Theme 1 – Policy, Legal/Regulatory and Institutional Frameworks of the BPO Sector in Vendor Countries

This brief report focuses on the interim findings on the policy, legal/regulatory and institutional frameworks of the BPO industry in vendor countries. The report is part of the project entitled: Development of BPO Industry in Kenya: Critical Success Factors. The overall aim of the project was "to undertake comprehensive research in the business process outsourcing (BPO) sub-sector in pioneer, emerging and mature markets to provide evidence and a deeper understanding of the imperatives for success in this industry to better inform Kenya's policy decisions and investment choices".

The following is a synthesis of the policy, legal/regulatory and institutional frameworks of the BPO industry in vendor countries (namely South Africa, India, Mauritius and Kenya).

Policy framework

In 1994, with a new democratic order being elected, South Africa entered a period of transition, dismantling structures established in the Apartheid era and replacing these with processes to empower and enfranchise all of the country's people. The South African Government's strategy for transformation is contained in the Growth, Employment and Redistribution (GEAR) program, formerly known as the Reconstruction and Development Programme (RDP). The South Africa ICT sector strategy was conceived in this new era of change. The purpose of this strategy is to further the development of the ICT Sector in South Africa. The strategy is intended to be complementary to and supportive of broader socio-economic development goals of the government of South Africa, particularly with regard to its emphasis on social upliftment and empowerment.

The South Africa IT Strategy Project (SAITIS) was developed by the Department of Trade and Industry and the Department of Communication, in consultation with the private sector and other stakeholders. SAITIS has four fundamental objectives: (1) to create a robust, growing and sustainable ICT sector; (2) to increase use of ICT as an enabler for socio-economic development; (3) to create a knowledgeable and growing ICT workforce; and (4) to create a world-class culture of ICT innovation.

South Africa already has an established ICT sector. Furthermore, the country's level of investment in ICT as a percentage of GDP appears to be comparable to that of most developed countries. South Africa has been in the BPO business since the mid 1990s. It is becoming a favoured international location for business process outsourcing and offshoring. South Africa has slowly accepted call centre culture; this promotes domestic market and also makes training employees easier.

In India, progressive free market policy is part of the forces that drives the country's economy and consequently BPO industry. The Indian Government has given priority to IT-BPO sector in Special Economic Zones to spiral growth. It is initiating many infrastructure projects with private sector involvement and encourages domestic technology adoption. The educational system is well aligned to industry needs. The other key policy initiative is on security. The Government set up a body to control against cyber crime in India; developed a cyber security training and awareness policy; and documented security policies covering use of information, mobile computing, user access.

The vision of the Mauritian Government is to transform Mauritius into a Cyber island and develop ICT as the 5th pillar of the economy alongside Sugar, Textile, Tourism and Financial Services. The objectives are to:

- Accelerate the integration of Mauritius into the World Information Society
- Position Mauritius as a strategic ICT regional hub
- Develop Mauritius as an attractive investment location for ICT
- Develop Mauritius as a competitive outsourcing destination for ICT and BPO/ ITES

The National ICT Strategic Plan (NICTSP) 2007-2011 seeks to provide the right environment for the harnessing of ICT to generate employment, improve quality of life, and create new opportunities for the socio-economic development of Mauritius. The strategy's expected goals are a 7% contribution to the gross domestic product of Mauritius from offshore ICT export services, employment of at least 29,000 qualified individuals, employment of 90% of those who graduate in ICT, the doubling of the number of foreign investors, and Memoranda of Understanding for collaborative ventures in the field of ICT with countries in the region. Other key objectives of the government's strategy include an increase in preference for ICT, with at least 50% acceptance for services available online, an increase in PC ownership by 20,000 households, and 12,000 PCs in primary schools, 150 Public Internet Access Points across the island, Internet connectivity and networking of all primary, secondary schools, and an increase in broadband penetration by at least 250,000.

The Mauritian vision and strategy for BPO/ITES industry is driven from the top of the government, with a lot of emphasis on foreign direct investment. In Mauritius, one will find the major international ICT players from USA, Europe and India, including Oracle, Microsoft, IBM, HP, CISCO, Accenture, Infosys, Hinduja Group, France Telecom, Teleforma, TNT Group. Although Mauritius has diversified BPO/ ITES services, call centres employ about 50% of the total workforce of the sector.

In Kenya, the current national ICT policy is the first for the country and was published through a special issue of the Kenya Government Gazette (Gazette Notice No. 2431) of March 2006. The vision in this policy is "*a prosperous ICT-driven Kenyan society*". Its mission is "*to improve the livelihoods of Kenyans by ensuring the availability of accessible, efficient, reliable and affordable ICT services*". Three of the broad objectives of the IT policy come close to addressing the opportunities in outsourcing.

The Kenya Vision 2030 represents the blueprint for the country's development upto year 2030. The vision aims to make Kenya *a globally competitive and prosperous nation with a high quality of life by 2030*. The vision has three pillars, namely, the economic pillar, the social pillar and the political pillar. The overall objective of the Kenya Vision 2030 is to realize a higher and sustainable growth of the economy in a more equitable environment, accompanied by increased employment opportunities. The Vision is to be implemented in five successive Medium-Term Plans (MTP), the first of which runs from 2008 to 2012.

One of the six key sectors in the economic pillar is Business Process Outsourcing and Offshoring (BPO). The aim of this sector is for Kenya to be "*the top off shoring* destination in Africa". The targets for the 2008-2012 MTP is to create 20,000 direct BPO jobs and an additional GDP contribution of Kshs 10 billion. This will be done by attracting at least five leading IT suppliers, at least ten large multi-national corporations and global players in Kenya. The flagship projects for the 2008-2012 period are the:

- establishment of a BPO park in Athi River EPZ,
- marketing campaigns to promote BPO in the targeted geographical markets,
- training programmes around primary processes, and
- designing and implementing a comprehensive incentive framework to improve the attractiveness of Kenya as a BPO destination and to encourge investments in this field.

The first MTP also pledges to develop a BPO and Contact Centre Policy. How this will be done is not spelled out. Indeed, this issue is left out in the implementation matrices in the Annex of the plan.

In summary, the policy framework exists for development of the BPO sector in Kenya. What is lacking is a clear plan with specific and lower level targets and monitoring and evaluation framework. For example, details of how we will create the 10,000 jobs and contribute KSh. 10 billion to GDP are missing. At the same time, the implementation matrices for both 2008-2012 Vision 2030 MTP and the national ICT sector master plan 2008-2012 (MoIC's response to the V2030 first MPT) do not have detailed performance indicators and targets that can be used for monitoring and evaluation.

Discussion Q1: What needs to be done to create clear and monitorable plans for the BPO and outsourcing sector?

Discussion Q2: Kenya has not finalized making ICT as one of the sectors. For example, one cannot obtain development data on ICT and its contribution to GDP. Most countries have created either an IT/BPO or ITES/BPO sector or industry. In Kenya, we talk about BPO sector. Should we have ICT and BPO as separate sectors?

Legal and regulatory framework

In South Africa, all the ICT legislations (Telecommunications Act of 1996, the Independent Broadcasting Authority Act and portions of the Broadcasting Act) were repealed by a convergence statute in 2006, the Electronic Communications Act. The objectives of this Act are:
- to create a single statute for the electronic communications sector;
- to provide for legislation that is technology neutral, and for the making of policy, licensing and regulation in an increasingly converged environment;
- to provide for the greater liberalisation of the sector; and
- to provide for less intrusive regulation by distinguishing between services requiring an individual licence and services requiring a class licence

The data protection laws are closely related to privacy laws and there is currently no all-encompassing privacy or data protection legislation. The right to privacy applies to online and offline activities and is internationally recognized as a fundamental right. Privacy is protected by the common law and Section 14 of the Constitution. The common law right of privacy is protected under the law of delict. In addition, South Africa has a variety of laws on intellectual property rights, including the Trade Marks Act, Copyright Act, Patents Act and Designs Act.

Finally, South Africa has comprehensive BPO-specific Quality Assurance Framework. These

standards are referred to as ARP 099 (Recommended Practices). They cover: inbound contact centres, outbound contact centres and back-office operations. South Africa competes at global quality service benchmark levels.

Until 1991, India was a closed economy with hardly any presence in international trade. Progressive liberalisation since 1991 has made India one of the biggest emerging markets. One of the ways encouraged investors into the IT-BPO industry is by strengthening the legal system and compliance with international laws e.g. labour laws, international relationship, etc. One of the key legislations is the Information Technology Act 2000 which, among other things, recognizes digital signatures, imparts legitimacy to contract through electronic means unless otherwise agreed, and provides for legal recognition of transactions through electronic data inter-change.

Other key laws are the Indian Copyright Act of 1957 amended in 1994 to outlaw software piracy, and the Indian Intellectual Property Rights (IPR) Laws which protect intellectual property in accordance with India's obligations under the TRIPS Agreement of the WTO. The importance of intellectual property in India is well established at all levels -- statutory, administrative and judicial. Cases of infringement of IPRs are tried in the judicial courts. The IPR Laws also provide for appeals in the judicial courts of the administrative decisions relating to Intellectual Property Rights.

In Mauritius, the Information and Communication Technologies Act 2001 repealed the Telecommunications Act 1998. This Act lays out the institutional and procedural guidelines for the regulation and democratisation of ICTs and related matters. The setting up of the ICT Authority, the ICT Advisory Council, and the ICT Appeal Tribunal is pursuant to the adoption of this Act.

Subsequently, Mauritius has created an appropriate legal framework consisting of the Electronic Transaction Act, Data Protection Act, and Cybercrime and Computer Misuse Act. The Electronic Transaction Act is essentially the e-commerce law. The following are three examples of what the Act provides:
- an appropriate legal framework to serve as the foundation to facilitate electronic transactions and communications and give a new orientation to the traditional way of doing business by fostering the conduct of transactions by electronic means;
- the legal recognition and regulation of electronic records and electronic signatures for authentication purposes during the conduct of electronic transactions and the security of such records and signatures;
- the regulation of the formation of contracts by electronic means; and
- uniform rules and regulations aimed at establishing standards to combat fraud, forgery or any unlawful practice in order to build and ensure confidence in electronic records and dealings to promote electronic communications and transactions.

The Data Protection Act provides for the protection of privacy rights of individuals in view of the developments in techniques used to capture, transmit, manipulate, record or store data relating to individuals. Finally, the Cybercrime and Computer Misuse Act provides for repression of criminal activities perpetrated through computer systems and aims at better protection against computer misuse. It also caters for new forms of Cybercrime, such as illegal interception of data and online child pornography.

In Kenya, ICT issues are considered under various legislations. These include the Kenya

Communications Act of 1998; the Science and Technology Act, Cap. 250 of 1977; and the Kenya Broadcasting Corporation Act of 1988. The national ICT policy (The Kenya Gazette, 2006) recognizes that these Acts are inadequate in dealing with issues of convergence, electronic commerce and e-Government. It thus also recognizes the need for a comprehensive policy, legal and regulatory framework which includes the following relevant aspects:

- Support ICT development, investment and application;
- Promote competition in the industry where appropriate;
- Address issues of privacy, e-security, ICT legislation, cyber crimes, ethical and moral conduct, copyrights, intellectual property rights and piracy.

The Kenya Communications (Amendment) Bill, 2008, which was to amend the Kenya Communications Act, 1998 and address some of the above challenges, was passed by parliament in December 2008 and the President signed it into law. One of the key sections is on electronic transactions under Part VII. In this part, the new Act, among other things, gives legal recognition of electronic records; recognizes electronic messages as valid for the formation of contracts; and supports the use of electronic records and electronic signatures in government and its agencies. The new Act also deals with various aspects of ICT and cyber crimes.

Kenya also has other relevant legislation, including the Industrial Property Act of 2001, which protects intellectual property rights; the Copyright Act of 2001, the Trade Marks Act and the Trade Descriptions Act. There is also the Freedom of Information Bill, which if enacted, will, among other things, enable the public to access information in the possession of the government and public authorities and certain private bodies that have a public character. Kenya does not however have a data protection legislation.

Discussion Q3: Although the Kenya Communications (Amendment) Act covers a wide range of areas and may not be perfect, it has tremendously improved the legal and regulatory framework for the ICT/BPO sector(s) in Kenya. The sub-marine cables are beginning to land from June 2009 and the national backbone fibre is under implementation (What is the status for this?). We have complained for many years over the lack of these infrastructural components. What is preventing investors from taking advantage of these initiatives in the short- to medium-term?

Discussion Q4: What do we need to do in the medium- to long-term to further improve the legal and regulatory framework for ICT/BPO sector(s)?

Institutional framework

The main institution that works for the BPO sector in South Africa is the Business Processing enabling South Africa (BPeSA). BPeSA, in close collaboration with the Regional Associations (Calling the Cape, Contacting Gauteng and the KZNonSOURCE), is involved in vigorous marketing of South Africa as an excellent outsourcing destination. The Regional associations ensure equitable growth of the BPO sector in all geographical areas in South Africa.

Another institution is the Independent Communications Authority of South Africa (ICASA), which is the regulator of telecommunications and the broadcasting sectors in South Africa. It is not clear whether ICASA has a role to play in the BPO sector in South Africa. Others are Department of Communications, which is in charge of telecommunications policy, e-

commerce policy and information society issues; the Department of Public Service Administration (DPSA), which is responsible for developing IT policy for government and coordination of all government IT initiatives. It is not clear whether these departments developed the BPO policy.

NASCCOM, India's private sector lobby group has been extremely effective and works very closely with the Government to implement the required policy issues, education system, to grow the industry. The association works with academic institutions to develop and update curricula. NASCCOM has evolved to become India's voice in the industry, both domestically and globally. It started small but has grown to become an authority in IT-BPO Services in India and Globally.

The other important institution for the BPO sector in India is the Data Security Council. This is a government body including industry players that was formed to manage and limit fraud and cyber crime in India. Such a council gives clients confidence in a country as it demonstrates the seriousness with which the Government takes cyber crime.

In Mauritius, the Board of Investment (BOI) is the key institution that many firms claim has helped to grow the BPO/ITES sector. BOI is dynamic and has become critical in creating and maintaining links with existing and potential external clients. It has offices abroad to assist potential investors to start businesses in Mauritius and regularly organizes missions abroad to market Mauritius as an outsourcing destination. The other government institutions that have significant roles on outsourcing are the National Computer Board and the Information and Communication Technologies Authority (ICT Authority). The former empowers people by creating ICT awareness and spreading IT culture in Mauritius and empowers businesses by promoting the development of the Mauritian ICT   industry and operating incubator centres for start-ups in the ICT sector. The latter, which is the ICT regulator, licenses BPO firms.

Finally, there is the Outsourcing & Telecommunications Association of Mauritius (OTAM), an association which regroups call centres/BPOs, software developers, International Long Distance (ILD) operators and Internet Service Providers. OTAM promotes the interests of its members through negotiations with government and the authorities, promotion of networking and participation in regional and international fairs, organisation of ICT forums and activities aimed at the development of the ICT sector in Mauritius. It credits itself for successfully lobbying for the Data Protection Act.

Kenya has a number of institutions that are key for the BPO sector. One of the key ones is the Kenya ICT Board, whose objectives are:
- To develop and position Kenya as the preferred ICT destination in Africa;
- To develop and promote competitive ICT industries in Kenya;
- To develop world class Kenyan ICT institutions; and
- To increase ICT access, utilization for all Kenyans (become a principle driver in bridging the digital divide)

There has been little visible benefits of the Kenya ICT Board for the BPO sector. The key development has been the bandwidth subsidy but many BPO firms did not qualify for varying reasons. The ones that did say it has enabled them to be more competitive. The Board has been organizing various trainings and meetings for BPO firms but the clear output based on this is not clear in the public domain.

Kenya Investment Authority (KenInvest) is the second key institution for the BPO sector. It provides professional assistance, facilitation, information and advice to local or a foreign investors seeking to establish a new investment or expand existing investments in Kenya. Two of its key responsibilities of KenInvest are to facilitate the implementation of new investment projects and to organize investment promotion activities both locally and internationally.

The Export Promotion Council's key mandate is to develop Kenya's exports of products and services. EPC has been instrumental in training services exporters on how to market their services. The EPC has been working with the BPO association to train its members on how to market their services. The EPC also organizes annual networking sessions, through the Bridges across Borders program in collaboration with the International Trade Centre in Geneva.

The EPC in previous years used to focus mainly on developing the export of products sector. However, they are now placing a lot of emphasis and resources on the export of services, with BPO being one of the key areas they are focusing on. The EPC has a wealth of resources from the ITC in Geneva, which are being disseminated to the BPO industry in Kenya, as well as other professional services sectors.

The Communications Commission of Kenya, the ICT regulator, plays a peripheral role in the BPO sector. It registers BPO firms at an annual fee of Ksh10,000. However, many firms are resisting this registration. This is an issue that needs addressing. Another institution that also has potential to play a role is the Ministry of Higher Education, Science and Technology. It has initiatives to incubate software development and plans to put up technology parks.

In conclusion for Kenya, it can be observed that there is an overlap between KenInvest and the Kenya ICT Board when it comes to promotion of Kenya as an investment destination to potential investors. There could be other overlaps as well. For example, both KICTB and MoHEST are planning for technology/BPO parks. This is likely to lead to duplication of effort, differences in the messages communicated to stakeholders and confusion on the part of investors with respect to whom to deal with, amongst other problems. In addition, there is need to coordinate between ICT Board, KenInvest, EPC and MoEST. The big question is: Who will perform the coordination? Finally, the Monitoring and Evaluation (M&E) Directorate in the Ministry of Planning has never been devolved into the ministries and public enterprises. Whether it is a consequence of this lack of devolution or not, the M&E capacity of the Ministry of Information and Communications, Kenya ICT Board and all the other institutions highlighted earlier is weak. At the same time, the institutional framework for Vision 2030 is in the formation stages and, even if it were to develop strong M&E capabilities, it may not be able to marshal enough power to ensure corrective action is taken by the concerned institutions in a timely manner.

Discussion Q5: What needs to be done to improve/strengthen the institutional framework in order for the BPO and outsourcing sector to play its planned role in the Kenyan economy?