example, an umbrella clause can be used to limit performance requirements, providing that the host state is party to some international treaties containing a prohibition of performance requirements (such as the TRIMs Agreement).	
Denial of benefits	Provides for the right of the State to deny the benefits of the agreement to certain investors. For example, such a clause allows the denial of treaty protection to companies that have no substantial business activities in the State (e.g. a shell company organised under the laws of a Contracting Party but controlled by nationals of a third country), or to companies originating from a country with which the host State does not maintain normal economic relations.	There is no denial of benefits clause in Mauritius BITS, as in the majority of all existing BITS. This means that Mauritius does not require the assets to be first located within its jurisdiction to benefit from the protection provided for in its treaties. The absence of such a clause is coherent with the platform concept used by Mauritius, under which the country has been the base for third party foreign investment to be channelled into China or India, with which Mauritius has BITs. It might mean that shell companies established under the laws of Mauritius by investors from non-parties countries could benefit from treaty protection.
Dispute Settlement		
Investor-state dispute resolution	Arguably, the most important feature of a BIT. It enables the investor directly to assert its rights accorded under the treaty.	Mauritius' BITs are fairly consistent in their treatment of investor-State dispute settlement issues. The country to refer to international arbitration in case a dispute arises out of a matter under the treaty scope. The ISDS clause in Mauritius' BITs typically gives the investor a right to go, after a cooling-off period during which the parties must try to settle the disputes in an amicable way, before an arbitral tribunal, be it an ICSID tribunal or an ad hoc tribunal that can follow the UNCITRAL rules. However, there are some variations among treaties signed by Mauritius regarding the scope of the ISDS clause. For example, the BIT between Swaziland and Mauritius limits the ISDS provisions only to cases of expropriation and nationalisation.

Table 2.1. **Main features of Mauritius investment treaties and options for treaty drafting**[1] *(cont.)*

Key provisions	General description	Salient features of Mauritius' BITs and recommendations
		Through such clauses, Mauritius gives in advance its consent to international arbitration – it should be recalled that Mauritius' domestic law does not provide for an automatic consent to international arbitration. The country also commits, in its ISDS clauses, to be bound by the content of arbitral awards. Such a liberal and open approach to investment dispute, providing foreign investors with easy access to international arbitration, is in line with Mauritius International Arbitration Act 2008. The combination of both the law and the ISDS treaty provisions should facilitate the practice of referring to international arbitration. Although the approach to ISDS is a very favourable one, the reviewed BITs do not contain very detailed ISDS provisions. Such succinct clauses afford Mauritius little control over potential arbitrations. A recent global trend is to address ISDS mechanisms in more detail, providing greater guidance to the disputing parties for the conduct of arbitration and of other procedural requirements. Mauritius might wish to start doing that in order to ensure greater control over the conduct of potential disputes. The government is also encouraged to clarify how the submission for ISDS will interact with domestic judicial and administrative adjudication procedure, through the inclusion, for example, of a "fork-in-the-road provision" that requires investors to choose between litigation in domestic courts and international arbitration with the effect that once that choice has been made, it becomes final. Mauritius could also insert a mandatory waiting period that investors must observe before instituting proceedings. Mauritius might also wish to further promote the principle of judicial economy. To this end, it is useful to set up a mechanism to avoid frivolous claims, i.e. claims that lack a sound legal basis, to better protect the country against potential abuses of the ISDS system. Another mechanism to foster judicial economy and to avoid inconsistent results is to allow the consolidation of claims having a question of fact or law in common, or arising out of the same circumstances.
Investment promotion		
Promotion and facilitation	Commitment to encourage the promotion and facilitation of investment.	Mauritius commits, in all of its investment treaties, to encourage and promote investment. Such hortatory approach, encouraging partner countries to a best-endeavour in terms of investment promotion, is expressed in a vague and general wording and does not encompass any specific obligation regarding exchange of information and transparency with mechanisms to implement them. This "best endeavour approach" is taken by the vast majority of existing BITs. Mauritius could adopt a more conducive approach to investment promotion in its treaties and to specify promotional activities that should be undertaken. Measures aiming at promoting outward investment could include actions such as providing information, technical assistance, insurance, and support to aid domestic firms to establish operations overseas. A provision requiring the State parties to exchange information on investment opportunities with a view to increasing investment flows could also be inserted.
Transparency	Promotes investment through the dissemination of information.	BITs signed by Mauritius do not have a provision on transparency obligations. Mauritius might be well advised to include transparency regulations in its future BITs and impose on both host States and foreign investors an obligation of transparency in the exchange of information and in the process of domestic rulemaking.

Table 2.1. **Main features of Mauritius investment treaties and options for treaty drafting**[1] *(cont.)*

Key provisions	General description	Salient features of Mauritius' BITs and recommendations
Special provisions bearing on the protection of the environment, labour market rights, public health national security concerns	Language referring to specific public policy concerns.	Crucial emerging issues, such as environmental protection, public health and labour standards, are not yet reflected in all of Mauritius' BITs. Some BITs do however contain safeguard clauses, be they general exceptions, such as in the Mauritius-Singapore BIT, or more specific safeguards protecting policy objectives. For instance, Article 11 of the Mauritius-Switzerland BIT (1998) provides that "Nothing in this Agreement shall be construed to prevent a contracting party from taking any action necessary […] for reasons of public health or the prevention of diseases in animals and plants." Likewise, the BIT signed in 2005 with Belgium and Luxembourg contains a specific clause on environmental protection. In Article 10 of Mauritius-Singapore BIT, Mauritius retains the right to implement national policies: "For avoidance of any doubt, it is declared that all investment shall, subject to this Agreement, be governed by the laws in force in the territory of the contracting party in which such investments are made". Likewise, Article 12 of the BIT between Mauritius and Comoros (2001) states that "Nothing in this agreement shall be construed to prevent a contracting party from adopting any measure whatsoever to protect essential security interests or in the interest of public health or the prevention of diseases affecting animals and plants". Similar clauses relating to the protection of the environment, health and labour rights are contained in some BITs signed during the past decade with African countries, such as with Burundi, Cameroon, Guinea and Benin. Such a cautious treaty language allows the authorities to strike a balance between openness, an overall very favourable environment for investors, the protection of policy objectives, and some political leeway. Mauritius could consider inserting more provisions safeguarding fundamental values. This is a good practice that is increasingly often reflected in recent BITs. This would allow the authorities to invoke public benefit purposes exceptions without violating their treaty commitments.

1. This table only looks at the most salient and debatable provisions of Mauritius' BITs. It does not analyse widely accepted provisions such as the State-State dispute resolution clause, the compensation for losses clause, the temporal scope of the treaty, limitations to performance requirements, etc.
2. For more information on the management of capital inflows and capital account, see *IMF Discussion Papers*: *www.imf.org/external/pubs/ft/spn/2010/spn1004.pdf*, *www.imf.org/external/pubs/ft/sdn/2011/sdn1106.pdf*, *www.imf.org/external/pubs/ft/sdn/2012/sdn1210.pdf*.

shopping" in taking advantage, through the most-favoured-nation provision, from protection standards that were provided to investors from third countries. As far as it is possible, consistency in treaty drafting should be pursued to give Mauritius the greatest control upon its international commitments. The government itself recognises the need to reinforce the consistency of its treaty practice and plans to update and fine-tune the Model BIT over 2014. The amended Model BIT is expected to include a National Treatment provision and more detailed provisions on the conduct of arbitration, in particular with regard to the transparency of proceedings.

Mauritius' investment treaty policy appears to follow the most **traditional and common approach in investment treaty drafting**. The treaty provisions

remain rather succinct. Overall, they do not reflect most of the recent and innovative approaches in treaty practice. For example, crucial emerging issues, such as environmental protection, public health, and labour standards, which are increasingly included in safeguards provisions of worldwide BITs, are reflected in the Model BIT, but not yet contained in the majority of Mauritius investment treaties. Mauritius could also consider inserting detailed guidelines on indirect expropriation and processes of compensation for expropriation. In the context of an active national strategy of expanding the treaty network, and with the rapid evolution of investment law over recent years, it would be advisable to further clarify and update the content of BITs core standards of protection. Reflecting innovative treaty practices is likely to give States greater control upon the interpretation of their treaty commitments. It would also allow Mauritius to better protect its interests, both as a host and a home country and to ensure greater consistency among treaties it has signed. When deciding among various policy options, Mauritius must take into account its peculiar position, compared to other African countries, as it is not only an investment destination, but also a strong outward investor.

Clear and updated policy directions could be set out in the revised Model BIT, and treaties concluded in the future could be drafted more consistently along the lines of this Model. Before engaging in a process of treaty drafting with new partner countries, the government should undertake a stocktaking and analysis of its existing BITs to highlight potential inconsistencies. The exercise would allow Mauritian negotiators to make an informed choice between various policy options and to build their treaty policy on international best practices.

Once this stocktaking has been done, and in light of the observations gathered below, Mauritius might wish to reconsider and **regularly update its current investment agreements** through renegotiations with partner countries. So far, Mauritius does not have a programme of periodic review of existing international treaties and commitments. Regular revision of treaties should be the responsibility of a dedicated team, well trained, aware of new legal developments and sensitised to ISDS issues. Mauritius is encouraged to keep track of treaty negotiations to ensure a correct interpretation of the meaning given to the treaty provision at the time of the negotiations.

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